

NO. 84475-5

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDWARD MICHAEL GLASMANN, APPELLANT

Petition for Review from a decision by the Court of Appeals, Division II

No. 39700-5-II

Corrected Answer to Motion for Discretionary Review

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Table of Contents

A. ISSUES PERTAINING TO PETITIONER'S REQUEST FOR DISCRETIONARY REVIEW, 1

 1. Whether the Order Dismissing Petition conflicts with a decision of the Supreme Court or another decision of the Court of Appeals?..... 1

 2. Whether the petitioner raises a significant question of law under the State or federal Constitutions? 1

 3. Whether the petitioner raises an issue of substantial public interest that should be determined by the Supreme Court?... 1

B. STATEMENT OF THE CASE, 1

 1. Procedure..... 1

 2. Facts 2

C. ARGUMENT..... 4

 1. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *State v. Kruger*, 116 Wn. App. 685 (2003)(Div. III),..... 4

 2. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT 12

 3. THE COURT OF APPEALS CORRECTLY DETERMINED THAT CUMULATIVE ERROR DID NOT DENY PETITIONER A FAIR TRIAL..... 14

D. CONCLUSION, 15

Table of Authorities

State Cases

<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994)	14
<i>In re Personal Restraint of Lord</i> , 152 Wn. 2d 182, 188, 94 P. 3d 952 (2004)	6
<i>In re Personal Restraint of Reed</i> , 137 Wn. App. 401, 409, 153 P.3d 890 (2007)	6
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	8
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996).....	10
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	10
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	10
<i>State v. Classen</i> , 143 Wn. App. 45, 64, 176 P.3d 582 (2008).....	12
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984).....	14
<i>State v. Coleman</i> , 152 Wn. App. 552, 488, 216 P.3d 479 (2009).....	12
<i>State v. Fernandez-Medina</i> , 141 Wn. 2d 448, 455-456, 6 P.3d 1150 (2000)	6
<i>State v. Glasmann</i> , 142 Wn. App. 1041, 2008 WL 186783 (2008)(#34997-3-II).....	1, 4, 5, 7
<i>State v. Glasmann</i> , 164 Wash.2d 1017, 195 P.3d 88 (2008).....	1, 5, 2
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)	14
<i>State v. Kennealy</i> , 151 Wn. App. 861, 892, 214 P.3d 200 (2009).....	12
<i>State v. Kruger</i> , 116 Wn. App. 685, 67 P.3d 1147 (2003).....	4, 5, 7

<i>State v. Magers</i> , 164 Wn.2d 174, 191, 189 P.3d 126 (2008).....	12
<i>State v. McFarland</i> , 127 Wn. 2d 322, 335, 899 P.2d 1251 (1995).....	5, 8, 9
<i>State v. Russell</i> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995).....	14
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	9, 10

Federal and Other Jurisdictions

<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	8, 9, 11
<i>U.S. v. Layton</i> , 855 F. 2d 1388, 1420 (9th Cir. 1988).....	8

Rules and Regulations

RAP 13.4(b).....	4, 11
RAP 13.5A.....	2
RAP 16.11(b).....	2

A. ISSUES PERTAINING TO PETITIONER'S REQUEST FOR DISCRETIONARY REVIEW.

1. Whether the Order Dismissing Petition conflicts with a decision of the Supreme Court or another decision of the Court of Appeals?
2. Whether the petitioner raises a significant question of law under the State or federal Constitutions?
3. Whether the petitioner raises an issue of substantial public interest that should be determined by the Supreme Court?

B. STATEMENT OF THE CASE.

1. Procedure

Petitioner Edward Glasmann, hereinafter referred to as "petitioner", is restrained pursuant to a Judgment and Sentence entered in Pierce County cause No. 04-1-04983-2. (Appendix A). The case facts and procedure are related in detail in the unpublished Court of Appeals opinion in *State v. Glasmann*, 142 Wn. App. 1041, 2008 WL 186783 (2008)(#34997-3-II)(Appendix B). The petitioner sought discretionary review of the direct appeal. This Court denied review. *State v. Glasmann*, 164 Wash.2d 1017, 195 P.3d 88 (2008).

The petitioner next filed a Personal Restraint Petition (PRP)(Court of Appeals #39700-5-II). On March 25, 2010, the Acting Chief Judge of the Court of Appeals dismissed the PRP as frivolous under RAP 16.11(b). The petitioner now seeks discretionary review of the Court's Order Dismissing Petition, pursuant to RAP 13.5A.

2. Facts

The facts are taken from the Court of Appeals opinion in *State v. Glasmann, supra*, at 1-2:

Edward Michael Glasmann and Angel Benson were romantically involved and engaged to be married. On the night of October 22, 2005, Glasmann and Benson went to dinner in Tacoma and rented a motel room in Lakewood to celebrate Glasmann's birthday. Both Glasmann and Benson ingested methamphetamine, ecstasy, and alcohol over the course of the evening. In addition, Glasmann and Benson had been arguing throughout that day and evening.

Around midnight, their argument escalated. Glasmann hit Benson, who curled up into the fetal position to protect herself from his blows. Glasmann eventually told Benson that he wanted to go for a ride. They both left the motel room.

Outside the room, another hotel guest, Erika Rusk, witnessed Glasmann (1) pin Benson against the wall with one hand around her neck and repeatedly punch her with his other hand; (2) release Benson and kick her twice in the stomach; (3) drag her to the passenger side of his Corvette and got into the driver's seat; (4) reach over to the open passenger door and attempt to pull Benson into the car by her hair; (5) pull forward from the parking stall while Benson was not fully in the car; and (6) run over Benson's leg with his car.

Once in the car, Benson put the car into park, grabbed the keys, and ran into a mini-mart adjacent to the motel. Inside the mini-mart, she hid on the floor behind the counter. As Rusk watched, she was calling 911 and reporting these events to dispatch.

Lakewood Police Officers Timothy Borchardt and David Butts arrived to find Glasmann's Corvette parked in the roadway. As they approached, they observed Glasmann exit his Corvette, run over to the

mini-mart, and climb into three separate cars, apparently hoping to steal one and escape.

Their guns drawn, Officers Borchardt and Butts ordered Glasmann to show his hands. Glasmann refused to comply, and told the officers that he had a gun. When Glasmann pushed a man aside in order to access the third car, Officer Butts approached the open driver's side window and sprayed pepper spray into Glasmann's eyes. Glasmann then exited the vehicle through the passenger door and ran into the mini-market, pursued by a group of officers.

Glasmann continued to yell, "[S]hoot me, I have got a gun. Go ahead and shoot me." 4 Report of Proceedings (RP) at 116. As if it were a weapon, he pointed a black object at the officers. Eventually, Glasmann ran behind the counter, grabbed Benson, put his arm around her neck in a choke hold, and pulled her body in front of his, threatening to kill her. Glasmann then dropped to the floor, holding Benson between him and the officers.

When Benson was able to "wiggle her way down from [Glasmann's] body," Officer Ryan Hamilton applied a stun gun to Glasmann. 4 RP at 125-26. The officers then removed Benson. They took Glasmann into custody, determined he was not armed, and realized he had brandished a stereo remote control as a weapon.

Benson was taken to Tacoma General Hospital, where Dr. William Eggebroten examined and treated her injuries: several contusions and abrasions on her right leg, hip, and arms. While at the hospital, Officer Borchardt and Officer Butts interviewed Benson about the incident. She told them that Glasmann had threatened to kill her if she did not get into his Corvette in the motel parking lot. Benson was released a few hours after arriving at the hospital.

A few days later, on October 27, 2004, the Lakewood police domestic violence detective met with Benson to conduct a follow-up interview. The detective examined only those injuries that Benson's clothing did not cover. He did not take pictures at the time because they were in a public place. But Benson agreed to have a friend take pictures of her injuries and send them to him the following morning.

The State charged Glasmann with one count of first degree assault under RCW 9A.36.011(1)(a); one count of attempted first degree robbery under RCW 9A.56.190, .200; RCW 9A.28.020; one count of first degree kidnapping under RCW 9A.40.020(1)(a); and one count of obstructing a law enforcement officer under RCW 9A.76.020(1).

