

66914-1

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NO. 66914-1-I

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

STATE OF WASHINGTON

Respondent

v.

JACEK JASIONOWICZ,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. May the court force the defendant to claim self-defense by giving, sua sponte, a self-defense instruction?

2. Where there was no evidence the defendant was acting in self-defense when he committed the charged assault, did counsel's decision to not request a self-defense instruction constitute ineffective assistance of counsel?

3. Where the circumstantial evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that the defendant knew the car he possessed was stolen, was the evidence sufficient to support his conviction for possession of a stolen vehicle?

4. Where the Supreme Court has held that designating a crime as "domestic violence" does not increase the punishment for that crime, may this Court ignore that precedent?

5. If the designation of a crime as "domestic violence" does not increase the punishment, is the designation a jury question?

6. Where the defendant's status as a convicted felon and convicted domestic violence misdemeanor -- not a ruling or sentence of the court below -- dispossessed him of his firearm

rights, is the issue of the constitutionality of that dispossession properly before the Court?

7. Does dispossessing a domestic violence misdemeanant of his firearm rights pass constitutional muster since the original understanding of the right allowed the State to prohibit violent criminals from possessing firearms?

II. STATEMENT OF THE CASE

On October 29, 2009, the victim, Melisa Tryon, drove from Shelton to the defendant's auto body shop in Lynnwood. The victim had been dating the defendant since June, 2008. The defendant lived in an apartment above the body shop he owned. 2/7 RP 31, 29.

At some point, the defendant and the victim went to the None of Your Business Bar. The victim got into a verbal altercation with her son. She left the bar and went back to the shop. A short time later, the defendant returned to the shop, unlocked the door, and the two of them went up to his apartment. 2/7 RP 33-34.

The victim testified that when they got to the apartment, the defendant said that his son would never call his mother the name the victim's son had called her. She responded, "Well, I'm glad you're a way better parent than me, and . . . I'm going [to] bed." 2/7

RP 38. The defendant grabbed the victim's hair, forced her head down, "[t]hen he rammed me into the bathroom wall with my head down." The victim's head and shoulder went through the sheetrock wall. The blow "kind of rendered me unconscious for a minute." 2/7 RP 39-40.

The victim said that after the defendant rammed her head through the wall, he "put his hands around my neck and put his knee into my stomach." "Then he straddled me. Then he put his hand around my neck and told me I was a liability and he was going to kill me." 2/7 RP 41-42.

The victim said the defendant squeezed her neck three separate times, and each time she was not able to breathe. Each time, before she passed out, the defendant released his hold, then re-applied it. The last time, the victim stopped struggling and pretended to be dead. The defendant let her go and went out of the apartment. 2/7 RP 42-43. The defendant remained on the landing outside the only exit from the apartment. 2/7 RP 45.

At some point, the victim went to bed and went to sleep. The defendant came back into the apartment. He went to sleep on the other side of the couches that had been made into a bed. 2/7 RP 47.

The next day, the defendant got the victim cigarettes, filled her car up with gas, and fixed her car door. 2/7 RP 136-138. The victim drove to her girlfriend's residence where she used to live. From there she called 911 to report she had been assaulted. 2/7 RP 54.

The police took the victim back to the defendant's shop. They knocked on the door, but there was no answer. Two of the defendant's co-workers were out in front of the shop. They told the officer that the defendant was not inside the shop. Since the victim insisted that the defendant was inside, the officers knocked again, and the defendant came out. 2/7 RP 83.

The officers arrested the defendant. They then took off the handcuffs so he could sign a consent to search form and show the officers the apartment. 2/7 RP 83, 96, 104. When the officer took off the handcuffs, the victim said, "Well, if his trying to kill me and strangle me isn't going to put him in jail, how about a stolen vehicle?" 2/7 RP 56.

While one officer took the defendant upstairs to the apartment, another officer looked at a car that was in the back of the shop under a tarp. The car was a 2003 white Audi. The bumpers and license plates were missing. The officer relayed the

VIN number to dispatch, and dispatch confirmed that the car was stolen. After the officers were finished, they sealed the doors of the shop, and an officer stayed at the shop until an officer from the Snohomish County Auto Theft Task Force arrived. 2/7 RP 105-06.

While showing the officers the apartment, the defendant told them that he was at his computer when the victim "started to slap him and push him and then he pushed her back." The defendant said the victim fell against the wall. 2/7 RP 85. The officer estimated that the wall was about eight feet from the computer. 2/7 RP 87.

The defendant also told the detective that the victim started screaming, so "he got on top of her and put his hands over her mouth[.]" The defendant admitted he put his hands around the victim's neck. 2/7 RP 88. He did not say anything about being hit with a belt buckle.

The officers took the defendant to the Lynnwood jail and booked him. When he was released, an officer drove him back to his shop. There he met the officer from the Snohomish County Auto Theft Task Force. 2/7 RP 89, 111, 117. The officer inspected the Audi. He noted that "[i]t was in various stages of dismantle

which is common in an auto theft investigation.” The engine, hood, and some of the side paneling were missing. 2/7 RP 112.

