

64734-2

64734-2

NO. 64734-2-1

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIS CHAD MOORE,

Appellant.

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

The Honorable Dave Needy, Judge

2010 SEP 15 PM 1:35
COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied effective assistance of counsel in a criminal case because his attorney had an actual conflict of interest.

2. There was insufficient evidence to convict the appellant of assault.

3. There was insufficient evidence to convict the appellant of assault with a deadly weapon.

4. The trial court erred by entering judgment and sentence against the appellant.

Issues Related to Assignments of Error

1. In a criminal case, does defense counsel have an actual conflict of interest where counsel previously prosecuted and convicted his client, where the prior conviction increases the client's offender score and standard sentence range, where the prior conviction and a current offense qualify as "strikes" under Washington's "Persistent Offender" sentencing scheme, and neither the client nor the former prosecuting agency has given informed consent to the representation?

2. Is the state's evidence insufficient to convict the accused of assault where the testimony of the complaining witness is

inherently improbable and defies physical laws and physical evidence?

3. Is a vehicle a “deadly weapon” when it is used to cause a two to three inch scratch on the rear bumper of another vehicle?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecutor charged appellant Chad Moore by Amended Information with second degree assault with a deadly weapon and non-felony hit and run of an attended vehicle. CP 65. A jury convicted Moore as charged. CP 97-98. Moore’s offender score for the felony is two, based on a prior 1996 conviction for first degree assault. CP 135-36. His standard range is 12-14 months. CP 136. The superior court sentenced Moore to twelve months plus one day of confinement for the assault and 365 days for the hit and run, to be served concurrently. CP 138.

2. Defense Counsel’s Previous Prosecution of His Client

Moore’s jury trial began on October 19, 2009. 1RP 1.¹ On the second day, October 20, the state alerted the trial court that defense counsel Corbin Volluz had prosecuted Moore in the 1996 assault case

¹ Appellant’s citations to “RP” refer to the Reports of Proceedings as follows: 1RP: October 19, 2009; 2RP: October 20, 2009; 3RP: October 23, 2009; 4RP: October 26, 2009; 5RP: October 27, 2009; 6RP: November 13, 2009; 7RP:

resulting in Moore's prior conviction. 2RP 6-8. At the time, Volluz was employed as a deputy prosecutor for Skagit County. 2RP 6-8.²

Volluz informed the court he did not recall previously prosecuting his client. 2RP 7. As the parties discussed the matter it was also determined that the trial judge, Hon. Dave Needy, was the elected prosecutor for Skagit County when Moore was convicted in 1996. 2RP 8. Regarding defense counsel's possible conflict of interest, Judge Needy told Moore, "I think that his motivation is at this point to do the very best job for you" 2RP 13. Moments later, the court stated,

His livelihood is built upon his representation and his ability to do well in representing criminal defendants in the courtroom, and I can't see any particular motivation or split loyalties in him doing anything other than that in this case.

2RP 20-21. The court added that, even if there were a conflict of interest, "I believe you can waive that conflict or give up that conflict if you wish." 2RP 21.

The court ordered a brief recess to allow Moore to seek independent legal advice. 2RP 22-28. After the recess, Moore informed the court he had contacted attorney David Wall who was

December 4, 2009; 8RP: December 11, 2009.

² The information came to light as the result of a newspaper reporter's

available to meet with Moore at 9:00 a.m. on October 23. 2RP 29-30.

Moore told the court “I don’t know exactly what’s going on yet. I would like time to consult with another [attorney].” 2RP 32. The court then ordered a recess to the afternoon of October 23. 2RP 46.

When the parties returned to court on October 23, attorney Wall addressed the court and focused on Judge Needy’s role as Skagit County Prosecutor during Moore’s 1996 case. As prosecutor, Needy had given approval to Volluz to deliver a copy of the prosecution file on Moore’s case to a law firm representing the victim in the case. 3RP 4-5; CP 99-104. Wall stated that Moore was “very uncomfortable” and argued that Moore should be permitted to file an affidavit of prejudice regarding Judge Needy. 3RP 8-9.