At trial, Glasmann, Benson, the officers, and Rusk all testified, resulting in conflicting testimony as to the events that occurred on the

night in question. The State also submitted the 911 dispatch tape, FN3 the mini-mart surveillance tape, FN4 and the recorded conversations between Glasmann and Benson while Glasmann was in the Pierce County Jail awaiting trial.

FN3. On the 911 tape, Rusk describes the events as they occur: Glasmann pulled forward in his vehicle, backed up, and then pulled forward again, driving over Benson's leg three times. Glasmann then reached over, yanked Benson into the car, and pulled out of the parking lot, onto South Tacoma Way.

FN4. The surveillance video showed the events inside the mini-mart.

C. ARGUMENT.

RAP 13.4(b) states what the Supreme Court requires when considering a case for discretionary review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *State v. Kruger*, 116 Wn. App. 685 (2003)(Div. III).

In his collateral attack, the petitioner's primary issue was the same as one raised in his direct appeal: ineffective assistance of counsel for failure to pursue a voluntary intoxication defense. *See, State v. Glasmann*, 142 Wn. App. 1041 (2008), 2008 WL 186783. In the PRP, he also alleges

that counsel was ineffective in the question regarding petitioner's criminal history.

Neither the decision in the direct appeal nor in the PRP conflict with *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003). The Court of Appeals discussed and distinguished Kruger in the direct appeal. *State v. Glasmann, supra*, slip op. at 5. Likewise, in the Order Dismissing the PRP, the Court of Appeals discusses and distinguishes Kruger. Order, at 2. Division 2 does not explicitly or implicitly reject or differ from the analysis in Kruger in either of these opinions. This Court considered Glasmann's Petition for Review of the direct appeal and denied it. Noted at 164 Wn. 2d 1017 (2008). The Court should deny review of this same issue arising in the PRP.

A PRP is an appropriate vehicle where a defendant must raise an issue based on facts outside the record. *See, State v. McFarland*, 127 Wn. 2d 322, 335, 899 P.2d 1251 (1995). However this petitioner's declaration failed to support any new claim. He recounted how he was using drugs and alcohol, but this information was known at the time of trial. He testified regarding his drug and alcohol use. This part of his declaration did not raise an issue that was not or could not have been fully explored in the direct appeal.

Likewise, the excerpt from Ms. Benson's deposition failed to provide additional support to the claim. The small excerpt provided more of the same information that was known and testified about at the time of

trial. Moreover, the excerpt, and Ms. Benson's account of the facts in general, was of questionable value. The deposition was taken three years after the crime occurred, and nearly two years after the trial. It was made in a civil action against the Pierce County Sheriff's Dept and Lakewood Police, presumably regarding the actions of one of the officers who arrested the petitioner.

In his Motion for Discretionary Review, the petitioner argues that the Court of Appeals failed to view the evidence in the light most favorable to his claim of error, citing *State v. Fernandez-Medina*, 141 Wn. 2d 448, 455-456, 6 P.3d 1150 (2000). MDR at 4, 6. However this is not the correct standard, nor the holding of *Fernandez-Medina*. In a collateral attack, the petitioner has the burden to prove the constitutional error by a preponderance. *In re Personal Restraint of Lord*, 152 Wn. 2d 182, 188, 94 P. 3d 952 (2004). The petitioner also has the burden to prove actual prejudice from an instruction given or failed to be given. *See, In re Personal Restraint of Reed*, 137 Wn. App. 401, 409, 153 P.3d 890 (2007).

In *Fernandez-Medina*, the Supreme Court discussed the factual test for whether it was proper for the trial court to instruct the jury on a lesser-included offense or inferior degree of the charged offense. 141 Wn. 2d at 455-456. The Court did not hold that the reviewing court employs the same standard where the defendant made a deliberate choice of one trial strategy over another.

Significantly, in the present case, the jury was instructed regarding lesser-included offenses, at the request of the petitioner. According to trial counsel, this was part of an ultimately successful defense strategy.

As the Court of Appeals has pointed out in its opinion in the direct appeal and the Order Dismissing PRP, the fact that the petitioner had been drinking and using drugs is not the sole determinant in whether a defense of diminished capacity or voluntary intoxication should be pursued or would support an instruction on voluntary intoxication. *See, Kruger*, 116 Wn. App. at 692.

There was testimony at trial that the petitioner had been drinking and using drugs. In the direct appeal, the petitioner raised the same issue of ineffective assistance of counsel regarding the voluntary intoxication strategy. *See, Glasmann, supra*. The Court of Appeals reviewed that evidence in the light of *Kruger* and found against the petitioner. *Id.* This should have foreclosed the petitioner from raising it again.

This PRP also raised a new allegation of ineffective assistance of counsel, and prosecutorial misconduct. Petitioner there alleged that counsel was ineffective in the manner in which counsel asked about criminal history in direct examination of the petitioner. PRP at 16. The facts and circumstances of both of these issues are found in the record. As with the voluntary intoxication issue, they could have and should have been raised in the direct appeal. This Court should decline to further review these issues.

- b. The Court of Appeals correctly decided that defense counsel's decisions regarding the conduct of trial and whether to argue voluntary intoxication were trial strategy.

A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *U.S. v. Layton*, 855 F. 2d 1388, 1420 (9th Cir. 1988).

The decision by the Court of Appeals is fully supported by the record and the supplemental declaration of defense counsel. Trial counsel evaluated the evidence and discussed the case with the petitioner. *See* Declaration of Robert Quillian, Appendix C. Counsel did investigate the case, and considered the issue of voluntary intoxication. He concluded that the petitioner's detailed recall was inconsistent with petitioner's

statements to Dr. Trowbridge and the intoxication strategy in general. *Id.* In counsel's judgment, the best strategy was to attempt to mitigate the penalty or consequences by seeking and arguing the lesser included offenses. *Id.* Notably, counsel's strategy was successful. The petitioner was convicted of the lesser offenses of assault in the second degree and attempted robbery in the second degree. Appendix A.

- c. The petitioner did not demonstrate both deficiency in and prejudice from counsel's question regarding petitioner's criminal history.

Again, the decision by the Court of Appeals is supported by the record and the law. To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland*, 466 U.S. at 687; *see also*, *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335; *see also*, *Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a

strong presumption that a defendant received effective representation.

State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

Here, the defense filed a motion in limine regarding the criminal history that the defendant could be impeached with. Appendix D. During direct examination of the defendant, counsel asked if the defendant had prior felony convictions. RP 359. The defendant responded according to the trial court's ruling. *Id.* Later, out of the presence of the jury, the prosecutor raised the issue of the defendant's additional criminal history, arguing that counsel had "opened the door". Defense counsel explained that he had asked the question in the manner that he had in order to avoid

asking leading questions. RP 388. The prosecutor only sought to ask if the defendant had been convicted of more. *Id.* The court permitted the question on cross-examination. *Id.*

The result was de minimis. The prosecutor asked the defendant “those aren’t the only convictions you have, correct?”. The defendant responded “Correct.”. RP 390. No additional felonies; in type or number, were asked or volunteered. The prosecutor then moved on to a different line of questioning. The petitioner’s criminal history was not brought up again. It was not argued or addressed in closing or rebuttal argument. The jury was properly instructed to consider any such evidence only for credibility. Appendix E, instruction 6.

In order to rise to the level of constitutional deficiency, the error must be so serious as to deprive the defendant of a fair trial. *Strickland*, 466 U.S., at 694. Even if defense counsel’s mode of questioning was deficient, the mistake was harmless in the light of the totality of the evidence.

The petitioner must also demonstrate prejudice; i.e. that the result of the trial would probably be different. The petitioner fails to show that absent counsel’s mistaken question format, the trial result would probably have been different, i.e., he would have been acquitted.

The petitioner obviously disagrees with the conclusion reached by the Court of Appeals, which was based on the law, the record, and supplemental declarations provided. However, under RAP 13.4(b), he

must demonstrate that the Court's decision is legally erroneous. He does not.

2. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT.

“In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (internal quotation marks omitted). Prejudice in this context means that there is a “substantial likelihood that the misconduct affected the jury's verdict”. *State v. Coleman*, 152 Wn. App. 552, 488, 216 P.3d 479 (2009). Where the defendant does not object at trial, the objection is waived unless the defendant can prove that the prosecutor's comments were so flagrant and ill-intentioned that a curative instruction would have been ineffective to cure the resulting prejudice. *Coleman*, 152 Wn. App. at 488, citing *State v. Classen*, 143 Wn. App. 45, 64, 176 P.3d 582 (2008). A prosecutor has wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence in closing arguments. *State v. Kennealy*, 151 Wn. App. 861, 892, 214 P.3d 200 (2009).