The defendant initially told the officer that he did not know anything about the Audi. During the 20 minutes he talked to the officer, the defendant’s “story changed several times.” Eventually he told [the officer] that a friend of his had dropped the vehicle off to store it in October of 2008.” The defendant wasn’t able to identify the friend. The officer recalled the defendant told him that the friend dropped off the car at the defendant’s shop “strictly just to store it there.” Since the car had been there for more than a year and the friend was “known to dabble in criminal activities,” the defendant said “he believed the car was either maybe used in a crime or stolen.” 2/7 RP 113-14.

The State charged the defendant with third degree assault (DV) (Count I) and possession of a stolen vehicle (Count II). 1 CP 84. Before trial, the State amended the Count I to second degree assault by strangulation (DV). 1 CP 77.

At trial, the assault victim and the officers testified as set out above. The owner of the Audi testified that she reported her 2003 white Audi was stolen on December 7, 2008. The Audi was stolen

off the street in Seattle. She did not know the defendant and did not give anyone permission to have her car. 2/7 RP 101-02.

The defendant testified that when he and the assault victim came back from the bar, they got into an argument. They then went up to his apartment. He sat down at his computer and went onto the internet. He and the victim continued arguing. When the defendant told the victim that their relationship was over and he didn't want to see her again, "[t]hat's when she pulled out the belt buckle and hit me with the belt." 2/7 RP 130-32.

The defendant testified that he pushed the victim into the wall, and she started "screaming and yelling and cussing me out." 2/7 RP 133. The victim was "kind of leaning against the wall." The defendant asked the victim to stop screaming. When she did not stop, "I put the [hand] on her mouth to stop the screaming." The reason the defendant gave was "I live in this place and I could lose my one place where I was staying." 2/7 RP 134. The victim was screaming for "[h]alf a minute maybe" before the defendant put his hand over her mouth. 2/7 RP 135.

The defendant testified that the only way he knew to calm the victim down was to put his hand over her mouth. When the victim agreed to calm down and said she was okay, the defendant

took his hand off her mouth. 2/7 RP 135. The defendant denied that he attempted to choke or strangle the victim. 2/8 RP 162.

The defendant also testified that he acquired the Audi when he “did some work for the guy about two years ago, earlier.”

He owed me like \$1,500 for the work, maybe more, like \$1,800 for the work, and he disappeared and never paid me.” The person gave the defendant the Audi, told him it had a bad transmission, and that he would come back, fix the transmission, and pay the defendant what he owed him. 2/7 RP 139.

The defendant said he had a key to the car. The person who left it with him told him that he bought the car “on an auction[.]” 2/7 RP 139-40. After he had stored the car for about a year, the defendant gave the engine to a friend who ran a car dealership. The friend needed the engine to put in another Audi he was trying to sell. The defendant hoped to be reimbursed by the friend at some point. 2/7 RP 141. The defendant denied knowing that the car was stolen. 2/8 RP 162.

The defendant did not submit any proposed instructions. 2/7 RP 147. The State proposed standard instructions, including an instruction defining “family or household member.” 2 CP 104. The State also submitted a special verdict instruction and a special

verdict form. The special verdict form asked the jury if the defendant and the assault victim were “members of the same family or household?” 2 CP 109, 115.

When the court asked the defendant if he objected to any of the instructions, the defendant said:

I don't necessarily have any specific objection to the special verdict form or the definitions needed therefor; however, I do think the state of the law is that this is something that the jury does not find. I think to comply with the state of the law and to make things as clear as possible, we should omit this instruction, anything with regard to DV, and take out the special verdict form.

2/8 RP 151.

The State withdrew the proposed instructions. The court indicated it would not give the instructions related to the special verdict or send the special verdict form back with the jury. It gave the State leave to re-visit the issue if it believed the instructions should be given. 2/8 RP 152-53. The State did not ask the court to include those instructions.

The defendant argued that he did not strangle the assault victim. He said her story did not make sense, but his did. The defendant did not argue that he did not commit a fourth degree assault or that he was acting in self-defense. 2/8 RP 174-78.

The defendant also argued that he did not know the car was stolen. Since he didn't change the VIN number, try to sell the car, or re-paint the car, that corroborated his testimony that he didn't know it was stolen. 2/8 RP 180.

The jury found the defendant not guilty of second degree assault, but guilty of fourth degree assault and possession of a stolen vehicle.

During sentencing on March 10, 2011, the State asked the court to make a finding that "the assault was a domestic violence assault." The court the asked the defendant "Do you want to be heard first on the domestic violence issue?" The defendant answered, "No. I think that's appropriate." The court made "a finding based on the evidence that was testified to at trial and as set forth in the prosecutor's brief that it is a crime of domestic violence, the Assault IV." 3/10 RP 1.

The court sentenced the defendant to 365 days in jail for the assault, but suspended 245 days for two years. The court imposed 30 days in jail for possession of a stolen vehicle, and ran the jail concurrently with the sentence for the assault. 3/10 RP 9.

After announcing the sentence, the court said:

Sir, at this time I'm required to advise you by state law that it is now illegal for you to own, possess, or have in your control any firearm unless that right is later specially restored by both the superior court and the federal courts, if so required.

