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COURT OF APPEALS
DIVISION II

46687-2

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STATE OF WASHINGTON

BY _____
DEPUTY

No.

STATE OF WASHINGTON,

Respondent,

v.

DARRELL PARNEL BERRIAN,

Petitioner.

FILED
JAN 26 2016
WASHINGTON STATE
SUPREME COURT

PETITION FOR REVIEW

DARRELL PARNEL BERRIAN
DOC No. 377195, C-A-60-1L
Coyote Ridge Corrections Center
P.O. Box 769
Connell, Washington
99326-0769

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A. IDENTITY OF PETITIONER

1. Petitiner Darrell Parnel Berrian, hereinafter: "Berrian," moves this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

2. Berrian seeks review of the Court of Appeals decision terminating review in State v. Darrell Parnel Berrian, COA No. 46687-2-II, filed on December 15, 2015. A copy of that Opinion is in Appendix A hereto.

C. ISSUE PRESENTED FOR REVIEW

3. Wherefore, Berrian submits the following issue for review:

> WHETHER THE COURT OF APPEALS ERRED WHEN IT LOOKED TO THE CIRCUMSTANCES OF A KNIFE'S USE FOR PURPOSES OF RCW 9.94A.825 TO QUALIFY A KNIFE WITH A BLADE UNDER THREE INCHES AS A DEADLY WEAPON?

D. STATEMENT OF THE CASE

4. In August, 2013, Berrian was charged with committing first degree assault in Pierce County Cause No. 13-1-03133-9, while armed with a deadly weapon as defined in RCW 9.94A.825. The jury answered "yes" to the Special Verdict, exsposing Berrian to increased punishment under RCW 9.94A.533(4)(a)(d).

5. On September 12, 2014, Pierce County Superior Court Judge Jerry T. Costello, imposed Judgment and Sentence upon

Berrian, which included a 161-month standard range sentence, and a 24-month deadly weapon enhancement, resulting in an actual 209-month term of confinement imposed. See, Appendix 2: Judgment and Sentence. Berrian filed a timely Notice of Appeal. See, State v. Berrian, COA No. 45607-II. In the Opening Brief of Appellant on appeal, counsel for Berrian argued: (1) The State's evidence fails to establish that Berrian intended to cause great bodily harm, and; (2) The State's evidence does not establish that Berrian assaulted Worrel with a deadly weapon or that he was armed with a deadly weapon. Attachment Five: Brief of Appellant.

6. In the Brief of Respondent on appeal, counsel for the State argued: (1) The State presented sufficient evidence for the jury to find Berrian intended to cause great bodily harm when Berrian plunged a knife deeply enough into Worrel's chest to cause bleeding around his lungs, and; (2) The jury reasonably found Berrian was armed with a deadly weapon when the knife's lethal capacity was vividly demonstrated through the life threatening trauma it inflicted. Attachment Six: Brief of Respondent.

E. SUBSTANTIVE FACTS

7. On November 13, 2012, Tavaris Morriel was hanging out with his friends when they decided to walk to a local Texaco Station to purchase beer. 3RP 70,74. While he was at the Texaco, Morriel noticed the store clerk outside arguing with two men. 3RP 75. One of those men, who had dreadlocks at the time, was later identified as Berrian. 3RP 120. Morriel went outside and tried to difuse the situation. 3RP 76. This resulted in a physical fight between Morriel and Berrian. 3RP 78.

8. Morriel and Berrian fought, pulling each other to the ground. 3RP 78. When the fight stopped, Berrian and the man he was with began to walk away. 3RP 78. Soon after, Berrian ran up behind Morriel. 3RP 83. Berrian then plunged his knife into Morriel's chest. 3RP 83-84. Morriel could not remeber much about the knife, but he recalled it was a short "shank" about the size of his thumb. 3RP 86.

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9. After being stabbed, Morriel went to the nearby apartment of his ex-girlfriend, Dyeshanna May. 3RP 39. Subsequently, emergency personnell transported Morriel to the hospital. 3RP 31.

10. Dr. Michelle Strong, the trauma surgeon who initially treated Morriel, found bleeding around Morriel's lung, which means " the knife went deep enough" to cause muscular bleeding in the chest cavity. 2RP 77. Dr. Strong conducted various testing because she was concerned the knife had caused serious internal trauma. 2RP 75-76. The muscular bleeding was the only injury found. 2RP 76-77.

11. About a month after his initial treatment, Morriel returned to the hospital with breathing difficulty. 2RP 30. It was ultimately discovered Morriel's breathing difficulty was caused by a bladder clot induced collapsing of his lungs attributable to the knife wound Serrian inflicted. 2RP 30. Morriel underwent chest surgery to clean out the clot. 2RP 30. Dr. Strong testified this type of wound could have been life threatening if the surgery had not been performed when it was. 2RP 39.

12. Morriel testified that he has a small scar from where he was stabbed and a longer scar as a result of the surgery.

3RP 92-93. He testified that he had some numbness around the wound, and that he cannot take breaths as deep as he used to. 3RP 93-94. However, Dr. Strong testified that she would not expect a stab wound like the one Morriel sustained to cause permanent loss or impairment of an organ or bodily function. 2RP 82-83, 84.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

13. The 48-month Deadly Weapon Enhancement to Berrian's First Degree Assault Sentence was Imposed Contrary to Washington Law. In a jury trial, Berrian was found guilty of committing assault in the first degree by means of a knife, RCW 9A.36.011, a deadly weapon within the meaning of RCW 9.94A.110(6), and of the aggravating factor of committing that same aasault while armed with that same knife, a deadly weapon within the meaning of RCW 9.94A.825.

14. Initiative Measure 159, the "Hard Time for Armed Crime Act," was passed during the 1995 legislative session and became effective for offenses committed after July 23, 1995. This initiative increased penalties and expanded the range of crimes eligiable for weapon enhancements. For specified crimes, when a court makes a finding of fact or when a jury returns a special verdict finding that the accused or an accomplice was armed with a deadly weapon (RCW 9.94A.825) at the time of the commission of the crime, the sentence must be enhanced. The

was an error if the defendant or an accomplice was armed with a firearm (RCW 9.41.010) at the time of the commission of the crime.

15. The sentence enhancement statute, RCW 9.94A.533, was enacted, via[voted] enactment, after voters passed Initiative Measure 159. This statute mandates the additional punishment for crimes committed with a firearm or, as applicable here, with a deadly weapon other than a firearm:

> (4) The following additional time shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010:
>
> (a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least 20-years;
>
> (b) If the offender is being sentenced under (a) of this section for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under subsection (3)(a) of this subsection, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed.

RCW 9.94A.533(4)(a)(b).

16. Assault in the first degree is a class A felony. RCW 9A.36.011. Berrim's conviction of that crime and the jury's Special Verdict finding that he was armed with a deadly weapon other than a firearm during the commission of that crime, subjected him to a 24-month deadly weapon enhancement under RCW 9.94A.533(4)(a)(3). However, because he had previously

been sentenced for a firearm enhancement under RCW 9.94A.533 (3)(a) in Pierce County Cause No. 13-1-02707-2, the 24-month enhancement term doubled to 48-month pursuant to RCW 9.94A.533 (4)(a). Thus, as a sentence for Berrian, the trial court imposed a 161-month standard range sentence and, pursuant to the special verdict, a 48-month deadly weapon enhancement which, "notwithstanding any other provision of law, shall be served in total confinement and shall run consecutively to all other sentencing provisions." RCW 9.94A.533 (4)(a).