In the present case, the prosecutor used Powerpoint slides to illustrate his closing. The slides included a photograph of the defendant which had been admitted into evidence as Exhibit 89. The other slides appended to the Petition are essentially illustrations of the court's instructions and argument of the law and facts.

The PRP includes slides with petitioner's photograph (exhibit 89) with the word "GUILTY" in large letters. PRP Appendix H, p. 8-10.

The use of these slides in closing argument was not misconduct. It is to be expected that a prosecuting attorney will argue in closing that a defendant is guilty. Both parties advocate for the verdict the respective parties want the jury to reach. The parties are permitted and expected to argue the law and the evidence. The jury is instructed that "The Lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law". Appendix E, instruction 1.

Many trial attorneys use illustrations in closing argument. Powerpoint slides have become a common means of illustration. The defendant did not object to this argument because it was not improper. As the Court of Appeals observed, while the slides may have been "melodramatic", it was not misconduct. Order Dismissing, at 4. It did not violate due process resulting in an unfair trial. The petitioner does not show that this issue rises to the level of public interest requiring Supreme Court review.

3. THE COURT OF APPEALS CORRECTLY
DETERMINED THAT CUMULATIVE ERROR
DID NOT DENY PETITIONER A FAIR TRIAL.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995).

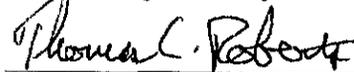
The record of this case, as a whole, shows that the petitioner received a fair trial. As argued above, he was represented by effective counsel, and the prosecutor did not commit misconduct. There was no such accumulation of error to deprive the petitioner of a fair trial.

D. CONCLUSION.

The petitioner fails to demonstrate that the Order Dismissing conflicts with decisions of either the Supreme Court or another Division of the Court of Appeals. In addition, the petitioner has failed to show that he was actually and substantially prejudiced by the new alleged errors. For the reasons argued above, the State respectfully requests that the Court deny the Petition for Discretionary Review.

DATED: October 21, 2010.

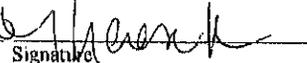
MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

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

10-21-10 
Date Signature

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Please see attached the State's Corrected Answer to Motion for Discretionary Review in the below stated matter:

St. v. Glasmann

No. 84475-5

Submitted by: T. Roberts

WSB # 17442

Please call me at 253/798-7426 if you have any questions.

Therese Kahn

Legal Assistant to T. Roberts

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDWARD MICHAEL GLASMANN, APPELLANT

Petition for Review from a decision by the Court of Appeals, Division II

No. 39700-5-II

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APPENDIX "A"

Judgment and Sentence



04-1-04983-2 25545699 JDSWCD 05-30-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 04-1-04983-2

MAY 30 2006

vs.

EDWARD MICHAEL GLASMANN,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

- [] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).
- [X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

WARRANT OF COMMITMENT -f

04-1-04983-2

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 5/26/06

By direction of the Honorable

Kevin Stock

JUDGE

KEVIN STOCK
CLERK

By: *Melissa Engler*

DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

MAY 30 2006 *Melissa Engler*
Deputy

STATE OF WASHINGTON

County of Pierce

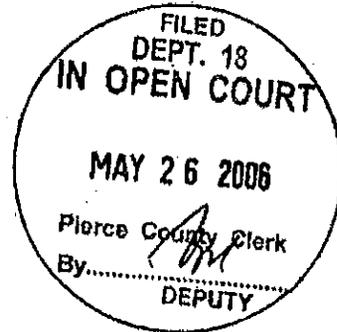
I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

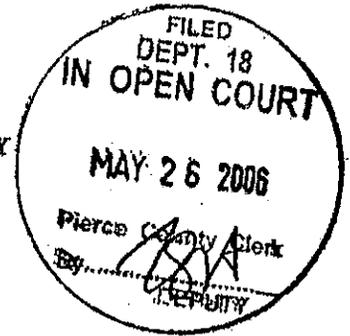
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk

By: _____ Deputy

jch





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-04983-2

vs

JUDGMENT AND SENTENCE (JS)
COUNT I, II, AND III

EDWARD MICHAEL GLASMANN

Defendant.

Prison
 Jail One Year or Less
 First-Time Offender
 SSOSA
 DOSA
 Breaking The Cycle (BTC)

MAY 30 2006

SID: 12234147
DOB: 10/22/64

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 May 9, 2006 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	Assault Second Degree	9A.36.021(1)(a)	N/A	10/23/04	042970053
II	Attempted Robbery 2°	9A.28.020, 9A.56.210	N/A	10/23/04	042970053
III	Kidnapping First Degree	9A.40.020(1)(a)	N/A	10/23/04	042970053

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Amended Information

The crimes charged in Counts I, II, and III involved domestic violence.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): NONE. ALL ARE SEPARATE CRIMINAL CONDUCT.

JUDGMENT AND SENTENCE (JS)
(Felony) (6/19/2003) Page 1 of 10

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

00-8-06242-7

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 SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	Burglary 2	06/24/81	Thurston Co., WA	04/30/81	Adult	NV
2	Assault 2	01/25/94	Thurston Co., WA	04/13/93	Adult	V
3	Unlawful Issuance of Bank Checks	01/25/94	Thurston Co., WA	04/13/93	Adult	NV
4	Manufacture/Deliver a Controlled Substance	01/25/94	Thurston Co., WA	06/25/93	Adult	NV
5	Domestic Violence Court Order Violation		Thurston Co., WA	11/30/93	Adult	NV
6	Unlawful Possession of a Firearm 2	06/21/95	Thurston Co., WA	01/07/95	Adult	NV
7	Robbery 2	06/21/95	Thurston Co., WA	04/20/95	Adult	V
8	Assault 3	09/01/98	Thurston Co., WA	04/20/98	Adult	NV
9	Unlawful Imprisonment	09/01/98	Thurston Co., WA	04/20/98	Adult	NV
10	UPCS-Meth.	10/03/02	Thurston Co., WA	04/19/02	Adult	NV
11	UPCS-Meth.	10/03/02	Thurston Co., WA	06/09/02	Adult	NV
12	Unlawful Possession of Explosive Device	10/03/02	Thurston Co., WA	06/09/02	Adult	NV

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	IV	63-84 months	N/A	63-84 months	10 years
II	9	IV	47.25 - 63 months	N/A	47.25-63 months	10 years
III	9	X	149-198 months	N/A	149-198 months	LIFE

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

04-1-04983-2

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows: N/A (Jury trial)

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Counts _____ The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

KTN/RJN	\$ _____	Restitution to: _____
	\$ _____	Restitution to: _____
		(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
PCV	\$ <u>500.00</u>	Crime Victim assessment
DNA	\$ <u>100.00</u>	DNA Database Fee
PUB	\$ <u>3,000.00</u>	Court-Appointed Attorney Fees and Defense Costs
FRC	\$ <u>10.00</u>	Criminal Filing Fee
FCM	\$ _____	Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____
\$ _____ Other Costs for: _____
\$3,710.00 TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____, RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

The above total does not include all restitution 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 _____

defendant waives any right to be present at any restitution hearing (defendant's initials): _____

RESTITUTION. Order Attached

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4.3 **COSTS OF INCARCERATION**

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 **COLLECTION COSTS**

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 **INTEREST**

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

4.6 **COSTS ON APPEAL**

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.7 **[] HIV TESTING**

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 **[X] DNA TESTING**

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 **NO CONTACT**

The defendant shall not have contact with ANGEL BENSON (d.o.b. 10/9/69) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for THE REMAINDER OF DEFENDANT'S LIFE (not to exceed the maximum statutory sentence).

[X] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 **OTHER:**

4.11 **BOND IS HEREBY EXONERATED**

4.12 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):

<u>84</u> months on Count	<u>I</u>	<u> </u> months on Count
<u>63</u> months on Count	<u>II</u>	<u> </u> months on Count
<u>198</u> months on Count	<u>III</u>	<u> </u> months on Count

Actual number of months of total confinement ordered is: 198 months

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[] The confinement time on Count(s) contain(s) a mandatory minimum term of .