3/10 RP 9-10.

The judgment and sentence for Count I, the fourth degree assault (DV) read, in part:

If this is a crime enumerated in RCW 9.41.040 which makes you ineligible to possess a firearm you must surrender any concealed pistol license at this time, if you have not already done so.

1 CP 34.

The judgment and sentence for Count II, the possession of a stolen vehicle, in the section titled "V. Notices and Signatures," read in part:

FIREARMS: You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license.

1 CP 29.

The defendant did not object to the court's advisement that he had lost his firearm rights or the warnings in either judgment and sentence.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

It violates due process for the court to compel the defendant to raise self-defense.

The defendant's own testimony was that after the assault by the victim was over, he either strangled the victim – as she testified -- or covered her mouth to stop her from screaming – as he testified. The decision of counsel to not request a self-defense instruction was not deficient performance.

The circumstantial evidence before the jury was sufficient for a rational juror to find beyond a reasonable doubt that the defendant knew the car in his shop was stolen.

The designation of a crime as “domestic violence” is not punishment. Accordingly, there is no requirement for a jury to make that designation.

RCW 9.41.040(2)(a)(i),¹ not an order or decision of the court, dispossessed the defendant of his firearm rights. The question of whether the dispossession was constitutional is not properly before the Court.

¹ A copy of RCW 9.41.040 is at Appendix A.

The statute dispossessing a domestic violence misdemeanant from his firearm rights passes muster under the U.S. Const. amend. II intermediate scrutiny. Since it serves an overriding governmental interest in protecting victims of domestic violence, it likewise passes muster under Const. Art. 1, § 24.

B. STANDARD OF REVIEW.

“The sufficiency of the evidence to raise a claim of self-defense is a question of law for the trial court, viewing the evidence from the defendant’s perspective.” State v. Walker, 40 Wn. App. 658, 662, 700 P.2d 1168, review denied, 104 Wn.2d 1012 (1985).

“To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.” State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997).

“To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness.” State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is

challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"Issues of constitutional and statutory interpretation are questions of law, and we review questions of law de novo." State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

C. IT VIOLATES THE DEFENDANT'S RIGHTS TO HAVE THE COURT INSTRUCT ON AN AFFIRMATIVE DEFENSE NOT REQUESTED BY THE DEFENDANT.

The defendant claims "[t]he trial court erred by failing to give a self-defense instruction to the jury." Brief of Appellant 8. He implies the court had some duty to review the evidence, determine whether there was evidence the defendant was acting in self-defense, and if so, instruct the jury – all in the absence of the defendant indicating in any way that he wished to raise self-defense. The court had no such duty.

"We hold that neither the State nor the trial court may compel a defendant to raise or rely on the affirmative defense stated in RCW 9A.40.090(2)." State v. McSorley, 128 Wn. App. 598, 605, 116 P.3d 431 (2005); accord, State v. Jones, 99 Wn.2d

735, 743, 664 P.2d 1216 (1983) (we do not impose an affirmative defense, like self-defense, on unwilling defendants).

The Court is of the opinion that it is a deprivation of a constitutional right to force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance.

Tremblay v. Overholser, 199 F. Supp. 569, 570 (D.C. 1961).

The issue in McSorley and Jones was whether the court could instruct the jury on an affirmative defense the defendant did not wish to raise – reasonable actions with no intent to harm the minor as a defense to luring in McSorley, 128 Wn. App. at 603; insanity as a defense to second degree assault in Jones, 99 Wn.2d at 737. Both convictions were reversed because “a defendant has a constitutional right to at least broadly control his own defense.” Jones, 99 Wn.2d at 740. To deny the defendant that right was to violate his right to due process of law.

Here, there was no request for a self-defense instruction. The defendant did not argue self-defense. There was no basis for the court to sua sponte instruct on self-defense.

The defendant cites no authority for his argument that the court was required to sua sponte instruct on self-defense, and the undersigned has found none. The cases the defendant cites were

all cases where a self-defense instruction was requested and not given,² or where an improper self-defense instruction was given.³ They do not stand for the proposition that if some evidence of self-defense is introduced, the court is required to sua sponte instruct on self-defense.

D. THERE WAS NO EVIDENCE THE DEFENDANT WAS ACTING IN SELF-DEFENSE.

The defendant argues that counsel's failure to request a self-defense instruction was deficient performance that resulted in his receiving ineffective assistance of counsel. Brief of Appellant 19-22. Since there was no evidence the defendant was acting in self-defense, counsel's decision to not request a self-defense instruction was not deficient performance.

To show deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "[A] defendant is not entitled to an instruction . . . for which there is no evidentiary support." State v. Ager, 128

² State v. Adams, 31 Wn. App. 393, 641 P.2d 1207 (1982).

³ State v. Bius, 23 Wn. App. 807, 599 P.2d 16 (1979); State v. Savage, 22 Wn. App. 659, 591 P.2d 851 (1979), reversed, 94 Wn.2d 569 (1980); State v. McCallum, 98 Wn.2d 484, 656 P.2d 1064 (1983).