The state argued there was neither an actual nor potential conflict of interest. 3RP 10. The prosecutor stated,

[T]he State has a very strong interest in pursuing this case and finishing it next week, rather than making this same victim come back and testify on another occasion with some other jury just because Mr. Moore now doesn’t feel comfortable.

3RP 10. Moore responded: “It’s not a case of that either. It’s—I had no idea that either one of you were ever involved before this case ever started.” 3RP 10-11.

investigation of court records. 2RP 6-8.

The court denied Wall's request for permission to file an affidavit of prejudice and ruled Volluz did not have a conflict of interest regarding his current client. 3RP 17-18. Trial resumed, and the jury convicted Moore as charged. CP 97-98.

There is no evidence either Moore or the Skagit County Prosecutor gave informed, written consent to Volluz's role as defense counsel, in light of Volluz's previous representation of the state in the 1996 case.

3. The Trial Record

The charges against Moore arose from a traffic incident on April 6, 2008. Complaining witness Debbie Wyman testified she was driving northbound on Ershig Road in Skagit County that day. 1RP 31. She testified that when she came to the intersection of Ershig and Bow Hill Road she stopped at the stop sign. 1RP 32, 66. She looked both ways, saw that Bow Hill was clear of traffic, and proceeded across Bow Hill. 1RP 32.

Wyman was driving a Nissan Pathfinder SUV, a "fairly new" and "fairly big" vehicle. 1RP 32, 55. As she continued northbound and approached the intersection with Colony Road, she noticed a "small, older pickup come flying up behind me." 1RP 32. She stated the pickup was "right on my tailgate." 1RP 33. Wyman turned right

on Colony Road, and the pickup continued to follow her. 1RP 33-34. Wyman testified she accelerated on Colony Road and made a gesture with her hands. 1RP 34. She described her gesture as conveying, "I don't have a clue why he was so upset. Kind of like a, I give up. I don't know what I did." 1RP 34-35.

Wyman stated she accelerated on Colony to get away from the pickup truck behind her. 1RP 72. She knew her Nissan Pathfinder could go faster than the small, older pickup. 1RP 37. She testified she looked at her speedometer and noted she was traveling forty-five miles per hour. 1RP 72. A car then emerged from a driveway in front of her, approximately two car lengths away. 1RP 35, 72. Wyman told the jury she had to slow down to avoid the car, but she did not have to apply her brakes to do so. 1RP 35. She simply released her foot from the accelerator pedal. 1RP 36.

According to Wyman, after she slowed for the car in front of her, the pickup truck behind her dropped back, accelerated, and hit her two times. 1RP 36-37. She said the contact jolted her car and "scared me to death." 1RP 36. During cross-examination, Wyman acknowledged the impact did not come close to causing her to lose control of her SUV. 1RP 59.

After the collision the pickup turned into a driveway. 1RP 38. Wyman testified the next driveway belonged to her in-laws, and she turned in there. 1RP 38. The pickup then followed into the in-laws' driveway as well. 1RP 38. Wyman called 911, and the other vehicle departed. 1RP 39-40. Wyman gave chase and obtained the vehicle's license plate number. She then pulled over to wait for a police officer at roadside. 1RP 40-45.

During cross-examination, Wyman insisted she knew on the day of the incident that drivers on Ershig Road were required to stop and yield to traffic on Bow Hill Road. 1RP 66.

Wyman's trial testimony diverged dramatically from statements she made on the day of the incident. Skagit County Deputy Sheriff Craig Caulk testified he contacted Wyman at roadside. 4RP 31. Wyman told Caulk she was stopped at the Ershig / Bow Hill intersection when she saw a pickup approaching on Bow Hill. 4RP 89. She told the deputy she thought the intersection had four-way stop signs, and she did not realize Bow Hill traffic was not required to stop. 4RP 89-90. She thus proceeded across Bow Hill even as the pickup truck approached. 4RP 90. She told Deputy Caulk the pickup went past her rapidly, just behind her SUV. 4RP 90. She described

her hand gesture when the pickup re-appeared as an acknowledgement she had made a mistake. 4RP 91.