17. For purposes of the special verdict, the State told the jury Berrian was armed with "a one and a half to two-inch knife." RP 33. However, pursuant to RCW 9.94A.325, a knife is not a deadly weapon unless it has a blade longer than 3-inches. Thus, the knife the State alleged that Berrian was armed with during commission of his crime is not a deadly weapon as a matter of law. Because their is no indication in the SRA of legislative intent to treat the list of instruments identified as deadly weapons in RCW 9.94A.325 as anything other than an exclusive list, the 48-month deadly weapon enhancement to Berrian's first degree assault sentence must be vacated. Statutory construction supports this conclusion.

18. In interpreting a statute, the court's primary purpose is to determine and enforce the intent of the

legislature. State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). "'[I]f the statute's meaning is plain on it's face, then the court must give effect to that plain meaning as an expression of legislative intent."' Jacobs, 154 Wash.2d at 600, 115 P.3d 281 (quoting Dep't of Ecology V. Campbell & Gwinn, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002). In ascertaining the "plain meaning" of a statute, the court looks not only to the ordinary meaning of the language at issue, but also to the general context of the statute, related provisions, and the statutory scheme as a whole. Jacobs, 154 Wash.2d at 600, 115 P.3d 281. If, upon this examination, the provision is subject to more than one reasonable interpretation, it is ambiguous and the rule of lenity requires the court to interpret the statute in favor of the defendant. Jacobs, 154 Wash.2d at 600-01, 115 P.3d 281. Such is the case at bar.

19. In State v. Sunvalt, 79 Wash.App. 124, 901 P.2d 319 (1995), division one of the Court of Appeals of Washington acknowledged a knife is a deadly weapon as a matter of law for purposes of RCW 9.94A.125 (recodified RCW 9.94A.825) if it has a blade longer than 3-inches. However, the Court held, "When the crime was committed with a knife having a blade shorter than 3-inches, the state must prove that the knife had the capacity to cause the victim's death and was used in a way that was likely to produce or could have easily and readily produced

death." Dunwalt, 79 Wash.App. at 129-130; citing State v. Cook, 69 Wash.App. 412, 417-418, 848 P.2d 1325 (1993); State v. Lua, 62 Wash.App. 34, 42, 813 P.2d 588, review denied, 117 Wash.2d 1025, 820 P.2d 510 (1991). Relevant to this determination, the Court held, "are the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied, and the injuries inflicted." Dunwalt, 79 Wash.App. at 130, citing State v. Thompson, 88 Wash.2d 546, 548-49, 564 P.2d 323 (1977).

20. In concluding that a knife with a blade 3 inches or less may constitute a deadly weapon depending upon the circumstances of its use for purposes of RCW 9.94A.125, Division One in Dunwalt relied on its decisions in Cook, 69 Wash.App. at 417-418, and Lua, 62 Wash.App. at 42, and the Supreme Court's decision in Thompson, 88 Wash.2d 548-549, as precedent supporting its conclusion. However, none of those cases dealt with deadly weapon findings under the Sentencing Reform Act (SRA), RCW 9.94A.125, RCW 9.94A.602, nor RCW 9.94A.825.

21. Division One's opinion in both Cook and Lua were premised on our Supreme Court's decision in Thompson. By special verdict, the jurys in Cook, Lua, and Thompson, found that each defendant was armed with a deadly weapon, to wit; a knife having a blade 3-inches or less as defined in RCW 9.95.040 during the

commission of their crimes.

22. "Deadly Weapon" is defined in RCW 9.95.040 as follows:

> The word 'deadly weapon' as used in this section includes, but are not limited to, any instrument known as a blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94.040. By stating: "The words 'deadly weapon' as used in this subsection includes, but are not limited to, the list of instruments identified in RCW 9.95.040, it is unambiguous that the Legislature, in enacting RCW 9.95.040, intended the list of instruments identified in the statute as deadly weapons to be illustrative rather than conclusive. Thus, to the extent the Supreme Court in Thomson, and Division One in Cook and Lua, looked to the circumstances of the three inch or less knives use to determine if they were deadly weapons as a matter of fact for purposes of RCW 9.95.040, it is exactly what the Legislature intended when it said: "The words 'deadly weapon' include but are not limited to" the list of instruments named in RCW 9.95.040.

23. The Legislature did no[t], however, intend the courts' to look at the circumstances of a three inch or less knives

use to determine if it is a deadly weapon for purposes of RCW 9.94A.125, RCW 9.94A.302, nor RCW 9.94A.325.

24. RCW 9.94A.325 states:

> For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death, and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, any weapon containing poisonous or injurious gas.

RCW 9.94A.325. There is no indication in RCW 9.94A.325, nor in the SRA as a whole, of a legislative intent to treat the instruments designated as deadly weapons in RCW 9.94A.325 as any thing other than conclusive. In identifying the instruments designated as deadly weapons in RCW 9.94A.325 the legislature did not, as an example, precede the list of identified instruments in RCW 9.94A.325 with notice, as it did in RCW 9.95.040, that the phrase deadly weapon "is not limited to" the instruments identified in the statute. It is reasonable, therefore, to assume the legislature intended the instruments it identified as deadly weapons in RCW 9.94A.325 to be conclusive.

25. A review of every state sentence enhancement statute in the USA reveals that whenever the legislature intended a factor to enhance a sentence and expose an offender to increased punishment, it was explicitly identified and designated what facts in the statute. See, e.g., [illegible] (list of aggravating circumstances in statute establishing an enhanced sentence is exclusive); [illegible] (authorizing two-year enhancement of maximum available sentence for each prior offense listed in [illegible]); [illegible] (authorizing enhancement of any felony sentence if prior was committed in one of five proscribed areas); [illegible] (authorizing enhancement of any felony sentence if crime was committed in a correctional facility); [illegible] (authorizing 12-month enhancement to sentence for sexual conduct with a dog); [illegible] (authorizing 10, 15, or 25 month enhancement, depending on felony classification, if the crime was sexually motivated); [illegible] (authorizing 12-month enhancement for assault of law enforcement/prison officers); [illegible] (authorizing increase in statutory range sentence if the offender involved the corporation, threatening, or solicitation of a minor in order to involve that minor in the commission of a felony). Most of these sentence enhancement statutes empower the trier of fact to 'make fact' to bring the defendant

within it's purview. Rather, in jury trials, that statute simply [illegible] the jury to answer yes or no to the question on the special verdict form. The question on the special verdict form [illegible] is designed to trigger a yes or no answer as to whether the defendant committed the crime by means of the question on the special verdict form.

26. The jury's role for purposes of a special verdict finding under RCW 9.94A.602 is limited to answering yes or no to the statutory question "whether the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime." [illegible], to the extent Division Two, in [illegible], relied upon the Supreme Court's decision in [illegible], which set forth the procedure for establishing whether a knife with a blade 3-inches or less qualifies as a deadly weapon for purposes of RCW [illegible], the Court's reliance was misplaced. The words the legislature used in RCW [illegible] clearly allowed an extraneous review of fact. No such words are used in RCW 9.94A.125, RCW 9.94A.602, or RCW 9.94A.[illegible].

27. Because the words the legislature used in RCW 9.94A.125, RCW 9.94A.602, and in RCW 9.94A.[illegible], do not support a legislative intent that a jury qualify an instrument not specifically identified as a deadly weapon in those statutes as a deadly weapon "depending on the circumstances of its use,"

this Court should reverse the Court of Appeals affirmance of the 48-month deadly weapon enhancement imposed upon Berrian by the trial court on that basis. What is vexing here, the Court should find, is the fact that the jury was never instructed to look at the circumstances of the knife's use to qualify the knife as a deadly weapon. Thus, the deadly weapon enhancement imposed must be VACATED.