Wn.2d 85, 93, 904 P.2d 715 (1995). It was not deficient performance for counsel to not request a self-defense instruction.

“Counsel is not required to present a defense not warranted by the demonstrable facts.” State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979). Here, there were no demonstrable facts that the defendant was acting in self-defense when he put his hands on the victim some 30 seconds after he had slammed her through the wall. Not requesting a self-defense instruction was not deficient performance.

The only evidence that the defendant was attacked by the victim came from him. The defendant told the officers the victim slapped and pushed him during an argument, and he pushed her back. 2/7 RP 85. At trial, he testified the victim hit with a belt buckle. In response, he pushed her through a wall that was some 8 feet away. 2/7 RP 132-33. The defendant offered no testimony that after he pushed the victim through the wall, he subjectively believed the victim was about to injure him.

After the victim was leaning against the wall screaming for about 30 seconds, the defendant went to her and put his hand over her mouth. The defendant said he did that to quiet the victim and

calm her down. He was concerned that the noise from the victim's screaming could cause him to lose his apartment. 2/7 RP 134-35.

The defendant has not established he had any belief – let alone a good faith belief – that it was necessary for him to use force against the victim after he pushed her through the wall.

The person claiming self-defense must believe he or she is about to be injured, and that belief must be objectively reasonable. Dyson, 90 Wn. App. at 438, RCW 9A.16.020(3).⁴ Since there was no evidence that the defendant believed he was about to be injured after he pushed the victim, there was no evidence that the defendant was acting in self-defense when he went to the victim and put his hands on her neck or face.

The defendant argues that since the victim was intoxicated, she was the first to become physical, and he knew how “violent and dangerous” she could be, he presented sufficient evidence to raise the issue of self-defense. Brief of Appellant 14-15. Had the charged assault been when the defendant pushed the victim into the wall, his evidence would have raised self-defense. That was not the charge.

⁴ A copy of RCW 9A.16.020 is at Appendix B.

The defendant was charged with strangling the victim. 1 CP 77. The alleged strangulation occurred after the defendant pushed the victim through a wall eight feet from where he was sitting. At that point, according to the defendant, the victim's assault had ceased. That ended the exigent circumstances allowing the defendant to defend himself. State v. Janes, 121 Wn.2d at 237.

According to the defendant, the victim did not move from the wall, but screamed at him. After listening for 30 seconds the defendant approached her and put his hands on her. This was the charged assault. The defendant did not subjectively or objectively need to touch the victim to defend himself. In fact, the defendant said that when he put his hand over the victim's mouth, he was trying to stop her screaming. He did not say he was trying to protect himself from injury or the threat of injury. There was no evidence that the defendant was acting in self-defense.

The defendant has not shown deficient performance of counsel in the decision to not request a self-defense instruction.

E. THE CIRCUMSTANTIAL EVIDENCE THAT THE DEFENDANT KNEW THE CAR IN HIS SHOP WAS STOLEN WAS SUFFICIENT TO FIND GUILT BEYOND A REASONABLE DOUBT.

The defendant claims that the evidence he knew the vehicle in his shop was stolen is insufficient to support his conviction for

possession of a stolen vehicle. Brief of Appellant 27-29. The circumstantial evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant knew the vehicle was stolen.

There is sufficient evidence in a charge of grand larceny by possession where the state has shown that the defendant was in possession of the item combined with slight corroborative evidence of other inculpatory circumstances tending to show guilt. Thus, the giving of a false explanation or one that is improbable or is difficult to verify in addition to the possession is sufficient.

State v. Ladely, 82 Wn.2d 172, 176, 509 P.2d 658 (1973).

The corroborative evidence before the jury that the defendant knew the vehicle was stolen included (1) the defendant initially told the officer he did not know anything about the car under a tarp in his shop, (2) during his 20 minute conversation with the police officer, the defendant's "story changed several times[,] (3) the defendant's last story to the officer was that a friend dropped the car off to be stored by the defendant, (4) the defendant "wasn't able to ever identify who this friend was[,] (5) the car was "in various stages of dismantle which is common in an auto theft investigation[,] (6) the license plates and bumpers of the car were missing, (7) the defendant gave the engine to a friend to put in another car with the expectation that he would be reimbursed when that car sold, and (8) the defendant testified that the car was left in

his shop as surety for payment for repairs he had made on another vehicle.

“False information given to the police is considered admissible as evidence relevant to defendant’s consciousness of guilt.” State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001). Here, the defendant gave the investigating officer at least two conflicting explanations of why the stolen car was in his shop, then gave a different explanation when he testified. First he claimed to know nothing about why the vehicle was there. Then, he said a friend he wasn’t able to identify left the car at the shop strictly for storage. Either or both of these explanations had to be false, since both could not be true. “[A] sense of guilt is inconsistent with [the defendant’s] denial of any improper conduct and, hence there is substantial probative value to the evidence[.]” State v. Allen, 57 Wn. App. 134, 143, 787 P.2d 566 (1990).