Deputy Caulk inspected the rear bumper of Wyman's Pathfinder. He observed a paint scrape on the bumper he described as "paint transfer." 4RP 36. Caulk testified paint transfer occurs when two vehicles make contact. He explained that speed in this situation is irrelevant because paint is "fragile." 4RP 19. Caulk also observed a piece of glass lying on top of the Pathfinder's bumper. 4RP 36.

Both Wyman and Deputy Caulk described the damage to Wyman's rear bumper as a *single* blemish. Wyman described it as "just a little scrape" and "maybe a two to three inch scratch on the bumper." 1RP 55-56. Caulk referred to the scratch as the "point of contact" and "the point of impact." 4RP 62-63. Wyman did not have the blemish repaired "because it's just a little scratch." 1RP 56. She did not report the scratch to her insurance company. 1RP 56.

After gathering information from Wyman, Caulk went to Moore's residence on Samish Island. 4RP 42. Moore had two pickup trucks parked there: the smaller Chevy he had been driving that day, and a larger Dodge. 4RP 47-48, 115-16.

Deputy Caulk observed damage to an auxiliary fog light mounted on the front bumper of the Chevy. 4RP 43. The light assembly was bent back and had broken glass. 4RP 43, 53. However, the bulb remained intact. 4RP 80. Caulk then contacted Moore, who came out of his house and spoke to the officer. 4RP 50-53. As Moore looked on, Caulk took the piece of glass recovered from Wyman's rear bumper and held it against the broken fog light assembly. 4RP 52-53. Caulk testified the assembly had fragments of glass on one edge, and the glass from Wyman's bumper "dropped right into place." 4RP 53. Caulk arrested Moore. 4RP 70.

Moore disputed Wyman's account of the incident. He testified he was driving his 1979 Chevy pickup truck that day. 4RP 115. Moore described the vehicle as an old, beat up truck in poor condition that accelerated poorly. 4RP 115-16. He explained he used it in his logging business for off-road work. 4RP 116.

Moore acknowledged he was angry because the SUV "almost killed" him when it crossed Bow Hill Road. 4RP 123. He reacted by tailgating the vehicle on Colony Road "very close." 4RP 117, 122-23. He testified Wyman "brake checked," meaning that she braked suddenly "like if somebody is riding too close or tailgating." 4RP 117-18. Moore stated he braked and steered to the right as the two

vehicles came within inches. 4RP 118-19. He was not aware of any contact. 4RP 119. He pulled over, but when he saw the other vehicle turn off into a driveway, he thought the other driver wanted to contact him. 4RP 126. However, when he followed into that driveway, he saw that the Pathfinder had moved several hundred feet along the property. 4RP 126-27. He then decided to go home because, after the near miss on Bow Hill and the “brake checking” on Colony, “It just didn’t seem like a very good situation.” 4RP 130-31.

At the time of the arrest, Deputy Caulk told Moore he shouldn’t have taken the matter into his own hands. 4RP 67. Moore later apologized to the officer, stating, “All I was doing was following, it was wrong for me to take the matter into my own hands.” 4RP 67-68. Moore told Caulk he tailgated the Pathfinder after the near miss on Bow Hill because “they needed to know” he was nearly killed. 4RP 107.

At the state’s request, the court instructed the jury on just one definition of assault:

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

5RP 6-7; CP 85 (Instruction 9).

In closing argument, the state urged that Moore intended “to scare the crap out of [Wyman]. His intent was to hit her . . . so that she would never do something like that again.” 5RP 15. The prosecutor argued Moore assaulted Wyman with a deadly weapon. Despite Wyman’s testimony she never came close to losing control of her Pathfinder, the state insisted a number of catastrophes “could have” occurred:

Any number of things *could have* happened She *could have* lost control just from the jolt itself. She *could have* had the rear of her tires lose traction with the pavement because of the impact just on her vehicle. She *could have* run off the road. Just from her fear alone, that distraction . . . *could have* caused her to veer off into oncoming traffic. Indeed, the need to get away from this guy *could have* caused her to speed, go in the other lane, lose control of the vehicle.