G. CONCLUSION

28. Because Berrian's instant petition involves an issue of substantial public interest that should be determined by the Supreme Court, the Court should accept review.

It Should be so Ordered.

DATED this 30th day of December, 2015.

Respectfully submitted,
BY THE PETITIONER:

Darrell Parnel Berrian

DARRELL PARNEL BERRIAN
DOC No. 377195, C-A-60-1L
Coyote Ridge Corrections Center
P.O. Box 769
Connell, Washington
99326-0769

DECLARATION OF MAILING

This is to certify that I, the undersigned, deposited in the U.S. Mail at the Coyote Ridge Corrections Center, a true and correct copy of my PETITION FOR REVIEW, postage pre-paid and properly addressed to the following source:

Kathleen Proctor
Deputy Prosecuting Attorney
WSB# 14811
930 Tacoma Avenue South, Room 946
Tacoma, Washington
98402-2171

DONE this 30th day of December, 2015.

BY THE PETITIONER:

Darrell Parnel Berrian
DARRELL PARNEL BERRIAN

A P P E N D I X

"A"

COURT OF APPEALS DECISION TERMINATING REVIEW

Filed
Washington State
Court of Appeals
Division Two

December 15, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARRELL PARNEL BERRIAN, Appellant.	No. 46687-2-II UNPUBLISHED OPINION

SUTTON, J. — Darrell Parnel Berrian appeals his conviction and sentence for first degree assault with a deadly weapon and the deadly weapon sentence enhancement. Berrian argues that the State failed to present sufficient evidence of intent to cause great bodily harm and that he was armed with and assaulted Tavaris Morriel with a deadly weapon. In his statement of additional grounds (SAG), Berrian also argues that (1) the trial court improperly admitted the photomontage from which Morriel identified Berrian as his assailant, (2) the trial court impermissibly closed the court room when it answered a jury question, (3) the State was relieved of its burden of proof because the jury instructions were improper, and (4) his trial counsel was ineffective for failing to propose a self-defense jury instruction.

We hold that the State presented sufficient evidence of intent to cause great bodily harm, Berrian was armed with a deadly weapon, the trial court did not err in admitting the photomontage, the trial court did not close the court room when it answered the jury's question, the trial court's jury instructions were not improper, and Berrian received effective assistance of counsel. Therefore, we affirm his conviction and deadly weapon sentence enhancement.

FACTS

I. STABBING INCIDENT

On the evening of November 12, 2012, Morriel was spending time with two of his friends. The three were drinking alcohol, and at midnight they walked down the street from the apartment complex they were in to a gas station to purchase more beer. While he was inside the store, Morriel saw a store employee arguing with two black men in the parking lot. Morriel went outside "to calm the situation down" by talking to them. 3 Verbatim Report of Proceedings (VRP) at 76. When he approached and told the two men to "chill out," one of the men, whose hair was in long dreadlocks, swung at Morriel, and the two began fighting. 3 VRP at 76.

Morriel estimated that they fought in the parking lot for five to ten minutes and ended up on the ground. Eventually, the men were separated. Morriel watched the two men walk down the street; then, he began to walk across the street in the other direction with his two friends, and soon after one of his friends told him that someone was running toward them. Morriel turned around, and the man with dreadlocks who he had been fighting with stabbed Morriel in his torso, close to his left breast, with a small knife that had a two inch blade. Once he realized what had happened, Morriel walked across the street from the gas station to his girlfriend's apartment, where he was contacted by the police and medical aid personnel.

Morriel was transported to the emergency room, where he was treated by a trauma surgeon. According to the trauma surgeon, the location of Morriel's wound, near the diaphragm, was "concerning" and that it is possible to have a wound to the chest which penetrates "all the way into the abdomen." 2 VRP at 75. The trauma surgeon performed a laparoscopic procedure on Morriel to ensure that the knife had not done so. Also, a stabbing injury like Morriel's could have

punctured a lung. Morriel experienced immediate "bleeding around the lung," which meant that the knife penetrated deep enough to cause muscular bleeding in the chest cavity. 2 VRP at 77.

Morriel continued to have difficulty breathing after he was released from the hospital. Morriel sought medical treatment again, and doctors discovered blood accumulation around Morriel's lung. Morriel then underwent surgery to remove a clot that had formed in his wound. If Morriel had not received treatment when he did, the blood clot would have been life threatening. About eight months after the stabbing, he had a small scar and numbness where he was stabbed, had a longer scar from the surgery, and he still could not breathe normally or "take deep breaths." 3 VRP at 93-94.

II. PHOTOMONTAGES[1]

Because Morriel could not give law enforcement more than a general description of his assailant, no detective was immediately assigned to investigate the case. In August 2013, however, an inmate at Pierce County jail sent information to the Lakewood Police Department that another inmate had told him he stabbed someone the previous fall in the neighborhood where the gas station is located. Detective Jeff Martin investigated the tip.

Martin received the name of the informant, but he did not immediately speak with that person because he wanted to independently verify the information. The informant had provided a description of the suspect who had committed the stabbing and specified that it was someone

[1] The trial court did not conduct an evidentiary hearing on this issue. At trial, the jury heard testimony from the Pierce County jail informant, Morriel, and Jeff Martin, the detective who created the two photomontages and who testified at length about the process of creating and presenting the montages to Morriel.

within his unit in the jail, so Martin searched through the inmates that were currently housed in that particular jail unit. Based on the description the informant provided, Martin narrowed down the possible suspects to a single person. This person was not Berrian.

After he identified a possible suspect, Martin created a photomontage that included the suspect he had narrowed down to but did not include Berrian. The montage included the suspect's booking photo with five additional booking photos of black males that looked similar to the suspect. This montage was on a single sheet of paper. Martin informed Morriel that officers "may have had a break in the case," and he and another officer met with Morriel on August 7 to present him with the montage. 4 VRP at 22. Before Morriel looked at the montage, he read and signed an admonishment that told him not to guess in his choice and that the photos should not influence his judgment. Morriel selected the person who Martin had earlier identified as the suspect,[2] but stated that he was only "60 percent" certain that the person he chose was his assailant. 4 VRP at 26.

The next day, Martin contacted the jail informant. During that interview, the informant told Martin that his cellmate, Berrian, was the person who said he had stabbed a person at a gas station the previous fall. Berrian told the informant that after the incident he had shaved off his dreadlocks to "disguise himself." 2 VRP at 169.

With this new information, Martin created a second photomontage that included Berrian's photograph with the only photograph that Martin could obtain at the time. Martin obtained this photograph from Pierce County jail, and Berrian did not have dreadlocks in the photo. In this

[2] This person was not Berrian.

montage, eight different photos were on separate pages. Berrian's photograph was photo number seven. Martin created the second montage different from the first photomontage because the only photo of Berrian available to Martin at the time was "slightly unique compared to -- typical photographs." 4 VRP at 29. Martin chose the photos for the second montage based on different aspects of their similarity to Berrian's photo, such as two individuals with their mouths open and two in gray clothing. All of the photos were of black males in jail uniforms.

When Martin contacted Morriel again to look at the second montage, Martin told Morriel that he "might have been right about being wrong" about his first choice. 3 VRP at 130. Before looking at the photos, Morriel again read and signed an admonishment identical to the first admonishment. Martin asked the officer who accompanied him, who had no knowledge of the investigation, to show the photos to Morriel so as to alleviate any suggestiveness that Martin may have conveyed. Morriel had an emotional reaction when he turned the page to Berrian's photograph and immediately identified Berrian as his assailant. At trial, Morriel again identified Berrian as the man who stabbed him.

III. PROCEDURE

The State charged Berrian with one count of first degree assault while armed with a deadly weapon.