At trial, the defendant said the car was left as a surety for payment for repairs he had made to another vehicle. This testimony directly contradicted both of the explanations the defendant gave to the police. This again indicates a consciousness of guilt. See Wilson v. U.S., 162 U.S. 613, 620-21, 16 S.Ct. 895, 40

L.Ed. 1090 (1896) (false statements made in explanation or defense tend to show guilt).

In addition, the defendant gave the engine to a friend with the expectation that the friend would sell it and reimburse him. This conduct conflicts with the defendant's testimony he was holding the car as surety for payment. Disposing of parts of the car is circumstantial evidence that the defendant knew the vehicle was stolen. He knew he had no legal right to dispose of the car or its parts. Only if he knew the car was stolen would the defendant have felt free to sell parts of it.

The evidence was sufficient for a reasonable juror to find beyond a reasonable doubt that the defendant knew the vehicle he had under a tarp in his shop was stolen.

The defendant argues that his explanation for possession "logically accounts for [his] actions, it is consistent, and it does not require the jury to find that he lied to police officers." Brief of Appellant 31. The defendant ignores his initial denial of knowing why the vehicle was in his shop, then his contradictory explanation that the vehicle had been left for storage by a friend he did not identify, and his contradictory testimony that the vehicle was left as

a surety for payment for repairs he made on another vehicle for an unidentified person.

Moreover, the jury was not required to accept the defendant's trial testimony. That testimony conflicted with both of his explanations to the police and with the circumstantial evidence he knew the car was stolen. The jury could have completely disregarded the defendant's testimony. It could also have found the circumstantial evidence was more convincing than the defendant's testimony he did not know it was stolen. "This Court 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), abrogated in part on other grounds, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The defendant then argues that "because the State failed to establish that [his] explanation was unverifiable, it is not sufficient corroborating evidence to prove knowledge the vehicle was stolen." Brief of Appellant 34. In making that argument, the defendant only cites cases where unverifiable explanations were held to be sufficient to show knowledge of the stolen nature of a car, State v. Rockett, 6 Wn. App. 399, 493 P.2d 321 (1972), or household goods, State v.

Douglas, 71 Wn.2d 303, 428 P.2d 535 (1967). He does not cite any cases suggesting that having a verifiable, but not verified, explanation requires the jury, or this Court, to accept that explanation. The undersigned has found no such cases.

There was ample circumstantial evidence for a rational juror to find beyond a reasonable doubt that the defendant knew the vehicle was stolen.

F. DESIGNATING THE ASSAULT AS A CRIME OF DOMESTIC VIOLENCE DID NOT INCREASE THE PUNISHMENT IMPOSED ON THE DEFENDANT.

The defendant claims that the designation of his assault as a crime of domestic violence was punishment, since it deprived him of the right to own or possess firearms. Brief of Appellant 42. The Supreme Court has specifically rejected this argument. State v. Schmidt, 143 Wn.2d 658, 676, 23 P.3d 462 (2001). The defendants in Schmidt were convicted of unlawful possession of a firearm based on felonies they committed before the amendments to RCW 9.41.040 included those felonies to dispossess them of their firearm rights. The Supreme Court considered if the amendments violated the prohibition on ex post facto laws. In deciding they did not, the Supreme Court ruled:

Although the prohibitions of the firearms statute impose a disability and present a threat of criminal punishment if violated, the prohibitions do not amount to punishment for the prior conviction, nor do they “alter the standard of punishment” applicable to those crimes. The statute prohibits ownership, possession or control of any firearm by a person previously convicted of a felony. The status of the defendant as a convicted felon makes the person subject to charge and punishment for unlawful ownership, possession or control of any firearm.

Schmidt, 143 Wn.2d at 676.

The analysis of whether a finding of “domestic violence” is punishment is the same for both an ex post facto and a sentencing issue. State v. Felix, 125 Wn.2d 575, 579, 105 P.3d 427, review denied, 155 Wn.2d 1003 (2005).

This Court is bound by the decisions of the Supreme Court. MP Medical Inc. v. Wegman, 151 Wn. App. 409, 417, 213 P.3d 931 (2009). Accordingly, unless or until the Supreme Court makes the loss of the right to possess or own firearms punishment, this Court must reject the argument that the designation of a crime as “domestic violence” is punishment.

G. SINCE THE DESIGNATION OF DOMESTIC VIOLENCE IS NOT PUNISHMENT, THERE IS NO REQUIREMENT FOR IT TO BE FOUND BY A JURY.

This Court has ruled in binding precedent that the classification of a crime as domestic violence does not have to be

made by the jury.⁵ State v. Winston, 135 Wn. App. 400, 402, 144 P.3d 363 (2006), Felix, 125 Wn. App. at 576-77.

In Felix and Winston, the defendants argued that the court designating their crimes as “domestic violence” increased their punishment in violation of the Sixth Amendment as set out in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 402 (2004). The Courts held the designation of a crime as “domestic violence” did not increase the punishment beyond what could have been imposed without that finding, thus there was no error in the court making the designation. Felix, 125 Wn. App. at 578, Winston, 135 Wn. App. at 407.