5RP 32-33 (emphasis added).

4. Sentencing

At Moore’s sentencing, the state offered a certified copy of Moore’s prior assault conviction. 8RP 13-14. Volluz did not challenge the court’s consideration of the prior conviction he had obtained as a deputy prosecutor. 8RP 19-20.

In imposing sentence at the low end of Moore’s standard range, the superior court remarked that Wyman’s testimony “contains

numerous inconsistencies, including statements from the officer himself that he attributed to her that were *vastly different* from her testimony at trial.” 8RP 20 (emphasis added). The court also observed, “The description that she gives of the contact between the [vehicles] is inconsistent with the physical evidence that was plain for everyone to see.” *Id.* The court agreed with the defense that the state’s evidence supporting the second degree assault charge comprised “very skinny facts for this conviction.” 8RP 21.

C. ARGUMENT

1. MOORE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY LABORED UNDER AN ACTUAL CONFLICT OF INTEREST.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). Effective assistance includes representation free from conflicts of interest. *Id.* An appellant presenting an ineffective assistance claim usually must establish prejudice. *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). However, an exception exists where the defendant’s trial attorney has an actual conflict of interest. *Mickens* at 171. In that circumstance, a defendant “need not demonstrate prejudice in order to obtain relief.” *Mickens* at 171 (quoting *Cuyler v.*

Sullivan, 446 U.S. 335, 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)); *see also Glasser v. United States.*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942) (in conflict scenario, the right to effective assistance “is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial”); *Regan* at 428 (where there is an actual conflict, harmless error analysis does not apply).

An “actual conflict” is one that adversely affects counsel's performance. *Mickens* at 172. Examples include failure to cross-examine a witness and failure to object to evidence, in deference to the interest of another client. *Glasser* at 73-76. In *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), defense counsel's representation of three co-defendants precluded cross-examination of any one of them on behalf of the other two, thus requiring automatic reversal. *Holloway* presumed such a conflict “undermined the adversarial process.” *Mickens* at 168.

The presumption was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants “effectively sea[l] his lips on crucial matters” and make it difficult to measure the precise harm arising from counsel's errors.

Id.

A defense attorney who formerly prosecuted his client may have an actual conflict of interest. In *United States v. Ziegenhagen*, 890 F.2d 937 (7th Cir. 1989), the defendant's attorney had appeared twenty years earlier as an assistant district attorney to recommend Ziegenhagen's sentence on two state convictions. 890 F.2d at 938. In the later federal prosecution under review, the government relied on the two convictions to seek an enhanced sentence. *Id.* Although Ziegenhagen's attorney challenged the sentence enhancement, the Seventh Circuit nevertheless held there was an actual conflict of interest. Citing the Model Code of Professional Responsibility, the court explained, "government employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper." 890 F.2d at 940. Although Ziegenhagen's attorney was not the prosecutor of record in the prior cases, the court stated his participation was "substantial enough to represent an actual conflict of interest." *Id.* The court concluded:

Needless to say, there may be countless ways in which the conflict could have hindered a fair trial, the sentencing hearing or even this appeal. We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf.

890 F.2d at 941.

This court should reverse Moore's convictions because his attorney had an actual conflict of interest. Volluz was ethically barred from challenging the prior conviction he personally obtained as a deputy prosecuting attorney. That prior conviction increased Moore's sentence range in this case, and it combined with Moore's current assault conviction to give Moore two "strikes" under Washington's Persistent Offender sentencing scheme. RCW 9.94A.030(34)(a)(ii). Volluz's performance was adversely affected because his duty to his former client barred him from challenging Moore's criminal history.

Various provisions of Washington's Rules of Professional Conduct prohibit a lawyer from attacking his own accomplishments for a former client. RPC 1.9(a) states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Comment [1] to RPC 1.9 provides examples of conflict scenarios that would violate the rule. The comment confirms this rule applies to former prosecutors: "a lawyer who has prosecuted an accused person could not properly represent the accused in a

subsequent civil action against the government concerning the same transaction.”

The Skagit County Prosecutor did not consent in writing to Volluz’s representation of Moore. Volluz was therefore barred from challenging Moore’s prior assault conviction because Volluz represented the Prosecutor in that matter, and Moore’s interests were materially adverse to those of the Prosecutor. RPC 1.9(a).

RPC 1.11 applies the same principle specifically to government attorneys. A lawyer who has formerly served as a public officer,

shall not . . . represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

RPC 1.11(a)(2). This rule prevented Volluz from challenging Moore’s prior conviction because Volluz participated personally and substantially in obtaining that conviction.

Volluz’s duty to his former client created a conflict of interest concerning his current client. RPC 1.7 states:

[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

. . .

(2) there is a significant risk that the representation of one or more clients *will be materially limited by the*

lawyer's responsibilities to another client, a former client, or a third person

(Emphasis added). Volluz's representation of Moore was materially limited by his responsibilities to the Prosecutor. Volluz could not challenge Moore's criminal history. That history elevated Moore's presumptive sentence and placed Moore one strike away from life imprisonment.

For the reasons detailed above, it is clear Volluz's duty to his former client adversely affected his representation of Moore. Volluz's duty to the Skagit County Prosecutor precluded him from challenging his client's criminal history. When defense counsel is constrained from challenging the state's evidence, there is an actual conflict of interest requiring automatic reversal. *Holloway v. Arkansas; Glasser v. U.S.*

The conflict was manifest at sentencing, but it was present from the outset of Volluz's representation. An accused whose lawyer is barred from pursuing a specific legal remedy proceeds with a weakened defense. As the *Ziegenhagen* court noted, there are "countless ways" such a conflict could hinder zealous advocacy on behalf of the accused. 890 F.2d at 941. One obvious risk is that plea negotiations before trial may be distorted if the defendant's criminal

history is off-limits for challenge by the defense. In practical terms, it is unlikely an accused would willingly choose a lawyer who is duty-bound *not* to pursue every possible defense in a criminal case.

Having shown his attorney had an actual conflict of interest, Moore is not required to establish prejudice. Reversal is automatic where a conflict adversely affected the attorney's representation. The conflict in this case left Moore's criminal history immune to challenge by the defense. Moore's convictions should be reversed.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MOORE OF ASSAULT BECAUSE WYMAN'S TESTIMONY WAS INHERENTLY IMPROBABLE AND DEFIED PHYSICAL LAWS AND PHYSICAL EVIDENCE.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. *E.g. State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 Wn. App. (2006). Evidence is sufficient to support a conviction when, viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Id.* However, the existence of a fact cannot rest upon guess, speculation, or conjecture. *Id.* Evidence must be substantial: "it must attain that character which would convince an unprejudiced, thinking mind of the

truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

A reviewing court defers to the trier of fact on issues involving conflicting testimony, credibility, and persuasiveness of the evidence. *Colquitt* at 808 (Hunt, J. dissenting). However, the jury’s prerogative to determine credibility is not boundless. In reviewing the sufficiency of evidence, an appellate court may disregard “inherently improbable testimony.” *United States v. Ramos-Rascon*, 8 F.3d 704, 709 n.3 (9th Cir. 1993) (citing *Leonard v. United States*, 324 F.2d 911, 913 (9th Cir.1963)). The court may reject testimony that is “contrary to the laws of nature or so inconsistent or improbable on its face that no reasonable factfinder could accept it.” *Ramos-Rascon* at 709 n.3 (citing *United States v. Saunders*, 973 F.2d 1354, 1359 (7th Cir.1992)); *see also United States v. Lindell*, 881 F.2d 1313, 1322 (5th Cir. 1989) (if testimony is so unbelievable on its face that it defies physical laws, the court may intervene and declare it incredible as a matter of law).

This court should reverse Moore’s assault conviction because Wyman’s testimony was inherently improbable, it defied physical laws and physical evidence, and it diverged radically from her statements on the day of the incident.