A. CrR 3.6 Motion to Suppress Photomontages & Motion to Dismiss

Berrian moved to suppress evidence of the two photomontages and Morriel's identification of him using the photomontages. At the CrR 3.6 hearing, defense counsel waived an evidentiary hearing on the photomontage issue because the surrounding facts were undisputed. The trial court found that because the parties' pleadings sufficiently described the circumstances of the montages and the key facts were largely undisputed, testimony was unnecessary and would not "appreciably add to the Court's understanding." Clerk's Papers (CP) at 85.

Before counsel provided oral argument on the suppression motion, the trial court noted that he had read the parties' briefs on the motion and asked counsel to focus on the suggestiveness of the photomontages. Following argument, the trial court denied Berrian's motion to suppress the photomontages because the second montage was not overly suggestive.

The trial court reasoned that the second photomontage and Berrian's photo in it was not "alarmingly unusual" because all of the men were black males who "generally resemble [Berrian]." CP at 85, 86. The trial court explained that Martin's comment about Morriel's uncertainty in his choice from the first photomontage "did not suggest to Mr. Morriel that he should choose anyone from among the eight photographs." CP at 87.

After the State rested its case, Berrian moved to dismiss the charge. Berrian argued that the State had not presented sufficient evidence of his intent to cause Morriel great bodily harm or that he was armed with a knife that had a blade three inches or longer. The trial court denied Berrian's motion.

B. JURY INSTRUCTIONS, QUESTION & VERDICT

The State proposed jury instructions and, before the trial court ruled on its specific instructions, defense counsel indicated that he had no objections to the State's proposed instructions. The trial court's to-convict instruction on first degree assault provided as follows:

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 13, 2012, the defendant assaulted Tavaris Morriel;
> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
> (3) That the defendant acted with intent to inflict great bodily harm; and
> (4) That this act occurred in the State of Washington.

CP at 152. The trial court instructed the jury that "[g]reat bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP at 154.

As to the State's charge of a deadly weapon sentencing enhancement, the trial court instructed the jury that a deadly weapon is "any weapon, device, or instrument, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." CP at 156. The trial court further instructed the jury that substantial bodily harm is "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." CP at 157.

During deliberations, the jury sent the trial court a question, but the parties did not designate the question in the Clerk's Papers on appeal, and the trial court did not read the question into the record. However, the trial court opened its discussion of the jury question by asking counsel if

both of them had had a chance to review it. Defense counsel responded, "Yes, Your Honor." 4 VRP at 125. The parties and the trial court then discussed how to answer the question, and the trial court ruled that it would answer as defense counsel had requested.

The jury found Berrian guilty of first degree assault and found by a special verdict that he was armed with a deadly weapon at the time of the assault. Berrian appeals.

ANALYSIS

Berrian raises two issues on appeal. First, he argues that the State failed to prove every element of first degree assault because it did not present sufficient evidence of intent to inflict great bodily harm. Second, Berrian argues that the State also failed to present sufficient evidence that Berrian assaulted Morriel with a deadly weapon, an element of first degree assault, or that he was armed with a deadly weapon, a requirement of the sentencing enhancement. We disagree.

I. STANDARD OF REVIEW ON SUFFICIENCY OF THE EVIDENCE

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253, 256 (2015). To determine if the State presented sufficient evidence, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015). An appellant's claim of insufficient evidence admits the truth of the State's evidence and "'all inferences that reasonably can be drawn [from it].'" *Condon*, 182 Wn.2d at 314 (alteration in original) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

II. INTENT TO INFLICT GREAT BODILY HARM

Berrian argues that the State presented insufficient evidence for the jury to find that he acted with intent to inflict great bodily harm because the knife he used was two inches, the knife wound did not impact any of Morriel's vital organs, the injury caused "only some internal bleeding," and the wound left a small scar. Br. of Appellant at 11. We disagree.

The State charged Berrian with first degree assault under RCW 9A.36.011(1)(a). That statute provides that a person commits first degree assault "if he or she, with intent to inflict great bodily harm . . . [a]ssaults another." RCW 9A.36.011(1)(a). Great bodily harm is "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

To find Berrian guilty of first degree assault, the jury was required to find beyond a reasonable doubt that Berrian, when he stabbed Morriel, "acted with intent to inflict great bodily harm." CP at 152. The trial court's jury instructions defined great bodily harm as "injury that creates a probability of death . . . or that causes . . . impairment of the function of any bodily part or organ." CP at 154.

A person acts with intent "when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010. First degree assault requires proof of specific intent, which is intent to produce a specific result. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Evidence of intent "'is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.'" *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)

(internal quotation marks omitted) (quoting *State v. Ferreira*, 69 Wn. App. 465, 468, 850 P.2d 541 (1993)). Specific intent may not be presumed, but we may infer it "as a logical probability from all the facts and circumstances." *Wilson*, 125 Wn.2d at 217.

We have previously held that stabbing a person in the chest falls within the statutory standard of great bodily harm. *State v. Langford*, 67 Wn. App. 572, 587, 837 P.2d 1037 (1992), *review denied*, 121 Wn.2d 1007 (1993), *cert. denied*, 510 U.S. 838 (1993). We have also previously held that a rational jury could find that the defendant acted with intent to cause great bodily harm when he stabbed several people "in the back, chest[,] or stomach" and one person needed several surgeries to repair the damage. *State v. Huddleston*, 80 Wn. App. 916, 922, 912 P.2d 1068 (1996).

The State's evidence at trial was sufficient for a rational jury to find that Berrian acted with intent to inflict great bodily harm when he stabbed Morriel. After fighting in the gas station parking lot, Morriel and Berrian left the area in opposite directions. As Morriel and his friends walked away, however, Berrian ran back to him and stabbed Morriel. It is undisputed that Berrian stabbed Morriel in his chest, near his left breast and the area of his diaphragm and his lungs. If Morriel had not undergone surgery for the blood clot that formed around his lung after his initial treatment, the injury inflicted by Berrian would have threatened Morriel's life. Morriel was unable to take deep breaths even after healing from the surgery. Viewed in the light most favorable to the State, it can be inferred "as a logical probability" from these facts and circumstances that Berrian acted with specific intent to inflict great bodily harm. *Wilson*, 125 Wn.2d at 217.

III. ARMED AND ASSAULTED VICTIM WITH A DEADLY WEAPON

Berrian also argues that the State presented insufficient evidence that he was armed with a deadly weapon and assaulted Morriel with that deadly weapon. We disagree.

The crime of first degree assault, as charged by the State, requires proof that Berrian assaulted Morriel with a deadly weapon. RCW 9A.36.011(1)(a). A deadly weapon under the crime of first degree assault is a weapon "which, under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6).

The State's information further charged that Berrian's sentence should be enhanced because he was armed with a knife, "a deadly weapon," when he assaulted Morriel.[3] CP at 1-2. To enhance a defendant's sentence following a guilty verdict, the jury must find that the defendant used "an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825.

The trial court instructed the jury that a deadly weapon is a weapon which, "under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm." CP at 156. Substantial bodily harm is "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." RCW 9A.04.110(4)(b). The trial court's jury instruction defining substantial bodily harm was identical to this statute.

A knife that has a blade longer than three inches is per se a deadly weapon. RCW 9.94A.825. It is a question of fact for the jury, however, whether a knife that has a blade

[3] RCW 9.94A.530 provides that the trial court may sentence a person to serve additional time on a standard range sentence if the jury finds that the defendant was armed with a deadly weapon.

shorter than three inches is a deadly weapon. *State v. Cobb*, 22 Wn. App. 221, 223, 589 P.2d 297 (1978). "The test is not the extent of the wounds actually inflicted." *Cobb*, 22 Wn. App. at 223. "Rather, the test is whether the knife was capable of inflicting life threatening injuries under the circumstances of its use." *Cobb*, 22 Wn. App. at 223 (emphasis omitted).