This Court has also held “We can see no reason to inform the jury of such a designation [of domestic violence], and we believe that prejudice might result in some cases.” State v. Hagler, 150 Wn. App. 196, 202, 208 P.3d 32 (2009).

Moreover, the defendant affirmatively asked that the court, not the jury, decide whether his assault was domestic violence.

⁵ The defendant’s argument that RCW 9.41.040(2)(a)(i) is unconstitutional as it applies to misdemeanants, but having a jury find that the crime was one of domestic violence would make the statute constitutional is somewhat confusing. Brief of Appellant 36-42.

Since the court acted at the defendant's request, invited error precludes this Court from considering the issue. State v. Momah, 167 Wn.2d 140, 145, 217 P.3d 321 (2009).

The court in making the determination that the assault was a crime of domestic violence was following the affirmative request of the defendant, as well as binding precedent. Asking the jury to make that determination may have violated the holding in Hagler. Here, there was no error.

H. THE ISSUE OF WHETHER THE DEFENDANT HAS LOST HIS FIREARM RIGHTS IS NOT PROPERLY BEFORE THIS COURT.

The defendant contends "The trial court impermissibly denied Mr. Jasionowicz his right to possess a firearm based on a 'Domestic Violence' finding that was never submitted to the jury[.]" Brief of Appellant 34. The defendant starts from a false premise. The court did not prohibit the defendant from possessing a firearm. The court simply notified the defendant that he had lost his right to possess firearms. That prohibition is imposed by statute. The defendant's status as a convicted felon and a convicted domestic violence misdemeanor -- not a ruling or sentence by the court -- deprived him of his right to possession or control of a firearm. See

Schmidt, 143 Wn.2d at 676 (it is the status as a convicted felon that makes one subject to punishment for possession of firearm).

The notice given to the defendant that he was prohibited from possessing firearms was not part of the sentence. It was not a court order. Because there is no court ruling or sentence concerning firearm rights to which the defendant has assigned error, his challenge to the constitutionality of RCW 9.41.040(2)(a)(i) is not properly before this Court. RAP 2.2,⁶ see Diversified Industries Development Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973) (courts will not consider only potential, theoretical, abstract, or academic disputes).

The cases cited by the defendant where courts ruled on the constitutionality of dispossession statutes have all had that issue directly before the court. In District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and McDonald v. Chicago, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) citizens sought to enjoin the District of Columbia and City of Chicago from enforcing their firearms ban because the ordinances violated the Second Amendment. 554 U.S. at 575, 130 S.Ct. at 3027. In State v. Sieyes, 168 Wn.2d 276, 225 P.3d 995 (2010), the

defendant was charged with unlawful possession of a firearm based on his age. He challenged the statute dispossessing all persons under 18 years of age from possessing firearms, except in limited circumstances.

In order for this Court to have the issue of the constitutionality of RCW 9.41.040(2)(a)(i) properly before it, the defendant would have to have been convicted of unlawful possession of a firearm or have brought a civil action to prohibit enforcement of the statute. Since neither is the case, the Court should not address this issue. See State v. Farmer, 116 Wn.2d 414, 420, 805 P.2d 200 (1991) (generally, one can only attack a statute as unconstitutional as it applies to his own conduct).

The defendant is, in effect, inviting this Court to give an advisory opinion that the statute barring him from owning or possessing firearms is unconstitutional. This Court should decline the invitation. See To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 416, 27 P.3d 1149 (2001), cert. denied, 535 U.S. 931 (2002) (advisory opinions are appropriate only on those rare occasions where there is overwhelming public interest in the resolution of the issue).

⁶ A copy of RAP 2.2 is at Appendix C.

I. BARRING A PERSON CONVICTED OF A DOMESTIC VIOLENCE MISDEMEANOR DOES NOT VIOLATE EITHER THE SECOND AMENDMENT OR CONST. ART. 1, § 24.

Should this Court reach the issue of the constitutionality of RCW 9.41.040(2)(a)(i), it should hold that the statute is constitutional.

The defendant argues that the statute prohibiting a person convicted of a misdemeanor assault classified as a crime of domestic violence violates his rights under the U.S. Const. amend. II⁷ (the Second Amendment) and Const. Art. 1, § 24.⁸ Brief of Appellant 40. The defendant is wrong.

It is well settled that “[p]ermanent restrictions on felons’ rights to possess firearms constitute acceptable regulation of the right to bear arms under both the federal and state constitutions.” State v. Hunter, 147 Wn. App. 177, 190, 195 P.3d 556 (2008), reversed on other grounds, State v. R.P.H., 173 Wn.2d 199, 265 P.3d 890 (2011); Accord District of Columbia v. Heller, 554 U.S.

⁷ “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. Const. amend. II.

⁸ “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ a body of armed men.” Const. art. I, § 24.

570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 6 (2008) (“[N]othing in this opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]”); State v. Tully, 198 Wash. 605, 607, 89 P.2d 517 (1939) (no authority supports the contention that prohibiting convicted felons of possessing firearms violates Const. Art. 1, § 24).

The question of the constitutionality of the prohibition of possession of firearms by persons convicted of domestic violence misdemeanors has not been directly addressed by Washington’s appellate courts.