It is beyond dispute Wyman changed her story. She told Deputy Caulk she saw the pickup approaching the intersection of Ershig and Bow Hill. She told him she thought the intersection had four-way stop signs obligating Bow Hill traffic to stop. Wyman stated she therefore proceeded across the intersection as the pickup approached. She told Caulk the pickup passed close behind her at a rapid speed. When the pickup re-appeared behind her, she gestured to acknowledge she had made a mistake. This account made sense.

Her trial testimony did not make sense. Wyman testified she looked both ways at the intersection and proceeded across Bow Hill because all was clear. Moments later the pickup truck apparition materialized behind her. Her gesture was not apologetic—it was one of incomprehension. She insisted she was completely aware there were two-way stop signs at the intersection in question, and that traffic on Bow Hill did not stop. Standing alone, this account appears improbable because it does not explain the sudden appearance of the angry pickup driver moments after Wyman crossed the intersection. In light of her statements to Deputy Caulk, Wyman's testimony was not merely improbable; it was plainly falsified.

The complaining witness's testimony also defied the laws of physics and the physical evidence meticulously documented by

Deputy Caulk. Wyman stated implausibly she was able to avoid hitting the car that entered Colony Road in front of her—just two car lengths away when she was traveling 45 miles per hour—without touching her brakes. She claimed the pickup truck rammed her twice.

However, Deputy Caulk's examination of the Pathfinder's rear bumper established there was just a single point of impact. Wyman herself described a single blemish: "just a little scrape." The physical evidence documented by Deputy Caulk disproved Wyman's claim she was rammed two times. Whatever occurred that day, it was not as Wyman described it to the jury.

This court should reverse Moore's assault conviction because Wyman's testimony was both "contrary to the laws of nature" and "so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Ramos-Rascon*. The jury could only speculate as to what actually occurred on Colony Road. The appellant's assault conviction should be reversed and dismissed.³

³ Moore's apology to Deputy Caulk for taking matters into his own hands does not affect the sufficiency of evidence equation. That apology did not admit an assault, and it was consistent with the sentiments of one who tailgated another driver and was partly responsible for causing a motor vehicle accident.

3. THERE WAS INSUFFICIENT EVIDENCE TO FIND MOORE'S VEHICLE WAS USED AS A DEADLY WEAPON.

"Deadly weapon" is defined as follows:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, *under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;*⁴

RCW 9A.04.110(6) (emphasis added).

The statute establishes explosives and firearms as deadly weapons per se. *State v. Carlson*, 65 Wn. App. 153, 158, 828 P.2d 30 (1992). For other weapons, the state must prove the object was readily capable of causing death or substantial bodily harm under the "circumstances of its use." *State v. Barragan*, 102 Wn. App. 754, 761, 9 P.3d 942 (2000). "The circumstances of a weapon's use include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted." *Id.*

Barragan held a pencil was a deadly weapon because the defendant used it to stab with force at the victim's eye while

⁴ "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of

threatening, “You’re gonna die.” 102 Wn. App. at 761. In *State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995), a bar glass qualified as a deadly weapon where the defendant struck the victim with the glass, causing injury requiring five stitches. The court in *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141 (2005) held a sword was a deadly weapon when it was used to stab the victim in the foot. The court explained,

The degree of force used was great enough to cut a hole through a leather shoe, and had Mr. Warner been wearing no socks and different shoes, perhaps ones in which his toes were exposed, or had the sword landed in a slightly different manner, the sword easily could have seriously injured his toe or even severed it.

Winings at 89. *State v. Hoeldt*, 139 Wn. App. 225, 160 P.3d 55 (2007) affirmed a pit bull dog was used as a deadly weapon:

Hoeldt was holding the dog by its neck or collar, and when Hoeldt released the dog, it charged Detective Acee, lunging at his throat and chest. A large, powerful dog that, by training or temperament, attacks a person in this manner when intentionally released or directed to do so by its handler, meets the instrumentality “as used” definition of deadly weapon.

Hoeldt at 230.

In *State v. Baker*, 136 Wn. App. 878, 151 P.3d 237 (2007), the defendant used his vehicle as a deadly weapon by ramming a

any bodily part. RCW 9A.04.110(4)(b).

pursuing police car. The impact shattered the windows of the police car, dented its side, damaged a front tire and rim, and pushed the car over a deep curb into a yard. *Baker* at 881.

If Moore assaulted Wyman with his dilapidated pickup truck, he did so not by *attempting* to use the truck as a weapon, and not by *threatening* to use the truck as a weapon. If there was an assault, Moore *used* his truck to make contact with Wyman's bumper. The circumstances of that use did not support the jury's deadly weapon finding. The truck, as used, was not "readily capable of causing death or substantial bodily harm," RCW 9A.04.110(6), when it made "just a little scrape" on the bumper of Wyman's Pathfinder. 1RP 55-56.

The state did not satisfy its burden to establish the contact between the vehicles could cause substantial bodily harm. Wyman's speed at the moment of contact is unknown. She testified she slowed for the vehicle that pulled out of the driveway in front of her just two car lengths away. Whether Wyman was traveling fifteen miles per hour or one mile per hour—or some other rate—is unknown. Wyman testified *she did not come close to losing control of her vehicle*. The damage caused was negligible. There was a small scrape on Wyman's bumper unworthy of repair. The glass on Moore's fog light broke, but the light bulb behind the glass remained unscathed.

Wyman was not injured in any way. There is no evidence Moore intended to injure Wyman. These are the circumstances that guide the deadly weapon inquiry. These circumstances demonstrate the truck, as used, was not readily capable of causing substantial bodily harm.

Speculation and conjecture were required to conclude otherwise. Indeed, the state exhorted the jury to imagine catastrophic scenarios for which there was no evidence. Wyman's speed was unknown, and there was no testimony—expert or otherwise—addressing the handling characteristics of Wyman's hefty SUV. Nevertheless, the prosecutor urged the jury to imagine what “could have” happened. The contact “could have” caused Wyman's rear tires to lose traction; it “could have” caused Wyman to run off the road; it “could have” caused her to veer into oncoming traffic; it even “could have caused her to speed, go in the other lane, lose control of the vehicle.”

None of these scenarios is remotely suggested in the record. Each required the jury to speculate and silently assume facts not presented to them. The state did not present sufficient evidence to support the deadly weapon element for its second degree assault charge.

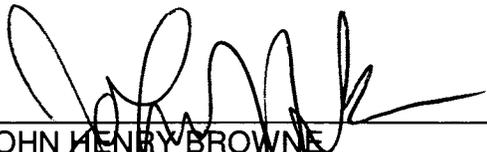
D. CONCLUSION

For the reasons discussed above, this court should reverse Moore's convictions because he was deprived of effective assistance of counsel due to his attorney's conflict of interest. In addition, his second-degree assault conviction should be reversed because there was insufficient evidence to convict Moore of assault, and insufficient evidence to support the deadly weapon element.

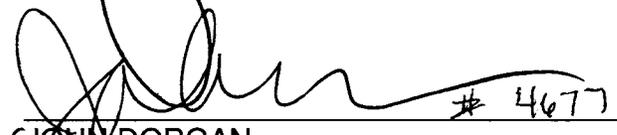
DATED this 2 day of July, 2010.

Respectfully Submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Plaintiff,

v.

WILLIS CHAD MOORE,

Defendant.

No. 64734-2-I
Court of Appeals

No. 08-1-00243-7
Skagit County Superior Court

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of
Washington that I on this day sent a copy of the "Brief of Appellant" to:

Rosemary Kaholokula
Skagit County Prosecuting Attorney's Office
605 S. Third
Mount Vernon, WA 98273

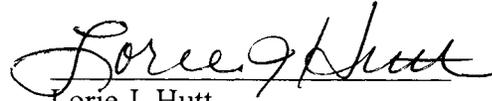
via U.S. Regular Mail, postage prepaid on.

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DECLARATION OF SERVICE - 1

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DATED at Seattle, Washington, this 6th day of July, 2010.

A handwritten signature in cursive script, appearing to read "Lorie J. Hutt". The signature is written in black ink and is positioned above the printed name.

Lorie J. Hutt

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