In *Cobb*, we held that the State presented sufficient evidence of a deadly weapon where a knife with less than a three inch blade produced a cut over the sternum bone, a cut to the forehead, and a cut in the muscle of the left arm. *Cobb*, 22 Wn. App. at 223. Although these injuries were not life threatening, we reasoned that a reasonable jury could have found that the knife was a deadly weapon in part because it could "inflict a penetrating wound to the chest cavity and endanger major structures." *Cobb*, 22 Wn. App. at 223-24.

Likewise, in *State v. Thompson*, 88 Wn.2d 546, 564 P.2d 323 (1977), the defendant used a pocketknife with a blade two to three inches in length to assault the victim during a robbery. The defendant held the knife against the victim's neck, and the victim sustained bruises on her right arm and a cut on her neck. *Thompson*, 88 Wn.2d at 550. Given these circumstances of the knife's use, our Supreme Court held that the jury could have properly found that the knife was a deadly weapon. *Thompson*, 88 Wn.2d at 550.

Here, the only evidence of the size of Berrian's knife was Morriel's estimation that it was "about two inches." 3 VRP at 86. Thus, the knife was not per se a deadly weapon under RCW 9.94A.825.

The circumstances in which Berrian used the knife, however, demonstrate that the State presented sufficient evidence for a rational jury to properly find beyond a reasonable doubt that the knife was a deadly weapon. The trauma surgeon who treated Morriel testified that the location

of Morriel's wound, near the diaphragm, was "concerning" and that it is possible to have a wound to the chest which penetrates "all the way into the abdomen." 2 VRP at 75. She further explained that a stabbing injury like Morriel's could have punctured a lung. Morriel experienced immediate "bleeding around the lung," which meant that the knife penetrated deep enough to cause muscular bleeding in the chest cavity. 2 VRP at 77.

Following his initial treatment, Morriel continued to experience shortness of breath. Morriel underwent surgery to clear a clot that had formed around his lung. If Morriel had not sought medical treatment for the clot, the injury would have been life threatening. Morriel testified that he still could not take deep breaths. Thus, the State provided sufficient evidence that Berrian used the knife in a way that could have easily produced Morriel's death. Therefore, a reasonable jury could have found that Berrian was armed and assaulted Morriel with a deadly weapon.

SAG ISSUES

Berrian raises two issues in his SAG that we do not address on the merits. First, Berrian claims that the informant's testimony was inadmissible hearsay. Assuming that Berrian is referring to the testimony of the Pierce County jail informant, Berrian does not identify which portion of the informant's testimony he believes was inadmissible hearsay, and he does not provide further argument on why this testimony was inadmissible. To the extent that the informant's testimony consisted of hearsay, however, the out of court statements that he testified to were Berrian's own words and were thus admissible. ER 801(d)(2) (party opponent's statements are not hearsay).

Second, Berrian claims that "[t]he State refused to introduce any Georgia State statutes [that] may be found to be comparable to any Washington State statutory language." SAG at 2.

Our State Supreme Court has held that a defendant's "affirmative acknowledgment" that prior out-of-state convictions are properly included in his or her offender score satisfies the State's burden to prove comparability of prior out-of-state convictions. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (emphasis omitted). Berrian's judgment and sentence includes two prior Georgia convictions in his criminal history and, at the sentencing hearing, Berrian did not dispute the calculation of his offender score. 4 VRP at 134-35 ("The Court: Is there any quarrel with the calculation of Mr. Berrian's offender score? [Defense counsel]: No, Your Honor."). Thus, Berrian has waived this claim of error.

Berrian raises five additional issues in his SAG. All of these claims of error fail.[4]

I. PHOTOMONTAGE

Berrian first argues that the trial court erred by admitting the second photomontage from which Morriel identified Berrian as his assailant. Berrian claims that the trial court erred when it admitted the photomontage because (1) admission of the photomontage violated his right to due process, (2) the identification procedure was conducted while he was in custody, and (3) Martin's

[4] Berrian also argues that irregularities at trial prevented him from having a fair trial and thus we should overturn the jury's verdict, citing CrR 7.5(a)(5). Other than his assignments of error, Berrian does not specify what irregularities justify reversing his conviction. Because the trial court did not err in any of the claims Berrian raises in his SAG, and the trial proceeding below otherwise appears to be fair, public, and proper, this claim also fails. RAP 10.10(c).

comment that Morriel may have been "right about being wrong" was tantamount to witness tampering.[5] 3 VRP at 130. The trial court did not err by admitting the photomontage.[6]

A. DUE PROCESS

Berrian argues that the trial court violated his right to due process and abused its discretion when it denied his motion to suppress the photomontage, which he argues was improperly suggestive. Berrian also argues that the trial court violated his right to due process because it failed to adequately discuss the rules applicable to admitting photomontage evidence, requiring him to argue that the photomontage was suggestive.[7]

An out-of-court identification of a suspect using a photomontage violates a defendant's right to due process if the procedure was "'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'" *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (quoting *State v. Linares*, 98 Wn. App. 397, 401 989 P.2d 591 (1999)). Due process concerns arise in the context of an eye witness identification only when an identification procedure

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[5] Berrian also argues that the photomontage was "harmfully prejudicial and toxic" to his "burdens and presumptions." SAG at 12. To the extent that this argument is not an extension of Berrian's due process arguments, this claim of error fails because Berrian did not object to the photomontage below under prejudice grounds. Thus, he failed to preserve it. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014) ("Even if a defendant objects to the introduction of evidence at trial, he or she 'may assign evidentiary error on appeal only on a specific ground made at trial.'" (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)).

[6] Berrian notes that he "has not been provided with a copy of any of the trial court['s] order, minute entries," or other relevant materials "to better focus the issues." SAG at 20. Berrian cites RAP 9.11, which allows us under certain circumstances to direct the trial court to take additional evidence before we decide a case. This rule does not apply here.

[7] Berrian further argues that the trial court abused its discretion in "overlook[ing] the well established" law on this issue. SAG at 13. Because admission of the photomontage did not violate Berrian's right to due process, the trial court did not abuse its discretion.

is both suggestive *and* unnecessary. *State v. Sanchez*, 171 Wn. App. 518, 573, 288 P.3d 351 (2012).

Berrian repeatedly asserts that the trial court shifted a burden onto him to disprove suggestiveness of the photomontage before requiring the State to prove the necessity of the evidence. We disagree. Washington State case law is clear that when challenging the admissibility of an identification from a photomontage the *defendant* first carries the burden to establish impermissible suggestiveness. *Vickers*, 148 Wn.2d at 118. If the defendant fails to meet this burden, the inquiry ends. *Vickers*, 148 Wn.2d at 118. However, if the defendant meets this burden, the trial court then considers, based on a totality of the circumstances, whether the procedure "created a substantial likelihood of irreparable misidentification." *Vickers*, 148 Wn.2d at 118. When deciding the admissibility of a suspect identification, the trial court must ensure that the identification is reliable by evaluating "the witness's opportunity to observe the suspect, the accuracy of any prior descriptions, the witness's level of certainty, and the passage of time." *State v. Collins*, 152 Wn. App. 429, 434, 216 P.3d 463 (2009).

Berrian cannot demonstrate that Martin's second photomontage, from which Morriel identified Berrian, was impermissibly suggestive. All eight photographs in the photomontage were booking photographs of black males who appeared to be the same general age. Although Berrian's facial expression in the montage is somewhat unusual, Martin deliberately chose the other seven photographs to prevent Berrian's photo from standing out.[8] As the trial court reasoned, Berrian's

[8] Martin chose two individuals with their mouths closed and two individuals with their mouths open; for each of these discrete categories, Martin chose two photos of inmates with orange uniforms and two inmates with gray uniforms.

photograph is not so unusual so as to "leap off the page." CP at 86. Thus, the trial court properly denied Berrian's motion to suppress the photomontage because it was not impermissibly suggestive. Therefore, the trial court need not have explicitly discussed necessity, contrary to Berrian's argument.

We also disagree that the trial court failed to consider applicable law on this issue and that it was uninterested in an in depth discussion. Both defense counsel and the State provided full briefing on the issue. At the CrR 3.6 hearing, the trial court noted that it had read the parties' briefs on the motion and asked counsel to focus on the suggestiveness of the photomontages. This request does not mean that the trial court ignored applicable case law. Furthermore, the trial court holds broad inherent power and statutory authority over courtroom operations. *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The record reflects that the trial court did not abuse its discretion in asking counsel to focus on a particular issue.

B. IN-CUSTODY IDENTIFICATION

Berrian also argues that the photomontage was inadmissible because Martin should have used a line-up instead because Berrian was in custody. We disagree.

Berrian relies heavily on *State v. Thorkelson*, which explained previous dicta by our Supreme Court that "disapproved of the use of photographic identification procedures when a suspect is in custody," favoring a lineup procedure instead. *State v. Thorkelson*, 25 Wn. App. 615, 618, 611 P.2d 1278 (1980). Division Two of this court declined to follow the *Thorkelson* reasoning. *State v. Royer*, 58 Wn. App. 778, 782, 794 P.2d 1325 (1990). "'[A] photographic identification conducted while a defendant is in custody, although not favored, will be suppressed only if it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

misidentification.'" *Royer*, 58 Wn. App. at 782 (quoting *State v. Weddel*, 29 Wn. App. 461, 473, 629 P.2d 912 (1981)). This holding is nearly identical to our Supreme Court's current rule on the admissibility of photomontages. *See Vickers*, 148 Wn.2d at 118.

Berrian also relies on *State v. Nettles*, which disapproved of the specific photographic identification procedure used in that case. *State v. Nettles*, 81 Wn.2d 205, 207, 209, 500 P.2d 752 (1972) (in an investigation involving two suspects, victim was shown only four photographs two weeks before trial, two women and two men; one of the photographs of the men was one defendant and one of the women was the other defendant). The *Nettles* court described a favored procedure:

> The witness should be shown the pictures of a number of possible suspects. The pictures of those suspects upon whom police suspicion has alighted at the time should not be particularly distinguishable from the other photographs shown to the witnesses; nor should any words or actions on the part of the police indicate the "favored" suspect.

Nettles, 81 Wn.2d at 210.

According to Martin's testimony at trial, the favored procedure in *Nettles* is precisely the procedure Martin used in the two photomontages. Martin included multiple photos of individuals that were not "particularly distinguishable" from each other, and another detective unfamiliar with the investigation presented the photos to Morriel so as to ensure Martin's conduct was not suggestive. *Nettles*, 81 Wn.2d at 210. As concluded above, the trial court properly denied Berrian's motion to suppress because this procedure was not impermissibly suggestive. Thus, Berrian's claim that the photomontage must be suppressed because he was in custody fails.

C. WITNESS TAMPERING

Lastly, Berrian argues that the trial court erred in admitting the second photomontage because Martin's comment that Morriel's uncertainty in his pick from the first photomontage may have been correct was equivalent to witness tampering. No evidence on the record suggests that Martin's conduct amounted to witness tampering.

Witness tampering, among other actions, is an attempt to influence a witness to testify falsely.[9] *State v. Williamson*, 131 Wn. App. 1, 6, 86 P.3d 1221 (2004), as amended (2005). In a prosecution for witness tampering, the State is entitled to rely on both the literal meaning of the words used to influence the witness as well as inferences from the words and the context in which they were used. *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990).

The record does not contain any evidence that Martin attempted to influence Morriel to testify falsely or that supports an inference that Martin engaged in witness tampering. Martin's comment about Morriel's uncertainty did not suggest a specific person that Martin believed Morriel should choose from the second photomontage. Nor did Martin's comment suggest that Morriel should withhold testimony. In fact, the admonishment that Morriel read before looking through the photomontages instructed him to not guess and that the photographs were not meant to influence his judgment. Martin did not threaten Morriel or direct him to pick a certain individual from the montage. Thus, Berrian's claim of witness tampering fails.

[9] RCW 9A.72.120 provides that a person is guilty of witness tampering when he or she "attempts to induce a witness . . . or a person whom he or she has reason to believe may have information relevant to a criminal investigation . . . to: (a) [t]estify falsely or . . . to withhold any testimony; or . . . (c) [w]ithhold from a law enforcement agency information which he or she has relevant to a criminal investigation."

II. PUBLIC TRIAL

Berrian next argues that the trial court violated his right to a public trial when it considered a jury question "in camera" without applying the *Bone-Club*[10] factors.[11] SAG at 3. We disagree.

A criminal defendant's right to a public trial is guaranteed by our state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art 1, § 22. We analyze whether the trial court impermissibly closed the court room according to a three-step framework. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). First, we ask whether the defendant's right to a public trial attaches to the particular proceeding at issue. *Love*, 183 Wn.2d at 605. Second, if the public trial right attaches to the proceeding, we ask whether the courtroom was closed. *Love*, 183 Wn.2d at 605. Lastly, we ask if the courtroom closure was justified. *Love*, 183 Wn.2d at 605. The appellant carries the burden to prove the first two steps while the proponent of the alleged closure carries the burden to prove the third step. *Love*, 183 Wn.2d at 605.

The right to a public trial attaches to the trial court's handling of a jury question. *See State v. Koss*, 181 Wn.2d 493, 501, 334 P.3d 1042 (2014) (addressing appellant's claim that the trial court impermissibly closed the courtroom when it did not discuss the jury's question on the record). Thus, Berrian has met his burden on the first step of the public trial framework. *Love*, 183 Wn.2d at 605.

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[10] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

[11] Although Berrian did not object to the alleged courtroom closure below, he may raise his right to a public trial for the first time on appeal. *State v. Shearer*, 181 Wn.2d 564, 569-70, 334 P.3d 1078 (2014).

However, Berrian cannot meet his burden on the second step of the framework, whether the courtroom was actually closed to the public. *Love*, 183 Wn.2d at 605. The record does not reflect that the trial court addressed the jury's question in a closed courtroom. Thus, Berrian's claim fails.

III. JURY INSTRUCTIONS

Berrian next argues that the State was relieved of its burden to prove every essential element of first degree assault because the trial court did not properly instruct the jury.[12] By shifting the "preliminary burden of proof" onto the defense by not receiving testimony on the photomontage procedure, Berrian argues that the trial court could not have accurately instructed the jury on the elements of the charged crime. SAG at 20. We disagree.

We review challenges to the legal sufficiency of jury instructions de novo. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976, *cert. denied* 135 S. Ct. 2844 (2015). Jury instructions that relieve the State of its burden to prove every essential element of the charged crime are not legally sufficient. *Walker*, 182 Wn.2d at 481.

The to-convict jury instruction on first degree assault in this case is identical to WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL, 35.02. *Cf.* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL, 35.02 at 452 (3d ed. 2008) (WPIC 35.02) and CP at 152. The Washington Pattern Instruction on first degree assault mirrors the statutory

[12] Defense counsel accepted the State's proposed jury instructions without objection because they were "straight out of the [Washington Pattern Jury Instructions]." 4 VRP at 66. However, because the due process clause requires the State to prove every element of the charged offense beyond a reasonable doubt and a jury instruction that relieves the State of its burden is an error of constitutional magnitude, Berrian may raise challenges to the jury instructions for the first time on appeal. *State v. Ridgley*, 141 Wn. App. 771, 779, 174 P3d 105 (2007).

elements of first degree assault.[13] *Cf.* WPIC 35.02 and RCW 9A.36.011. The to-convict instruction twice told the jury that it must find every element listed in the jury instruction beyond a reasonable doubt. Thus, nothing in the to-convict jury instruction on first degree assault relieved the State of its burden to prove every element of the charged crime beyond a reasonable doubt. The legal sufficiency of this jury instruction is unrelated to the admissibility of the photomontage, which as we held above the trial court properly admitted. Therefore, Berrian's claim of error fails.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, Berrian argues that his trial counsel was ineffective for failing to propose a self-defense jury instruction because Morriel was intoxicated and the testimony of the State's witnesses was conflicting.[14] Because Berrian was not entitled to a self-defense jury instruction and trial counsel's request for such an instruction would have been futile, his claim of error fails.

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[13] WPIC 35.02 provides that the jury should be instructed on the elements of first degree assault as follows:

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about(date), the defendant assaulted(name of person);
>
> (2) That the assault was committed [with a firearm] [or] [with a deadly weapon] [or] [by a force or means likely to produce great bodily harm or death];
>
> (3) That the defendant acted with intent to inflict great bodily harm; and
>
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

[14] Berrian further assigns error to his trial counsel's performance "for not challenging the State" on the issues he raises in his SAG. SAG at 2. Berrian's counsel objected to introduction of the photomontage, which constitutes the majority of Berrian's argument in his SAG. Because we hold that the remaining claims of error in Berrian's SAG fail for various reasons, we do not further consider Berrian's claim that his counsel was ineffective on these issues.

A. STANDARD OF REVIEW

Under our state and federal constitutions, a criminal defendant has the right to effective assistance of counsel. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). To prevail on a claim that trial counsel was ineffective, the defendant has the burden to establish (1) that counsel's representation was deficient by falling below an objective standard of reasonableness and (2) a reasonable probability that the result of the proceeding would have been different if counsel had been effective. *Jones*, 183 Wn.2d at 339.

Our review of an attorney's performance is "highly deferential." *State v. Humphries*, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). If trial counsel's conduct may be considered a legitimate trial tactic, his or her performance is not deficient. *Humphries*, 181 Wn.2d at 720. To overcome our presumption that trial counsel's performance is reasonable, a defendant bears the burden to establish the absence of a legitimate trial tactic that explains trial counsel's performance. *State v. Hamilton*, 179 Wn. App. 870, 879-80, 320 P.3d 142 (2014). We review the reasonableness of counsel's performance by considering all the circumstances surrounding counsel's trial decisions. *Hamilton*, 179 Wn. App. at 879.

B. SELF-DEFENSE INSTRUCTION

A defendant is entitled to a self-defense jury instruction when he or she produces "some evidence" of self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once the defendant does so, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473. "Evidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the

defendant sees.'" *Walden*, 131 Wn.2d at 474 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)).

No evidence on the record demonstrates that Morriel was the first aggressor in the fist fight at gas station, which would have put Berrian in a position to defend himself. Instead, Morriel testified that he intervened in an argument between Berrian and a store clerk. According to Morriel's testimony, one of the men arguing with the clerk, Berrian, swung at him after he tried to calm the situation. The fist fight between Morriel and Berrian ended and Morriel began to walk away, but Berrian, ran back to him and stabbed him with a knife. There is no evidence in the record that Berrian acted in self-defense, and thus Berrian was not entitled to a self-defense instruction.

Morriel's level of intoxication, alone, is not sufficient to justify a self-defense instruction without "some evidence" that Berrian acted in self-defense. *Walden*, 131 Wn.2d at 473. Nor would inconsistent witness testimony justify the need for a self-defense instruction without evidence that Berrian's conduct was justifiable self-defense. The testimony at trial did not establish that Berrian was entitled to a self-defense instruction because he did not produce any evidence of self-defense. Therefore, defense counsel's request for a self-defense instruction would have been futile. Berrian's counsel was not deficient for failing to request such an instruction.

CONCLUSION

We hold that the State presented sufficient evidence of intent to cause great bodily harm, Berrian was armed with a deadly weapon, the trial court did not err in admitting the photomontage, the trial court did not close the court room when it answered the jury's question, the trial court's

jury instructions were not improper, and Berrian received effective assistance of counsel. Therefore, we affirm his conviction and deadly weapon sentence enhancement.

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

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

J.
LEE, J.

A P P E N D I X

"2"

FELONY JUDGMENT AND SENTENCE

FILED
DEPT. 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By _____ DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DARRELL PARNEL BERRIAN Defendant. SID: WA27230532 DOB: 12/09/1981	CAUSE NO. 13-1-03133-9 JUDGMENT AND SENTENCE (FJS) 377195 [X] Prison [ ] RCW 9.94A.712\9.94A.507 Prison Confinement 9-16-14 [ ] Jail One Year or Less [ ] First-Time Offender SEP 15 2014 [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Alternative to Confinement (ATC) **[ ] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8** **[ ]Juvenile Decline [ ]Mandatory [ ]Discretionary**

I. HEARING

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

II. FINDINGS

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

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 08/11/14 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a)	D	09/05/13	LAKEWOOD PD 123180029

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Jury Verdict Information

[X] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) I. RCW 9.94A.602, 9.94A.533.

14-9-09014-6

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[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[X] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): ATTEMPTED ROBBERY IN THE FIRST DEGREE; UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, 13-1-02707-2

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

COUNT NO	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADLT JUV	TYPE OF CRIME
1	PURCHASE/POSSESS CONTROLLED SUBSTANCE	06/24/99	Lowndes Co. Superior Ct., GA	05/07/99	A	
2	SALE OF COCAINE	08/16/11	Lowndes Co. Superior Ct., GA	05/18/10	A	
~~[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):~~		2/14/14	Pierce Co., WA	7/7/13	A	
3	Att. Robbery 1° w/FASE	2/14/14	Pierce Co, WA	7/7/13	A	
4	UPOF 1°					

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	5	XII	138-184 MOS	48 MOS	186-232 MOS	LIFE

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

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

_____

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

_____

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2.6 [ ] FELONY FIREARM OFFENDER REGISTRATION. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

[ ] The court considered the following factors:

[ ] the defendant's criminal history.

[ ] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

[ ] evidence of the defendant's propensity for violence that would likely endanger persons.

[ ] other: _____

[ ] The court decided the defendant [ ] should [ ] should not register as a felony firearm offender.

III. JUDGMENT

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

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

IV. SENTENCE AND ORDER

IT IS ORDERED:

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

JASS CODE

RTN/RJN $_____ Restitution to: _____

$_____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV $ 500.00 Crime Victim assessment

DNA $ 100.00 DNA Database Fee

PUB $ 1500.00 Court-Appointed Attorney Fees and Defense Costs

FRC $ 200.00 Criminal Filing Fee

FCM $_____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$_____ Other Costs for: _____

$_____ Other Costs for: _____

$ 2200.00 TOTAL

☒ The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

☒ is scheduled for DISMISSED

☒ RESTITUTION. Order Attached

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

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

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

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

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

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b **ELECTRONIC MONITORING REIMBURSEMENT.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of $_____.

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

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

4.3 **NO CONTACT**

The defendant shall not have contact with Tavaris Lamar Morrell 3.18.86 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years ~~(not to exceed the maximum statutory sentence)~~.