It is clear that prohibitions against possessing firearms by a person convicted of a domestic violence misdemeanor do not offend the Second Amendment, even after Heller. U.S. v. Staten, 666 F.3d 154, 167 (4th Cir. 2011), U.S. v. Booker, 644 F.3d 12, 26 (1st Cir. 2011), cert. denied, ____ U.S. ____, 2012 WL 538441 (2012); U.S. v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010), cert. denied, ____ U.S. ____, 131 S.Ct. 1674 (2011); U.S. v. White, 593 F.3d 1199, 1206 (11th Cir. 2010).

In determining whether the statute prohibiting possession of firearms by persons convicted of domestic violence misdemeanors violated the Second Amendment, each of the federal appellate

courts used the intermediate level of scrutiny because persons convicted of a crime of domestic violence were “outside the core right of the Second Amendment . . . which is the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense.” Staten, 666 F.3d at 159 n. 3. “Under the intermediate scrutiny standard, the government bears the burden of establishing a reasonable fit between [the statute] and a substantial governmental objective.” Staten, 666 F.3d at 161.

In applying the intermediate standard, the federal courts have recognized that “domestic abuse is a serious problem in the United States.” Georgia v. Randolph, 547 U.S. 103, 117, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). Further, social science reports uniformly indicate that “recidivism rates among domestic violence misdemeanants is high.” Staten, 666 F.3d at 166. As the Seventh Circuit said, “No matter how you slice these [social science report] numbers, people convicted of domestic violence remain dangerous to their spouses and partners.” Skoien 614 F.3d at 644. Last:

[W]e have no trouble concluding that the government has indeed established that the use of firearms in connection with domestic violence is all too common, increases the risk of injury or homicide during domestic violence, and often leads to injury or homicide.

Staten, 666 F.3d at 167.

The federal courts of appeal have uniformly found that prohibiting persons convicted of misdemeanor crimes of domestic violence from firearm ownership and possession do not violate the Second Amendment.

[N]o one doubts that the goal of [the statute], preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relationship between [the statute] and this objective.

Skoien, 614 F.3d at 642.

Likewise, the prohibition on a misdemeanant convicted of a crime of domestic violence does not offend const. Art. I, § 24. In interpreting Art. 1, § 24 before Sieyes, courts used the rational basis test.

“It has long been recognized that the [const., Art. 1, § 24] guarantee is subject to reasonable regulation by the State under its police power.” State v. Krantz, 24 Wn.2d 350, 353, 164 P.2d 453 (1945). “[O]ur legislature may criminalize or otherwise burden the right to bear arms only when it acts rationally within established constitutional guidelines, and judicial implementation of legislative action must be mindful of the constitutional restraints.” State v. Gurske, 155 Wn.2d. 134, 151, 118 P.3d 333 (2005).

The rational basis test may no longer be used to determine if a statute violates const. Art. 1, § 24. Sieyes, 168 Wn.2d at 295 n. 20 (despite this court's occasional rhetoric about "reasonable regulation" of firearms, we have never settled on levels-of-scrutiny analysis for firearms regulations under the Second Amendment).

The Supreme Court indicated that, despite its earlier references to using First Amendment jurisprudence, it would evaluate claims that a statute violates const. Art. 1, § 24, by looking to (1) the original meaning of Art. 1, § 24, (2) the traditional understanding of the right, and (3) the burden imposed on those dispossessed by upholding the statute. Sieyes, 168 Wn.2d at 295.

The defendant has the burden of showing that the statute is unconstitutional. "We start with the well-established principle that a statute is presumed constitutional, and the party challenging it has the burden to prove beyond a reasonable doubt that it is unconstitutional." State v. Hag, ___ Wn. App. ___, 268 P.3d 997, 1004 (2012). He has not met that burden.

As the defendant correctly points out, the original meaning of Art. 1, § 24 is that citizens of the State of Washington have the individual right to "bear arms in defense of himself, or the State[.]" Sieyes, 168 Wn.2d at 292.

As the United States Supreme Court recognized the original understanding of the Second Amendment was it protected “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” Heller, 554 U.S. at 635. The Second Amendment was adopted 100 years before the drafting of the Washington Constitution. It is unlikely that the understanding of Art. 1, § 24 differed in this area from the original understanding of the Second Amendment – the government could dispossess violent criminals of their firearm rights.

The defendant has pointed to nothing indicating that the original understanding of Art. 1, § 24 was that the State could not prohibit possession of firearms by those convicted of violent crimes. In fact, the Supreme Court found that such regulation did not offend Art. 1, § 24. Tully, 198 Wash. At 607. Under the original understanding of Art. 1, § 24, the State could dispossess persons convicted of crimes of domestic violence of their firearm rights.

Last, the right to bear arms by the defendant is not excessively burdened. He only temporarily lost his right to possess and own firearms. After three years, unless he is charged or convicted of another crime, the defendant will be able to have his rights reinstated. RCW 9.41.040(4)(b)(ii), see State v. Swanson,

116 Wn. App. 67, 78, 65 P.3d 343 (2003) (court has no discretion to not restore firearm rights if the petitioner is qualified for restoration under the statute).