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced.

Confinement shall commence immediately unless otherwise set forth here:

(b) 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: 580 days

4.13 [X] COMMUNITY CUSTODY is ordered as follows:

Count	<u>I</u>	for a range from:	<u>18</u>	to	<u>36</u>	Months,
Count	<u>II</u>	for a range from:	<u>18</u>	to	<u>36</u>	Months,
Count	<u>III</u>	for a range from:	<u>24</u>	to	<u>48</u>	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 for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

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 service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community

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3 custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to
4 monitor compliance with the orders of the court as required by DOC. The residence location and living
5 arrangements are subject to the prior approval of DOC while in community placement or community
6 custody. Community custody for sex offenders may be extended for up to the statutory maximum term of
7 the sentence. Violation of community custody imposed for a sex offense may result in additional
8 confinement.

9 The defendant shall not consume any alcohol.

10 Defendant shall have no contact with: ANGEL BENSON,

11 Defendant shall remain within outside of a specified geographical boundary, to wit:

12 The defendant shall participate in the following crime-related treatment or counseling services: _____

13 The defendant shall undergo an evaluation for treatment for domestic violence substance abuse

14 mental health anger management and fully comply with all recommended treatment.

15 The defendant shall comply with the following crime-related prohibitions: APPENDIX F

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Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

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4.14 [] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the 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 4.13.

4.15 **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 10 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 purpose 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.

5.3 **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 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 may be taken without further notice. RCW 9.94A.7602.

5.4 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 **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 driver'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.

5.6 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 5-26-06

JUDGE Beverly H. Mack
Print name _____

John C. Hill
Deputy Prosecuting Attorney

R.M. Quillran
Attorney for Defendant

Print name: JOHN HILLMAN
WSB # 25071

Print name: R.M. Quillran
WSB # 6236

Edward M. Glasmann
Defendant
Print name: Edward M. Glasmann

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. 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.627; 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 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.

FILED
DEPT. 18
IN OPEN COURT
MAY 26 2006
Pierce County Clerk
By: _____
DEPUTY

Defendant's signature: _____

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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 04-1-04983-2

I, KEVIN STOCK 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 COURT REPORTER

Court Reporter

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: _____

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Angel Benson

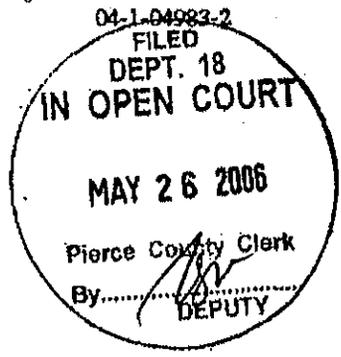
(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; _____

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections, or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: _____



IDENTIFICATION OF DEFENDANT

SID No. 12234147 Date of Birth 10/22/64
(If no SID take fingerprint card for State Patrol)

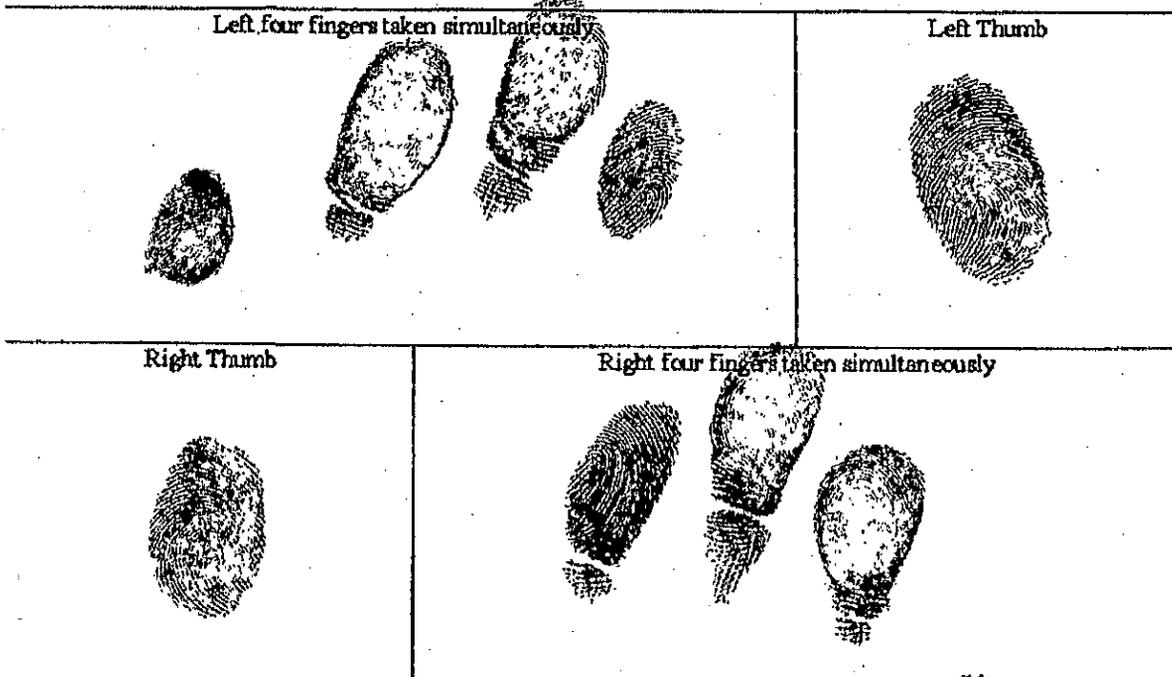
FBI No. 958733CA2 Local ID No. UNK

PCN No. UNK Other

Alias name, SSN, DOB: _____

Race:		Ethnicity:		Sex:	
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male	
<input type="checkbox"/> Native American	<input type="checkbox"/> Other: :	<input checked="" type="checkbox"/> Non-Hispanic	<input type="checkbox"/> Hispanic	<input type="checkbox"/> 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. Clerk of the Court, Deputy Clerk, _____ Dated: 5/26/06

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: _____

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: CF8C8510-F20D-AA3E-5597D3A403F1B063 containing 13 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/Chris Hutton, Deputy.

Dated: Oct 21, 2010 9:09 AM



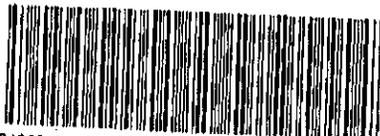
Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to: <https://www.co.pierce.wa.us/cfapps/secure/jinx/courtfilling/certifieddocumentview.cfm>, enter **SerialID: CF8C8510-F20D-AA3E-5597D3A403F1B063**. The copy associated with this number will be displayed by the Court.

APPENDIX "B"

Opinion

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF8C9D4B-F20F-6452-D4A3EF4680970E58
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

FILED
PIERCE COUNTY CLERK'S OFFICE



04-1-04983-2 30585878 MND 08-22-08

A.M. SEP 19 2008 P.M.

PIERCE COUNTY WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

No. 34997-3-II

v.

MANDATE

EDWARD M. GLASSMAN,
Appellant.

Pierce County Cause No.
04-1-04983-2

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

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on January 23, 2008 became the decision terminating review of this court of the above entitled case on September 4, 2008. Accordingly, this 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. Costs and attorney fees have been awarded in the following amount:

Judgment Creditor Respondent State: \$4.87
Judgment Creditor A.I.D.F.: \$2,835.72
Judgment Debtor Appellant Glassman: \$2,840.59



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 17th day of September, 2008.

[Signature]
Clerk of the Court of Appeals,
State of Washington, Div. II

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF8C9D4B-F20F-6452-D4A3EF4680970E58
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

MANDATE
34997-3-II
Page Two

Kathleen Proctor
Pierce Co Dep Pros Atty
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Hon. Beverly G. Grant
Pierce Co Superior Court Judge
930 Tacoma Ave So
Tacoma, WA 98402

Stephanie C Cunningham
Attorney at Law
4616 25th Ave NE # 552
Seattle, WA, 98105-4183

Indeterminate Sentence Review Board

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF8C9D4B-F20F-6452-D4A3EF4680970E58
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

FILED
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DIVISION II
08 JAN 23 AM 9:14
STATE OF WASHINGTON
BY: _____
DEPUTY

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

No. 34997-3-II

STATE OF WASHINGTON,

Respondent,

v.

EDWARD MICHAEL GLASMANN,

Appellant.

UNPUBLISHED OPINION

HUNT, J. — Edward Michael Glasmann appeals his jury conviction for second degree assault.¹ He argues the State failed to establish that he intentionally ran over the victim's leg with his car. In his statement of additional grounds (SAG),² he asserts that (1) he was denied his right to a fair trial because members of the jury allegedly observed him in handcuffs, and (2) he was denied effective assistance of counsel because his attorney failed to request a voluntary intoxication instruction. We affirm.

FACTS

I. ASSAULT

Edward Michael Glasmann and Angel Benson were romantically involved and engaged to be married. On the night of October 22, 2005, Glasmann and Benson went to dinner in Tacoma and rented a motel room in Lakewood to celebrate Glasmann's birthday. Both

¹ The jury also convicted Glasmann of attempted second degree robbery, first degree kidnapping, and obstructing a law enforcement officer. He does not challenge those convictions in this appeal.

34997-3-II

Glasmann and Benson ingested methamphetamine, ecstasy, and alcohol over the course of the evening. In addition, Glasmann and Benson had been arguing throughout that day and evening.

Around midnight, their argument escalated. Glasmann hit Benson, who curled up into the fetal position to protect herself from his blows. Glasmann eventually told Benson that he wanted to go for a ride. They both left the motel room.

Outside the room, another hotel guest, Erika Rusk, witnessed Glasmann (1) pin Benson against the wall with one hand around her neck and repeatedly punch her with his other hand; (2) release Benson and kick her twice in the stomach; (3) drag her to the passenger side of his Corvette and got into the driver's seat; (4) reach over to the open passenger door and attempt to pull Benson into the car by her hair; (5) pull forward from the parking stall while Benson was not fully in the car; and (6) run over Benson's leg with his car.

Once in the car, Benson put the car into park, grabbed the keys, and ran into a mini-mart adjacent to the motel. Inside the mini-mart, she hid on the floor behind the counter. As Rusk watched, she was calling 911 and reporting these events to dispatch.

Lakewood Police Officers Timothy Borchardt and David Butts arrived to find Glasmann's Corvette parked in the roadway. As they approached, they observed Glasmann exit his Corvette, run over to the mini-mart, and climb into three separate cars, apparently hoping to steal one and escape.

Their guns drawn, Officers Borchardt and Butts ordered Glasmann to show his hands. Glasmann refused to comply, and told the officers that he had a gun. When Glasmann pushed a

² RAP 10.10.

34997-3-II

man aside in order to access the third car, Officer Butts approached the open driver's side window and sprayed pepper spray into Glasmann's eyes. Glasmann then exited the vehicle through the passenger door and ran into the mini-market, pursued by a group of officers.

Glasmann continued to yell, "[S]hoot me, I have got a gun. Go ahead and shoot me." 4 Report of Proceedings (RP) at 116. As if it were a weapon, he pointed a black object at the officers. Eventually, Glasmann ran behind the counter, grabbed Benson, put his arm around her neck in a choke hold, and pulled her body in front of his, threatening to kill her. Glasmann then dropped to the floor, holding Benson between him and the officers.

When Benson was able to "wiggle her way down from [Glasmann's] body," Officer Ryan Hamilton applied a stun gun to Glasmann. 4 RP at 125-26. The officers then removed Benson. They took Glasmann into custody, determined he was not armed, and realized he had brandished a stereo remote control as a weapon.

II. FOLLOW-UP

Benson was taken to Tacoma General Hospital, where Dr. William Eggebroten examined and treated her injuries: several contusions and abrasions on her right leg, hip, and arms. While at the hospital, Officer Borchardt and Officer Butts interviewed Benson about the incident. She told them that Glasmann had threatened to kill her if she did not get into his Corvette in the motel parking lot. Benson was released a few hours after arriving at the hospital.

A few days later, on October 27, 2004, the Lakewood police domestic violence detective met with Benson to conduct a follow-up interview. The detective examined only those injuries that Benson's clothing did not cover. He did not take pictures at the time because they were in a

34997-3-II

public place. But Benson agreed to have a friend take pictures of her injuries and send them to him the following morning.

III. PROCEDURE

The State charged Glasmann with one count of first degree assault under RCW 9A.36.011(1)(a); one count of attempted first degree robbery under RCW 9A.56.190, .200; RCW 9A.28.020; one count of first degree kidnapping under RCW 9A.40.020(1)(a); and one count of obstructing a law enforcement officer under RCW 9A.76.020(1).

At trial, Glasmann, Benson, the officers, and Rusk all testified, resulting in conflicting testimony as to the events that occurred on the night in question. The State also submitted the 911 dispatch tape,³ the mini-mart surveillance tape,⁴ and the recorded conversations between Glasmann and Benson while Glasmann was in the Pierce County Jail awaiting trial.

Apparently on one occasion, three jurors observed Glasmann in handcuffs outside the courtroom. Glasmann's counsel requested a mistrial. The trial court questioned jurors number three and thirteen about their observations of Glasmann outside the courtroom. Both jurors testified that they did not form impressions of Glasmann based on their observations of him in the hallway. One of the jurors testified that he saw Glasmann on the elevator "for a second." The other juror testified that he turned a corner in the courthouse and saw Glasmann for "a split

³ On the 911 tape, Rusk describes the events as they occur: Glasmann pulled forward in his vehicle, backed up, and then pulled forward again, driving over Benson's leg three times. Glasmann then reached over, yanked Benson into the car, and pulled out of the parking lot, onto South Tacoma Way.

⁴ The surveillance video showed the events inside the mini-mart.

34997-3-II

second” before he turned around and left. When the court asked the two jurors whether they could follow an instruction telling them that they were not to consider the fact that they had seen Glasmann in the hall, both answered, “Yes.”

The officer who had been transporting Glasmann testified that the jurors who observed Glasman were between eight and ten feet away, and he (the officer) did not believe the jurors saw the handcuffs, because Glasmann was wearing a long sleeved shirt that covered the handcuffs and was holding a book in his hands. The trial court found no prejudicial effect and denied Glasmann's motion for mistrial.

The jury convicted Glasmann of second degree assault, attempted second degree robbery, first degree kidnapping, and obstructing a law enforcement officer. Glasmann stipulated to his offender score, and the trial court sentenced him to a standard range sentence, totaling 198 months.

Glasmann appeals.

ANALYSIS

I. SUFFICIENCY OF EVIDENCE

Glasmann argues that the State failed to present sufficient evidence to prove the requisite intent to convict him of second degree assault. His argument fails.

A. Standard of Review

Sufficiency of the evidence is a question of constitutional magnitude, which an appellant may raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). When a defendant challenges the sufficiency of the evidence in a criminal case on appeal, we

34997-3-II

draw all reasonable inferences from the evidence in favor of the State and interpret all reasonable inferences from the evidence strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of sufficiency admits the truth of the State's evidence and all inferences that an appellate court can reasonably draw therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980).

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found guilt beyond a reasonable doubt for the crime charged. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

B. Second Degree Assault

RCW 9A.36.021(1)(a) provides: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . Intentionally assaults another and thereby recklessly inflicts substantial bodily harm."

Recklessly causing harm is not the same as intentionally causing harm. Thus, under the statute, second degree assault by battery requires an intentional touching that *recklessly* inflicts substantial bodily harm. It does not require specific intent to inflict substantial bodily harm.

State v. Esters, 84 Wn. App. 180, 185, 927 P.2d 1140 (1996), *review denied*, 131 Wn.2d 1024 (1997); *see also State v. Keend*, 140 Wn. App. 858, ___, 166 P.3d 1268, 1273 (2007); *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992) (defendant may be convicted of second

34997-3-II

degree assault if he intended to put another in apprehension of harm whether or not he intended to inflict or was incapable of inflicting that harm).

The State presented sufficient evidence to establish that Glasmann intentionally touched Benson, thereby recklessly inflicting substantial bodily harm. Rusk testified about the events she had observed from outside her motel room: Glasmann dragged Benson into the passenger seat of his car, got into the driver's side, and drove forward while Benson was only half in the vehicle. Glasmann drove over Benson's leg, reversed the car, and then pulled forward again onto her leg. And after running over her leg three times, Glasmann yanked Benson into the car by her hair and drove off. The State also presented the 911 dispatch tape, which corroborated Rusk's testimony.

Although each provided slightly different details about the events, Benson,⁵ the officers, and the physician who had examined Benson after the assaults, all testified. The jury also heard recorded telephone calls that Glasmann had made to Benson while awaiting trial, suggesting that they discussed details of their testimony before trial and/or that he threatened Benson to testify in a specific way at trial.

⁵ Benson testified that she and Glasmann had been engaged in an ongoing verbal argument throughout the day, which escalated into a mutual physical altercation later at the motel. The altercation moved from inside their motel room to outside by the car because Glasmann wanted to go for a drive. Although Benson did not want to go with Glasmann because she was afraid of him driving, somehow she ended up in the passenger seat. She opened the door and tried to get out while the car was moving. While she held onto something or Glasmann held onto her from the driver's seat, Benson was running backwards, trying to catch her balance; she fell, and the car went up her leg and parked on her pelvis. Glasmann then reversed the car off Benson, got out, put her back in the passenger seat, and said he was taking her to the hospital. But Benson was scared, so she put the car in park, grabbed the keys, and ran to the mini-mart. Inside the mini-mart, Benson yelled, "Help me," or "Save me," and hid behind the counter.

34997-3-II

Glasmann testified that he had intentionally pushed Benson into the car, even though she had made it clear that she did not want to drive with him. He even acknowledged that his car had "rolled" onto Benson, after which he yanked her into the car. He claimed, however, that he had driven out of the motel parking lot with the intention of finding a hospital for her.

In essence, the jury had to weigh the conflicting testimonies of Glasmann, Benson, and the other witnesses. We defer to the jury's finding Glasmann and Benson not credible.⁶ Taken in the light most favorable to the State, the testimony provided sufficient evidence for the jury to find that Glasmann intentionally touched Benson when he dragged her into the car, pulled her hair, and ran over her leg, among other intentional touches, thereby recklessly inflicting substantial bodily harm, namely several contusions and abrasions on her right leg, hip, and arms. Accordingly, we hold that the State presented sufficient evidence to prove the elements of second degree assault.

II. STATEMENT OF ADDITIONAL GROUNDS

A. Right to Fair Trial

In his SAG, Glasmann first contends that the trial court denied his right to a fair trial under the federal and Washington state constitutions because members of the jury observed him in handcuffs outside the courtroom. We disagree.

On appeal, we evaluate an unconstitutional restraint claim under a harmless error standard. *State v. Finch*, 137 Wn.2d 792, 861, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999).

⁶ *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987).

34997-3-II

We presume an error violating a constitutional right to be prejudicial, unless it affirmatively appears from the record to be harmless beyond a reasonable doubt. *Finch*, 137 Wn.2d 859. Harmless error may be established when the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached. *Finch*, 137 Wn.2d at 859.

But when the jury's view of the defendant in shackles or handcuffs is brief or inadvertent, the defendant must make an affirmative showing of prejudice, and he carries the burden of curing any defect. *State v. Elmore*, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000). To demonstrate prejudice, the defendant must show "a substantial or injurious effect or influence on the jury's verdict." *Elmore*, 139 Wn.2d at 274 (quoting *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998)). There must be evidence in the record beyond the defendant's bare allegations that seeing the defendant in shackles prejudiced the jury. *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

Glasmann fails to persuade us that some jurors observing him in handcuffs outside the courtroom influenced the jury's verdict to his prejudice. *See State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001). The record does support this contention: Neither juror testified that they had observed Glasmann in handcuffs outside the courtroom. Moreover, both jurors testified that they did not form impressions of Glasmann based on their observations of him in the hallway. In addition, the transporting officer explained to the trial court that the jurors had observed Glasmann from between eight and ten feet away and he did not believe they saw the handcuffs, because they were covered by Glasmann's long-sleeved shirt and a book he was holding in his hands. The record shows no prejudice.

34997-3-II

We hold, therefore, that the jurors' inadvertent observations of Glasmann outside of the courtroom did not affect his right to a fair trial.

B. Effective Assistance of Counsel

Finally, Glasmann contends that his attorney rendered ineffective assistance of counsel by failing to request an intoxication instruction. This argument also fails.

A criminal defendant is entitled to a voluntary intoxication instruction if: (1) one of the elements of the crime charged is a particular mental state; (2) there is substantial evidence of ingesting an intoxicant; and (3) the defendant presents evidence that this activity affected his ability to acquire the required mental state. *State v. Harris*, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004). In other words, the evidence must reasonably and logically connect Glasmann's intoxication with his asserted inability to form the requisite level of culpability to commit second degree assault. *See State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003) (stating that mere intoxication is not enough; rather, the evidence must show the effects of the intoxicant).

Glasmann relies on a Division Three case, *State v. Kruger*, to support his contention that he was entitled to a voluntary intoxication jury instruction. In *Kruger*, however, Division Three found "ample evidence of [the defendant's] level of intoxication on both his mind and body, e.g., his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray." *Kruger*, 116 Wn. App. at 692. But such is not the state of the evidence here.

Contrary to Glasmann's assertion, the record does not contain ample evidence that his level of intoxication affected his ability or lack thereof to form the mental state required to

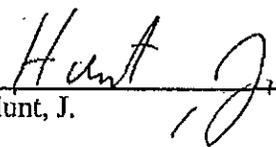
34997-3-II

establish the crimes charged. At best, the evidence merely showed that Glasmann had ingested unspecified amounts of methamphetamine, ecstasy, and alcohol the night of the incident. See *Kruger*, 116 Wn. App. at 692. As such, Glasmann was not entitled to an involuntary intoxication instruction.

Because counsel's performance was not deficient, we hold that Glasmann was not denied effective assistance of counsel when his counsel failed to request an intoxication instruction.

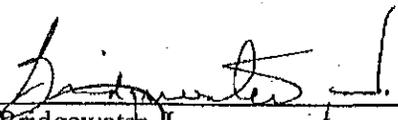
Affirmed.

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

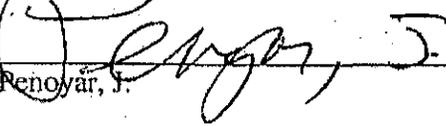


Hunt, J.

We concur:



Bridgewater, J.



Renojar, J.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: CF8C9D4B-F20F-6452-D4A3EF4680970E58 containing 13 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/Chris Hutton, Deputy.

Dated: Oct 21, 2010 9:09 AM



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APPENDIX "C"

Declaration of Robert Quillian

Room 946
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PIERCE COUNTY
PROSECUTING ATTORNEY

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SWORN DECLARATION OF ROBERT M. QUILLIAN

ROBERT M. QUILLIAN makes the following declaration in accordance with RCW 9A.72.085:

I am a duly licensed attorney in the State of Washington, and have been asked to submit this Sworn Declaration in response to the claims of Edward M. Glasmann in a Personal Restraint Petition filed in the Court of Appeals. In that Personal Restraint Petition, Mr. Glasmann alleges that I provided ineffective assistance of counsel in my representation of him in Pierce County Superior Court case number 04-1-04983-2. I am submitting this Sworn Declaration based upon the provisions of RPC 1.6(b)(5).

After I was appointed to represent Mr. Glasmann by the Pierce County Department of Assigned Counsel, I met with him in the Pierce County Jail on a number of occasions. The first couple meetings we had were more for getting to know and become comfortable with each other. Also, in those initial meetings, I tend to provide information to the client, rather than request or seek information from the client, and that was how those initial meetings with Mr. Glasmann went. As is my customary procedure, I reviewed with Mr. Glasmann the charges he was facing, the elements of each of those charges, and the potential penalties involved if he were convicted of any or all of those charges. I also, over the course of those initial

SWORN DECLARATION
OF ROBERT M. QUILLIAN - 1

ROBERT M. QUILLIAN
Attorney at Law
2633-A PARKMONT LANE S.W.
Olympia, Washington 98502

1 meetings, discussed, in general terms, the State's evidence against Mr. Glasmann, and
2 I also discussed with him potential defenses to these charges. I always want to be sure
3 that my clients have a full understanding of the charges against the, the general
4 parameters of the evidence against them, and possible defenses, before I seek to elicit
5 much information from them. Once I was satisfied that Mr. Glasmann had a firm
6 understanding of those matters, we moved on to more of a give and take between the
7 two of us, as to how best to defend against these extremely serious charges.
8

9 I was aware that prior counsel had discussed a defense of diminished capacity
10 and/or voluntary intoxication with Mr. Glasmann, and had, in fact, arranged to have
11 Mr. Glasmann interviewed by Dr. Brett Trowbridge in that regard. I had received, as
12 part of discovery, a two page report from Dr. Trowbridge, but it reflected that Mr.
13 Glasmann did not complete the evaluation with Dr. Trowbridge, as he (i.e. Mr.
14 Glasmann) was contemplating hiring new private counsel. Interestingly, the
15 Trowbridge report did indicate that Mr. Glasmann told Dr. Trowbridge that he
16 remembered nothing about the incident, but the report indicates that Mr. Glasmann
17 attributed that to "blackouts" arising from the effects of an automobile accident. There
18 is nothing in Dr. Trowbridge's report which indicates that Mr. Glasmann told Dr.
19 Trowbridge that he was so high on drugs that he could not recall the incident.
20
21

22 Once I began to discuss the incident in question with Mr. Glasmann, I was
23 immediately struck with the high degree of specific recall he had about the events of
24 the evening. While he certainly indicated that he had consumed drugs on the day in
25 question, at no time did he give me any indication that he did not recall the events in
26

SWORN DECLARATION
OF ROBERT M. QUILLIAN - 2

ROBERT M. QUILLIAN
Attorney at Law
2633-A PARKMONT LANE S.W.
Olympia, Washington 98502
(360) 339-0166

1 question (except as to the events after he was tasered in the AM/PM market, which
2 was essentially after the vast majority on the events giving rise to these charges). In
3 fact, he was extremely detailed as to the chain of events on that day and evening.
4 Based on our several discussions about the events of the evening, I did not feel that a
5 claim of voluntary intoxication/blackout/lack of recall was an advisable way to
6 proceed in Mr. Glasmann's defense. **At no time** did I tell Mr. Glasmann that
7 voluntary intoxication would be our "primary defense".
8

9 The police reports and witness statements, as well as the results of my
10 interviews with witnesses, painted a picture of goal-oriented and intentional actions
11 on the part of Mr. Glasmann. All of these accounts, in addition to the facts as related
12 to me by Mr. Glasmann himself, seemed to fly in the face of voluntary intoxication
13 being a viable defense in his case. I discussed this with Mr. Glasmann, and it was
14 agreed that the focus of the defense would be in another direction.
15

16 My analysis of the charges and the facts led me to the conclusion that the
17 Kidnapping in the First Degree charge was the charge on which the State had the
18 strongest evidence. I discussed this with Mr. Glasmann, and he agreed with that
19 analysis. I felt that it was highly unlikely that Mr. Glasmann could avoid conviction
20 totally in this case. Thus, the focus of the defense became more of an attempt to
21 mitigate the nature of whatever convictions he might get, and I felt that there were
22 valid arguments, based on how Mr. Glasmann had described the events to me, that he
23 was not guilty of neither Assault in the First Degree nor Attempted Robbery in the
24 First Degree, but instead may well be guilty of no crime as to those charges or a lesser
25

26 SWORN DECLARATION
OF ROBERT M. QUILLIAN - 3

ROBERT M. QUILLIAN
Attorney at Law
2633-A PARKMONT LANE S.W.
Olympia, Washington 98502
(360) 352-0166

1 crime. I was cognizant, and advised Mr. Glasmann about, the draconian sentencing
2 scheme where one is being sentenced for two or more serious violent offenses, and I
3 was aware that Mr. Glasmann was charged with two serious violent offenses.

4 I discussed all this with Mr. Glasmann, and we came to an agreement that our
5 trial strategy would be to try to avoid convictions for two serious violent offenses. We
6 agreed that that would necessarily involve Mr. Glasmann testifying in his own behalf,
7 and describing to the jury, in detail, as he had with me, the events of the day and
8 evening in question. Any plan to attempt to rely on a defense of diminished capacity
9 or voluntary intoxication had been discarded, by the agreement of both myself and
10 Mr. Glasmann, early on in our discussions, as we both agreed that such a defense
11 would be difficult to make out and difficult to prevail on, thus likely resulting in
12 convictions as charged. The plan was to do our best, on the facts, to avoid convictions
13 for both Assault in the First Degree and Attempted Robbery in the First Degree.
14

15
16 Mr. Glasmann was, as far as I could tell, completely in agreement with that
17 trial strategy. He voiced no concern to me that we were not pursuing a voluntary
18 intoxication defense in the weeks and months leading up to trial, nor in the course of
19 the trial itself. He did indeed testify in his own behalf, and his testimony was clear
20 and detailed as to the events of the incident in question, just as he had recited those
21 events to me. When the jury returned its verdicts, which found him guilty of the lesser
22 offenses of Assault in the Second Degree and Attempted Robbery in the Second
23 Degree, Mr. Glasmann was extremely pleased with the result of the trial.
24

25 Simply put, Mr. Glasmann and I discussed his case in detail, and all possible
26

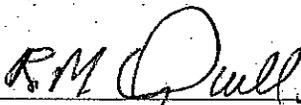
SWORN DECLARATION
OF ROBERT M. QUILLIAN - 4

ROBERT M. QUILLIAN
Attorney at Law
2633-A PARKMONT LANE S.W.
Olympia, Washington 98502
(360) 355-0166

1 defenses to these charges. We agreed upon a trial strategy of trying to avoid
2 convictions for two serious violent offenses based on the facts, not upon a defense of
3 voluntary intoxication. I feel that Mr. Glasmann's clear and detailed testimony went a
4 long way towards reaching the resolution which we reached, and I have no hesitation
5 or qualms about having pursued that trial strategy in Mr. Glasmann's case.

6 I declare under penalty of perjury under the laws of the State of Washington
7 that the foregoing is true and correct.

8
9 SIGNED at Olympia, Washington, on January 15, 2010.

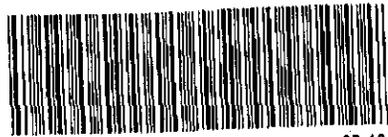
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SWORN DECLARATION
OF ROBERT M. QUILLIAN - 5

ROBERT M. QUILLIAN
Attorney at Law
2633-A PARKMONT LANE S.W.
Olympia, Washington 98502
(360) 355-0111

APPENDIX "D"

Defendant's Motion in Limine



04-1-04983-2 25435239 MTL 05-10-06

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

STATE OF WASHINGTON,

Plaintiff,

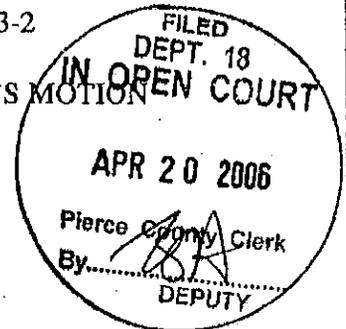
vs.

EDWARD M. GLASMANN,

Defendant.

NO. 04-1-04983-2

DEFENDANT'S MOTION
IN LIMINE



The Defendant herein, EDWARD M. GLASMANN, by and through his attorney, ROBERT M. QUILLIAN, hereby moves the Court before trial and before selection of the jury, for an Order instructing the State's counsel and the State's witnesses not to, directly or indirectly, mention, refer to, question concerning or attempt to convey to the jury in any manner, any of the facts or matters indicated below without first obtaining permission of the Court outside the presence or hearing of the jury and further instructing the State's counsel to warn and caution each and every one of his witnesses to strictly follow any Order entered by the Court in connection with this motion:

1. Any evidence as to the reputation of the Defendant for aggressive, dishonest, or violent behavior.
2. Any evidence as to other crimes, convictions, wrongs, or bad acts of the

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Defendant (unless the Defendant testifies, and then subject to the limitations of ER 609).

DATED: April 17, 2006.



ROBERT M. QUILLIAN,
Attorney for Defendant
WSBA #6836

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document.

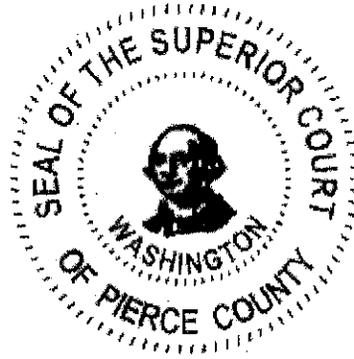
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plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/Chris Hutton, Deputy.

Dated: Oct 21, 2010 9:11 AM



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document that was transmitted electronically by the Court, sign on to: [https://](https://www.co.pierce.wa.us/cfapps/secure/linx/courtfilling/certifieddocumentview.cfm)

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enter **SerialID: CF8F287A-F20F-6452-D67A5BF6D6730B7B**.

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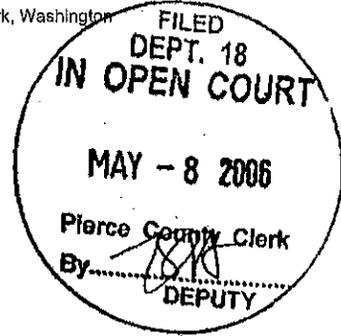
APPENDIX "E"

Jury Instructions

Case Number: 04-1-04983-2 Date: October 21, 2010
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Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



04-1-04983-2 25435258 CTINJY 05-10-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

EDWARD MICHAEL GLASMANN,

Defendant.

CAUSE NO. 04-1-04983-2

COURT'S INSTRUCTIONS TO THE JURY

DATED this 8th day of May, 2006.

Beverly K. Grant
JUDGE

ORIGINAL

INSTRUCTION NO. 1

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

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

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

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

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

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

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

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

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

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

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

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.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

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, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 3

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.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

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.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

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.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 6

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 7

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another by any force or means likely to produce great bodily harm or death.

Case Number: 04-1-04883-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 8

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

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 9

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 is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 10

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

INSTRUCTION NO. 11

To convict the defendant of the crime of assault 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 October, 2004, the defendant assaulted Angel Benson in the Budget Inn parking lot;
- (2) That the assault was committed by a force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with intent to inflict great bodily harm; 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stuck Pierce County Clerk, Washington

INSTRUCTION NO. 12

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault in the First Degree necessarily includes the lesser crimes of Assault in the Second Degree, Assault in the Third Degree, and Assault in the Fourth Degree.

The crime of Attempted Robbery in the First Degree necessarily includes the lesser crime of Attempted Robbery in the Second Degree.

The crime of Kidnapping in the First Degree necessarily includes the lesser crimes of Kidnapping in the Second Degree and Unlawful Imprisonment.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he shall be convicted only of the lowest crime.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 13

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 14

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 15

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 16

To convict the defendant of the crime of assault in the second 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 October, 2004, the defendant intentionally assaulted Angel Benson in the Budget Inn parking lot;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Angel Benson, and
- ⑥ 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of assault in the third degree when under circumstances not amounting to assault in either the first or second degree he or she

(1) with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm, or

(2) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 18

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

INSTRUCTION NO. 19

To convict the defendant of the crime of assault in the third 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 October, 2004, the defendant caused bodily harm to Angel Benson in the Budget Inn parking lot;
- (2) That the bodily harm was either (a) caused by a weapon or other instrument or thing likely to produce bodily harm or (b) was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering;
- (3) That the defendant acted with criminal negligence; and
- ④ That the acts occurred in the State of Washington.

If you find from the evidence that elements(1), (3), and (4) and either (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (2)(a) and (2)(b) are alternatives and only one need be proved. You must unanimously agree that (2)(a) has been proved, or that (2)(b) has been proved.

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

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 20

A person commits the crime of assault in the fourth degree when he or she commits an assault not amounting to assault in the first, second, or third degree.

INSTRUCTION NO. 21

To convict the defendant of the crime of assault in the fourth 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 October, 2004, the defendant assaulted Angel Benson in the Budget Inn parking lot; and
- (2) 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 22

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

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 23

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

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 24

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property, not belonging to the defendant, 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 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. The taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom it was taken, such knowledge was prevented by the use of force or fear.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 25

Deadly weapon means any firearm, whether loaded or unloaded, weapon, device, or instrument, 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 injury.

Case Number: 04-1-04883-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 26

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

INSTRUCTION NO. 27

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

- (1) That on or about the 23rd day of October, 2004, the defendant did an act which was a substantial step toward the commission of robbery in the first degree;
- (2) That the act was done with the intent to commit robbery in the first degree; and
- (3) 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.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 28

A person commits the crime of robbery in the second degree when he or she commits robbery.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 29

To convict the defendant of the crime of attempted robbery in the second 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 October, 2004, the defendant did an act which was a substantial step toward the commission of robbery in the second degree;
 - (2) That the act was done with the intent to commit robbery in the second degree;
- and
- (3) 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 30

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to hold the person as a shield or hostage.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 31

Abduct means to restrain a person by using or threatening to use deadly force.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 32

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty.

Restraint is without consent if it is accomplished by physical force, intimidation or deception.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 33

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

- (1) That on or about the 23rd day of October, 2004, the defendant intentionally abducted another person;
- (2) That the defendant abducted Angel Benson with intent to hold the person as a shield or hostage; and
- (3) 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 34

A person commits the crime of kidnapping in the second degree when he or she intentionally abducts another person.

INSTRUCTION NO. 35

To convict the defendant of the crime of kidnapping in the second 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 October, 2004, the defendant intentionally abducted Angel Benson; and
- (2) 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-8452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 36

A person commits the crime of unlawful imprisonment when he or she knowingly
restrains another person.

INSTRUCTION NO. 37

To convict the defendant of the crime of unlawful imprisonment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of October, 2004, the defendant knowingly restrained Angel Benson;
- (2) that such restraint was without Angel Benson's consent;
- (3) That such restraint was without legal authority; 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Case Number: 04-1-04983-2 Date: October 21, 2010

SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD

Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 38

A person commits the crime of obstructing a law enforcement officer when he willfully hinders, delays, or obstructs any law enforcement officer in the discharge of the law enforcement officer's official powers or duties.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 39

A person acts willfully when he or she acts knowingly.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 40

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 41

To convict the defendant of the crime of obstructing a law enforcement officer as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2004, the defendant wilfully hindered, delayed, or obstructed a law enforcement officer in the discharge of the law enforcement officer's official powers or duties;

(2) That the defendant knew that the law enforcement officer was discharging official duties at the time;

(3) 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.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 42

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 change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Case Number: 04-1-04983-2 Date: October 21, 2010
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 43

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and ten verdict forms: 1A, 1B, 1C, 1D, 2A, 2B, 3A, 3B, 3C, and 4A.

When completing the verdict forms, you will first consider the crime of assault in the first degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1A.

If you find the defendant guilty on verdict form 1A, do not use verdict forms 1B or 1C or 1D. If you find the defendant not guilty of the crime of assault in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 1B.

If you find the defendant guilty on verdict form 1B, do not use verdict form 1C. If you find the defendant not guilty of the crime of assault in the second degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser

crime of assault in the third degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty on verdict form 1C, do not use verdict form 1D. If you find the defendant not guilty of the crime of assault in the third degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the fourth degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1D the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty of the crime of assault but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form 1A and to find the defendant guilty of the lowest degree of assault for which you unanimously agree that the defendant is guilty.

You will next consider the crime of attempted robbery in the first degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 2A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 2A.

If you find the defendant guilty on verdict form 2A, do not use verdict form 2B. If you find the defendant not guilty of the crime of attempted robbery in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of attempted robbery in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 2B the words "not guilty" or the word

"guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 2B.

If you find the defendant guilty of the crime of attempted robbery but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form 1A and to find the defendant guilty on verdict form 2B.

You will first consider the crime of kidnapping in the first degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 3A.

If you find the defendant guilty on verdict form 3A, do not use verdict forms 3B or 3C. If you find the defendant not guilty of the crime of kidnapping in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of kidnapping in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form 3B.

If you find the defendant guilty on verdict form 3B, do not use verdict form 3C. If you find the defendant not guilty of the crime of unlawful imprisonment, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of unlawful imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3C the words "not guilty" or the word "guilty," according to the decision you reach.

Case Number: 04-1-04983-2 Date: October 21, 2010
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You will next consider the crime of obstructing a law enforcement officer as charged in Count IV. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 4A the words "not guilty" or the word "guilty," according to the decision you reach.

Since 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 proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: CF9FA0D9-F20F-6452-D7C62DE8640811BD containing 49 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/Chris Hutton, Deputy.

Dated: Oct 21, 2010 9:29 AM



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