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 **OTHER:** Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

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4.4a [ ] All property is hereby forfeited

[ ] Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

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

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

161 months on Count	I	____ months on Count	____
____ months on Count	____	____ months on Count	____
____ months on Count	____	____ months on Count	____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

48 months on Count No	I	____ months on Count No	____
____ months on Count No	____	____ months on Count No	____
____ months on Count No	____	____ months on Count No	____

Sentence enhancements in Counts _ shall run
[ ] concurrent [ ] consecutive to each other.
Sentence enhancements in Counts I shall be served
[X] flat time [ ] subject to earned good time credit

Actual number of months of total confinement ordered is: 209 months consecutive to 13-1-02707-2

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

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

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: ____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: ____

Confinement shall commence immediately unless otherwise set forth here: ____

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(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 400 [redacted] days

4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) I. 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[ ] consume no alcohol.

[X] have no contact with: see §4.3

[X] remain [X] within [X] outside of a specified geographical boundary, to wit: per DOC

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[ ] participate in the following crime-related treatment or counseling services: _____

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] comply with the following crime-related prohibitions: _____

[ ] Other conditions:

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[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

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

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

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V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**

[ ] Defendant waives any right to be present at any restitution hearing (sign initials): X_____.

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

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

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

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

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5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: Sept 12, 2014

JUDGE
Print name JERRY T. COSTELLO

Deputy Prosecuting Attorney
Print name: Jesse Williams
WSB # 35613

Attorney for Defendant
Print name: Michael Maltby
WSB # 26754

Defendant
Print name: Darrell Berman

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: X Darrell Berman

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By _____
DEPUTY

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 13-1-03133-9

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

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

NATASHA SEMAGO
Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX "F"

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

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

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

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

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

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

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

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

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

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

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

per DOC

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

see §43

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

_____ (IV) The offender shall not consume alcohol; _____

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

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

_____ (VII) Other: _____

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By _____
DEPUTY

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Telephone: (253) 798-7400

Case Number: 13-1-03133-9 Date: September 15, 2014
SerialID: 7A742C29-110A-9BE2-A9D6AA0947E132BD
Certified By: Kevin Stock Pierce County Clerk, Washington

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the aforementioned court do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said Court this 15 day of September, 2014

Kevin Stock, Pierce County Clerk

By /S/Tyler Wherry, Deputy.
Dated: Sep 15, 2014 10:55 AM

SEAL OF THE SUPERIOR COURT WASHINGTON OF PIERCE COUNTY

Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:
https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm,
enter **SerialID: 7A742C29-110A-9BE2-A9D6AA0947E132BD**.
This document contains 14 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

13-1-03133-9 43278796 ORDS 09-15-14

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By _____
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DARRELL PARNEL BERRIAN Defendant.	CAUSE NO. 13-1-03133-9 ORDER FOR BIOLOGICAL SAMPLE DRAW FOR DNA IDENTIFICATION ANALYSIS

THIS MATTER having come on regularly before the undersigned Judge for sentencing following defendant's conviction for:

[ ] A felony sex offense, which occurred after July 1, 1990, as defined by RCW 9.94A.030, to wit: _____, and/or

[ ] A violent offense, which occurred after July 1, 1990, as defined by RCW 9.94A.030, to wit: _____, and/or

[X] Any felony offense for which a conviction was obtained after July 1, 2002, to wit: Assault 1° w/ DWSE.

Pursuant to RCW 43.43.754, therefore, it is hereby ordered that the defendant provide a biological sample to be used for DNA identification analysis as follows:

PLACE TO BE TESTED

[ ] (Out-of-Custody) Report immediately to the Pierce County Sheriff's Office located on the 1st Floor of the County City Building, 930 Tacoma Ave S, Tacoma, Washington for a biological sample draw.

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[ ] (Out-of-Custody) Contact your CCO or other DOC representative to make an appointment to submit a DNA sample. Your sample must be submitted within 60 days of today's date or the date you are released from jail, whichever comes later.

[X] (In-Custody DOC) Submit to the biological sample draw by the Department of Corrections.

[ ] (In-Custody PC Jail) Submit to biological sample draw by the Pierce County Jail.

DONE IN OPEN COURT this 5th day of Sept., 2014.

JUDGE

JERRY T. COSTELLO

Presented by:

JESSE WILLIAMS
Deputy Prosecuting Attorney
WSB# 35543

Approved as to form:

MICHAEL MALTBY
Attorney for Defendant
WSB# 24754

DARRELL PARNEL BERRIAN
Defendant

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By DEPUTY

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs DARRELL PARNEL BERRIAN Defendant.	CAUSE NO. 13-1-03133-9 ADVICE OF RIGHT TO APPEAL

RIGHT TO APPEAL

Judgment and Sentence having been entered, you are now advised that:

1.1 You have the right to appeal your conviction(s). If you have entered a guilty plea, you have waived your right to raise certain issues, as discussed in your guilty plea statement, in an appeal. You have a right to appeal any sentence that is outside the standard sentence range. You also have a right to appeal rulings on other post convictions motions as listed in Rules of Appellate Procedure 2.2.

1.2 Unless a notice of appeal is filed with the clerk of the court within thirty (30) days from the entry of judgment or the order appealed from, you have irrevocably waived your right of appeal.

1.3 The clerk of the Superior Court will, if requested by you, file a notice of appeal on your behalf.

1.4 If you cannot afford the cost of an appeal, you have the right to have a lawyer appointed to represent you on appeal and to have such parts of the trial record as are necessary for review of errors assigned transcribed for you, both at public expense.

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ACKNOWLEDGMENT

Regarding the foregoing advice of my "Right to Appeal":

1. I understand these rights; and

2. I waive formal reading of these rights; and

3. I acknowledge receipt of a true copy of these rights.

DATE: 9.5.14

DEFENDANT: Darrell Barnes

DEFENDANT'S ATTORNEY:

DATE: 9.5.14

JUDGE:

JERRY T. COSTELLO

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By
DEPUTY

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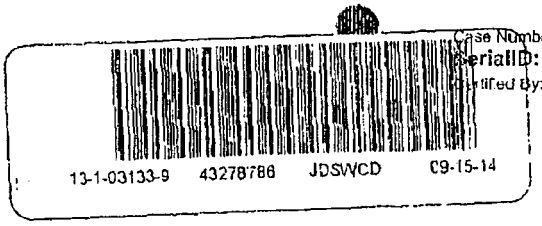

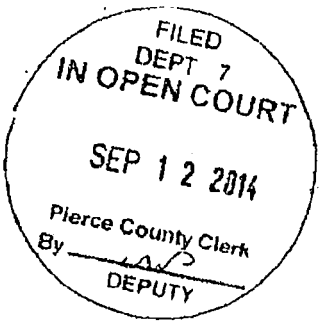

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DARRELL DARNEL BERRIAN, Defendant.	CAUSE NO: 13-1-03133-9 SEP 15 2014 WARRANT OF COMMITMENT 1) ☐ County Jail 2) ☒ Dept. of Corrections 3) ☐ Other Custody

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

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

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

☒ 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

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

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

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

Dated: 9.5.14

By direction of the Honorable

JUDGE
KEVIN STOCK JERRY T. COSTELLO

CLERK

By: Chris Hutton
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date SEP 15 2014 By Chris Hutton Deputy

FILED
DEPT 7
IN OPEN COURT
SEP 12 2014
Pierce County Clerk
By DEPUTY

STATE OF WASHINGTON
ss:
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this
_____ day of _____, _____.

KEVIN STOCK, Clerk
By:_____ Deputy

ajm

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400