Given the original understanding of what regulation was permitted by Art. 1, § 24, and the limited burden RCW 9.41.040(2)(a)(i) imposes on the right, the dispossession of convicted domestic violence misdemeanants does not offend Art. 1, § 24.

The defendant argues that “There is no historical record supporting the prohibition on firearms possession as a consequence of a misdemeanor assault[.]” Brief of Appellant 38. While it is true that RCW 9.41.040 was only amended in 1994 to dispossess domestic violence misdemeanants,⁹ that misses the point.¹⁰ The question is what was the original understanding of Art. 1, § 24. The defendant has cited no authority for the proposition that the original understanding was that the State could not dispossess violent criminals of the right to possess firearms, and

⁹ Laws of 1994, 1st Sp. Sess., Ch. 7, § 402.

¹⁰ The State notes that later amendments to RCW 9.41.040 added all felonies, not just violent ones or ones where a firearm was used would dispossess the felon of his firearm rights. Laws of 1997, Ch. 338, § 47.

the undersigned has found none. The defendant has not carried his burden of showing that the original understanding of Art. 1, § 24 was that the State could not prohibit violent criminals from possessing firearms.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on March 27, 2012.

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By:

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[Signature]

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West's RCWA 9.41.040

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

 Chapter 9.41. Firearms and Dangerous Weapons (Refs & Annos)

⇒9.41.040. Unlawful possession of firearms--Ownership, possession by certain persons--Restoration of right to possess--Penalties

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.240, 71.05.320, 71.34.740, 71.34.750, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there

shall be a rebuttable presumption that the person was not convicted of the charge.

(4)(a) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(i) Under RCW 9.41.047; and/or

(ii)(A) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(B) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(b) An individual may petition a court of record to have his or her right to possess a firearm restored under (a) of this subsection (4) only at:

(i) The court of record that ordered the petitioner's prohibition on possession of a firearm; or

(ii) The superior court in the county in which the petitioner resides.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

West's RCWA 9A.16.020

West's Revised Code of Washington Annotated CurrentnessTitle 9A. Washington Criminal Code (Refs & Annos)^ Chapter 9A.16. Defenses (Refs & Annos)→**9A.16.020. Use of force--When lawful**

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

- (1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction;
- (2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody;
- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;
- (4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;
- (5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety;
- (6) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to any person, or in enforcing necessary restraint for the protection or restoration to health of the person, during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

APPENDIX B

Rules Of Appellate Procedure, RAP 2.2

West's Revised Code of Washington Annotated Currentness

Part III Rules on Appeal

Rules of Appellate Procedure (Rap)

Title 2. What Trial Court Decisions May Be Reviewed--Scope of Review

➔RULE 2.2. DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) *Final Judgment.* The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) [Reserved.]

(3) *Decision Determining Action.* Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) *Order of Public Use and Necessity.* An order of public use and necessity in a condemnation case.

(5) *Juvenile Court Disposition.* The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) *Termination of All Parental Rights.* A decision terminating all of a person's parental rights with respect to a child.

(7) *Order of Incompetency.* A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult.

(8) *Order of Commitment.* A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) *Order on Motion for New Trial or Amendment of Judgment.* An order granting or denying a motion for new trial or amendment of judgment.

(10) *Order on Motion for Vacation of Judgment.* An order granting or denying a motion to vacate a judgment.

(11) *Order on Motion for Arrest of Judgment.* An order arresting or denying arrest of a judgment in a criminal case.

(12) *Order Denying Motion to Vacate Order of Arrest of a Person.* An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) *Final Order After Judgment.* Any final order made after judgment that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting

aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

(2) *Pretrial Order Suppressing Evidence*. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) *Arrest or Vacation of Judgment*. An order arresting or vacating a judgment.

(4) *New Trial*. An order granting a new trial.

(5) *Disposition in Juvenile Offense Proceeding*. A disposition in a juvenile offense proceeding that (A) is below the standard range of disposition for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(6) *Sentence in Criminal Case*. A sentence in a criminal case that (A) is outside the standard range for the offense, (B) the state or local government believes involves a miscalculation of the standard range, (C) includes provisions that are unauthorized by law, or (D) omits a provision that is required by law.

(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties, but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

We follow *Heller* in declining to analyze RCW 9.41.040(2)(a)(iii) under any level of scrutiny.^{FN20} Instead we look to the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute.



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March 27, 2012

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 MAR 28 AM 10:30

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

**Re: STATE v. JACEK JASIONOWICZ
COURT OF APPEALS NO. 66914-1-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

THOMAS CURTIS, #24549
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Appellant's attorney

This day I mailed a properly stamped envelope
to the attorney for the defendant that
contains a copy of this document.

I am aware of the penalty of perjury under the laws of the
State of Washington and that this is true.

Witness my hand and the County Prosecutor's Office
seal this 27th day of March 2012.

27th March
Dale H. [Signature]

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

2012 MAR 28 AM 10:27

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JACEK JASIONOWICZ,

Appellant.

No. 66914-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of March, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 27th day of March, 2012.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit