

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2003 SEP -4 PM 2:45

NO. 62653-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BUSHAW,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY CANOVA

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

STEPHEN P. HOBBS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	2
	A. PROCEDURAL BACKGROUND	2
	B. FACTUAL BACKGROUND	2
III.	<u>ARGUMENT</u>	7
	A. THE "TO-CONVICT" INSTRUCTION WAS PROPER	7
	1. Factual background: "to-convict" instruction	8
	2. Legal standard: "to-convict" instructions	10
	3. The "to-convict" instruction was not defective	11
	4. Any error in the "to-convict" instruction was harmless	15
	B. BUSHAW'S RIGHT TO BE PRESENT AT TRIAL WAS NOT VIOLATED	18
	1. Factual background: right to be present	19
	2. Legal analysis: right to be present	20
	3. Any error in responding to the jury inquiry is harmless	24
	C. A " <u>GUNWALL</u> " ANALYSIS IS NOT REQUIRED	30

D.	THE RIGHT TO BE PRESENT AT TRIAL UNDER ARTICLE I, § 22 IS COEXTENSIVE WITH THE SIMILAR RIGHT UNDER THE UNITED STATES CONSTITUTION.....	31
1.	The language of the parallel provisions: Factors 1 and 2	31
2.	State constitutional and common law history: Factor 3	34
3.	Preexisting state law: Factor 4	34
4.	Structural differences between the federal and state constitutions: Factor 5	35
5.	Particular state interest or local concern: Factor 6.....	35
IV.	<u>CONCLUSION</u>	37

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	16
<u>Hegler v. Borg</u> , 50 F.3d 1472 (9th Cir. 1995)	24, 25
<u>Illinois v. Allen</u> , 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).....	20, 32
<u>Lewis v. United States</u> , 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892).....	32
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	15, 16
<u>Rice v. Wood</u> , 44 F.3d 1396 (9th Cir. 1995), <u>vacated in part</u> , 77 F.3d 1138 (9th Cir. 1996)	24, 30
<u>Rushen v. Spain</u> , 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).....	25
<u>Snyder v. Massachusetts</u> , 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934).....	20
<u>United States v. Ford</u> , 632 F.2d 1354 (9th Cir. 1980)	25
<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	20
<u>United States v. Williams</u> , 455 F.2d 361 (9th Cir. 1972)	21

Washington State:

In re Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 24, 30

In the Matter of the Personal Restraint of Lord,
123 Wn.2d 296, 868 P.2d 835,
clarified on other grounds,
123 Wn.2d 737 (1994)..... 21, 24, 30

Linbeck v. State, 1 Wash. 336,
25 P. 452 (1890)..... 28

State v. Beaudin, 76 Wash. 306,
136 P. 137 (1913)..... 28

State v. Brown, 29 Wn. App. 11,
627 P.2d 132 (1981)..... 23, 24, 30

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 16

State v. Caliguri, 99 Wn.2d 501,
664 P.2d 466 (1983)..... 25, 29

State v. Castro, 141 Wn. App. 485,
170 P.3d 78 (2007)..... 20

State v. Clausing, 147 Wn.2d 620,
56 P.3d 550 (2002)..... 10

State v. Davis, 119 Wn.2d 657,
835 P.2d 1039 (1992)..... 12, 13, 14

State v. DeRyke, 149 Wn.2d 906,
73 P.3d 1000 (2003)..... 10, 11, 16

State v. Elmi, 166 Wn.2d 209,
207 P.3d 439 (2009)..... 13

State v. Emmanuel, 42 Wn.2d 799,
259 P.2d 845 (1953)..... 11

<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	31, 33, 34, 35, 36
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	1, 30, 31, 35, 36
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000).....	14
<u>State v. Hochhalter</u> , 131 Wn. App. 506 (2006).....	16
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	12, 14
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	16
<u>State v. Jones</u> , 34 Wn. App. 848, 664 P.2d 12 (1983).....	12
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	23, 30
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	12
<u>State v. Lanciloti</u> , 165 Wn.2d 661, 201 P.3d 323 (2009).....	36
<u>State v. Langdon</u> , 42 Wn. App. 715, 713 P.2d 120 (1986).....	27
<u>State v. Maryott</u> , 6 Wn. App. 96, 492 P.2d 239 (1971).....	33
<u>State v. Mathews</u> , 60 Wn. App. 761, 807 P.2d 890 (1991).....	11
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	10, 11
<u>State v. Osborne</u> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	12, 14

<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	11
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988).....	25
<u>State v. Sample</u> , 52 Wn. App. 52, 757 P.2d 539 (1988).....	11
<u>State v. Saraceno</u> , 23 Wn. App. 473, 596 P.2d 297 (1979).....	25
<u>State v. Shouse</u> , 119 Wn. App. 793 (2004).....	16
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914).....	28
<u>State v. Smith</u> , 85 Wn.2d 840, 540 P.2d 424 (1975).....	25
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	11
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	34
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	13, 14
<u>State v. Wilson</u> , 141 Wn. App. 597, 171 P.3d 501 (2007).....	20

Other Jurisdictions:

<u>People v. Dokes</u> , 79 N.Y.2d 656, 595 N.E.2d 836 (1992).....	21
---	----

Constitutional Provisions

Federal:

U.S. Const. amend. VI	20, 33, 34
U.S. Const. amend. XIV	20

Washington State:

Const. art. I, § 22.....	1, 20, 31, 32, 33, 34, 36
--------------------------	---------------------------

Statutes

Washington State:

RCW 9A.36.031	8
---------------------	---

Rules and Regulations

Washington State:

CrR 3.4.....	20, 32
CrR 6.15.....	22

Other Authorities

4A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE CRR 3.4 (6th ed. 2002).....	32
WPIC 10.01.....	9
WPIC 35.23.02.....	9
WPIC 35.50.....	9

I. ISSUES PRESENTED

1. Was the “to-convict” instruction for assault in the third degree proper?
 - a. Is “intent” an essential element of the crime of assault in the third degree?
 - b. Did the trial court properly include the term “intentionally” in the definition of assault, not in the “to-convict” instruction?
 - c. Assuming *arguendo* there was instructional error, was it harmless?
2. Was Bushaw’s right to be present at trial violated?
 - a. Was the trial court’s brief discussion with counsel concerning a written jury inquiry a “critical stage” of the proceedings that required Bushaw’s presence?
 - b. Assuming *arguendo* that Bushaw should have been present, was the error harmless?
3. Is a Gunwall analysis as to the scope of article I, § 22 required?
4. In conducting a Gunwall analysis, does article I, § 22 provide greater protection than the federal constitution?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Richard Bushaw was charged by amended information with two counts of assault in the third degree (the victims being two different law enforcement officers) and one count of possession of methamphetamine. CP 6-7. He was convicted of one count of assault in the first degree (Count I, Ofc. John Smith) after a jury trial. CP 105-06. The jury was unable to reach a verdict on the second assault count and acquitted Bushaw on the possession charge. CP 105; 4RP 131.¹ Bushaw received a standard range sentence pursuant to the Drug Offender Sentencing Alternative. CP 71-80. He has filed a timely appeal. CP 81-92.

B. FACTUAL BACKGROUND.²

Around noon on May 6, 2008, Seattle Police Department Officer John Smith was patrolling in the Wallingford neighborhood

¹ The State will refer to the Verbatim Report of Proceedings as follows:

1RP September 22, 2008 (Pre-Trial Proceedings)
2RP September 23, 2008 (Trial Proceedings)
3RP September 24, 2008 (Trial Proceedings)
4RP September 25 & 26, 2008 (Trial Proceedings)
5RP October 10 & November 21, 2008 (Motion to Continue & Sentencing)

A letter from the Washington Appellate Project dated July 15, 2009, incorrectly states that the report of proceedings consists of seven volumes. There are no transcripts in this matter from the dates of May 27 or May 28/June 13, 2009.

² Because there was no conviction on Counts II and III, the testimony concerning these charges will not be emphasized in this factual summary.

of Seattle, near Interstate 5 at Northeast 47th Street. 2RP 9-11.

Ofc. Smith saw Richard Bushaw climbing through a gap in a chain-link fence which separated the street from the freeway.

2RP 12-13. Also with Bushaw was his wife, Shelley Bushaw.

2RP 15.

Ofc. Smith briefly activated his siren and called out to Bushaw to stop. 2RP 14-15. It was not his intent to arrest Bushaw, but simply to find out if he had a legitimate reason for going through the fence and potentially onto the freeway. 2RP 15. In response to the officer's command, Shelley stopped, but Bushaw continued to climb through the fence. 2RP 15. Ofc. Smith got out of his patrol car and again told Bushaw to stop. 2RP 15-16.

Once through the fence, Bushaw crouched down behind an electrical box with his back to the officer. Ofc. Smith concluded that Bushaw might be trying to hide something. 2RP 15-17. When Ofc. Smith continued to tell Bushaw to come back, Bushaw became verbally aggressive and began swearing at the officer. 2RP 17-19. Shelley remained standing near the fence. 2RP 18.

Ofc. Smith again told Bushaw to come back through the fence and Bushaw slowly did so. Bushaw was angry and yelling.

2RP 19-20. The officer was concerned that Bushaw may have hidden weapons or narcotics behind the fence. 2RP 19.

Ofc. Smith told Bushaw to stand by a guard rail with his hands on it. 2RP 20-21. Because Bushaw repeatedly took his hands off the guard rail, the officer had him place his hands on the patrol car. 2RP 24-25. The officer then went through the gap in the fence to see if Bushaw had dropped anything behind the electrical box. Looking back, the officer saw that Bushaw had taken his hands off the patrol car and had turned to face the fence.

2RP 24-25. Officer Smith told Bushaw to put his hands back on the patrol car. He did so, but continued to yell and scream. 2RP 26.

A moment later, Bushaw again removed his hands from the car and faced the officer. 2RP 26.

The officer went back out through the fence and patted Bushaw down for weapons. 2RP 27. He felt a hard object in Bushaw's pocket, which Bushaw said was a Leatherman tool, but to the officer felt like it might be a small gun. Removing the object, the officer discovered that it was two Leatherman tools in a case attached together in the shape of an "L." 2RP 26-30. The Leatherman tools included knives, bottle openers, and screwdrivers. 2RP 31.

Ofc. Smith decided to handcuff Bushaw for safety reasons and told him that he was going to do so. 2RP 31. As the officer began to bring Bushaw's arms behind his back, Bushaw started "stiffening" and resisting." 2RP 31. Bushaw pulled his arms forward and the officer was forced to grab onto his (Bushaw's) hands as Bushaw pulled away from the patrol vehicle. 2RP 32.

About ten feet away from the vehicle, Bushaw reached back with his left hand and grabbed the officer's gun belt on the left side. 2RP 32-33. At this point, Ofc. Smith decided to take Bushaw to the ground. 2RP 33. He was concerned because Bushaw appeared exceptionally strong and believed that he would be better able to control Bushaw on the ground. 2RP 34. After several tries, the officer managed to sweep Bushaw's legs out from under him and they both fell to the street. As they struggled on the ground, Ofc. Smith tried to control Bushaw's hands. Bushaw would break free and forcefully grab the officer's hands and wrists. 2RP 33, 36.

Ofc. Smith was also trying to get on top of Bushaw. At times the officer was on his knees at other times on his back. 2RP 37. Bushaw would bring his legs forward and try and get away from the officer. During a pause in the fight, Ofc. Smith tried to tell Bushaw

to relax and calm down, but Bushaw said “he had mental problems and didn’t do shit” and the struggle resumed. 2RP 37.

This struggle continued for approximately two minutes. 2RP 33-35. Eventually, SPD Officer White arrived and assisted Ofc. Smith in restraining Bushaw. 3RP 82-83. Even this took a while because Bushaw was very strong. 2RP 38. While trying to control Bushaw, Ofc. White repeatedly yelled, “Stop resisting.” 3RP 86-87. Bushaw did not do so. Ofc. White also observed that Bushaw appeared very strong. 3RP 88-89. Eventually, Ofc. White obtained a wrist lock which allowed Ofc. Smith to handcuff Bushaw. 2RP 38; 3RP 85-86.

At one point – after Ofc. White arrived but while the struggle continued – Bushaw yelled back to his wife, “Go get it honey, please go get it” or words to that effect. 2RP 38; 3RP 88-89. Shelley Bushaw started backing up toward the gap in the fence, but stopped when ordered to do so by Ofc. White. 2RP 38-39; 3RP 89.

After Bushaw was subdued – and after Ofc. Smith had been treated by medical response for the minor injustices (scrapes) he had suffered – the officer searched the area behind the fence and electrical box. He discovered a syringe with an unknown fluid in it and small bag of crystal methamphetamine. 2RP 49-51; CP 38.

Shelley Bushaw testified for the defense and confirmed that the officer and her husband had struggled after Bushaw refused to keep his hands on the patrol car. 5RP 6. She stated that Bushaw held his hands so he couldn't be handcuffed and was demanding to know why he was being arrested. 5RP 6-7. Shelley testified that Bushaw and the officer struggled on the ground until other officers arrived and Bushaw was handcuffed. 5RP 7-9; 12-20.

Richard Bushaw testified in his own defense. He admitted that the officer asked him to place his hands on the patrol car and that he did not do so. 5RP 28-29. He stated he was confused as to why he was being detained. He admitted that he stiffened up when the officer tried to handcuff him and that there had been a brief struggle on the ground before he was handcuffed. 5RP 29. At the same time, Bushaw denied touching the officer while they were on the ground. 5RP 39-40.

III. ARGUMENT

A. THE "TO-CONVICT" INSTRUCTION WAS PROPER.

Bushaw argues that the assault in the third degree "to-convict" instruction was defective because it did not state that, in order to find him guilty, the jury had to find that he "intentionally" assaulted a law enforcement officer. This argument is without

merit. The “to-convict” instruction – which mirrors the approved Washington Pattern Jury Instruction (“WPIC”) – correctly stated the elements of the crime of assault in the third degree.

1. Factual background: “to-convict” instruction.

Assault in the Third Degree, when the victim is a law enforcement officer, is defined by statute as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

...

RCW 9A.36.031(g). No definition of assault is included in the statutory scheme, nor is “intent” listed as a separate element of the crime of assault.

The “to-convict” instruction on Count I in this case stated:

To convict the defendant of the crime of assault in the third degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 6, 2008, the defendant assaulted John D. Smith;
- (2) That at the time of the assault, John D. Smith was a law enforcement officer or other employee of a

law enforcement agency who was performing his official duties; and

- (3) That any of these acts occurred in the State of Washington.

...

CP 49 (Jury Instruction 7). This instruction mirrors the Washington Pattern Jury Instruction (“WPIC”). See WPIC 35.23.02.

The definition of the term “assault” was provided in Jury Instruction 9, which stated:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

CP 51 (Jury Instruction 9). This instruction mirrors the relevant portions of the WPIC definition of assault. See WPIC 35.50.

The term “intentionally” was defined in Jury Instruction 10.

CP 52. This instruction is identical to the WPIC definition. WPIC 10.01.

At trial, Bushaw proposed that the word “intentionally” be inserted in the “to-convict” instruction before the word “assault.”

3RP 145; 4RP 58. The trial court rejected this suggestion, stating:

The definition of assault that’s going to be given includes the intentional aspect of touching or striking. It is therefore redundant to include it as part of the

to-convict as Element No. 1 and. . . I won't be including it.

3RP 145. The trial court also rejected Bushaw's argument that because the word "intentionally" was included in the charging document it must also be included in the "to-convict" instruction:

While it may have been included in the language of the charging document, it is in the charging document as well redundant since the definition itself includes the requirement that the touching or striking be intentional, and intentional is defined further in a separate instruction.

The jury is instructed to consider all of the instructions and read them as a whole in deciding what the law is that they have to apply to the facts that they determine to have been proven or not proven.

3RP 146.

2. Legal standard: "to-convict" instructions.

The adequacy of a challenged "to-convict" jury instruction is reviewed *de novo*. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). As a general matter, "[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). Jury instructions are to be reviewed "in the

context of the instructions as a whole.” State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); Mills, 154 Wn.2d at 7.

Generally, the “to-convict” instruction must contain all elements essential to the conviction. Mills, 154 Wn.2d at 7; State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The reviewing court generally “may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” DeRyke, 149 Wn.2d at 910, 73 P.3d 1000; Mills, 154 Wn.2d at 7. However, other pertinent law – including definitions of terms – may be included in other jury instructions. Mills, 154 Wn.2d at 7.

3. The “to-convict” instruction was not defective.

The “to-convict” instruction in this case was not missing an essential element of the crime of assault in the third degree. “Intent” is not a separate *essential* element of the crime of assault; rather, it is implicit in the definition of the term assault itself. Accordingly, the trial court properly found that it was not necessary to include the term “intentionally” in the “to-convict” instruction.

Under the common law, an assault is an intentional act. State v. Mathews, 60 Wn. App. 761, 766-67, 807 P.2d 890 (1991); State v. Sample, 52 Wn. App. 52, 757 P.2d 539 (1988); State v.

Jones, 34 Wn. App. 848, 664 P.2d 12 (1983). That is, an allegation of assault contemplates knowing, purposeful conduct. State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992).

The Washington Supreme Court, however, has repeatedly rejected the suggestion that “intent” is a separate *essential* element of assault. See, e.g., State v. Davis, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992) (discussing intent and assault in the fourth degree); State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992) (discussing “knowingly” and assault in the second degree); State v. Osborne, 102 Wn.2d 87, 94, 684 P.2d 683 (1984) (discussing “knowingly” and assault in the second degree).

These cases all discussed whether “intent” or “knowledge” needed to be included in the charging document, which must contain all the essential elements of the crime.³ The Court unequivocally stated that these terms are not separate essential elements because inherent in the term “assault” is the concept of “intent” and “knowledge.” Summarizing its holding that the term

³ “All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

“intent” did not have to be included in the charging document, the Court in Davis stated:

[T]his court determined that assault is a *willful* act. . . .

Additionally, “language alleging assault contemplates *knowing, purposeful* conduct.” . . . Also, ““assault” is *not* commonly understood as referring to an *unknowing or accidental* act.”. . . . Furthermore, “‘assault’ includes the element of *intent*.”. . . .

Therefore, assault conveys the intent element for fourth degree assault, just as it conveys the “knowingly” element of second degree assault. All of the essential elements of fourth degree assault are, therefore, present in the charging document.

State v. Davis, 119 Wn.2d at 663 (citations omitted, emphasis in the original).

The Supreme Court recently upheld this conclusion when analyzing whether the common law definition of assault creates alternative means of committing the crime of assault. In rejecting this suggestion, the Court reaffirmed the holding in Davis:

[L]ike the definitions of great bodily harm, the *common law definitions of assault*, which we determined in State v. Davis. . . *do not constitute essential elements of the crime, are merely descriptive of a term, “assault,”* that constitutes an element of the crime of second degree assault.

State v. Smith, 159 Wn.2d 778, 788, 154 P.3d 873 (2007) (citation omitted, emphasis added); see also State v. Elmi, 166 Wn.2d 209, 216, 207 P.3d 439 (2009), citing Smith, 159 Wn.2d at 785-86

("[T]his court has held that the common law definitions of the term "assault" are merely descriptive and do not create alternative means of committing the crime of assault.").

In this case, Bushaw makes no reference to the controlling cases of Davis, Hopper, Osborne, or Smith. Bushaw's claim must be rejected because it is well-settled that "intent" is not a separate essential element of assault. As such, it need not be included in the charging document or the "to-convict" instruction.

Perhaps because this point is well-established, there have been few cases on appeal in which an appellant has argued that it is error not to include the term "intentionally" in an assault "to-convict" instruction. When this issue has been raised, it has been rejected. See State v. Hall, 104 Wn. App. 56, 63, 14 P.3d 884 (2000).

Finally, the trial court was exactly right when it stated that the use of the term "intentionally" in either the "to-convict" instruction or the charging document was redundant. 3RP 146. This is because the term "intentionally" is included in the jury instruction defining "assault." To include the term "intentionally" in the "to-convict" instruction, and reading this instruction together with the definition of assault, would be the equivalent of stating: "To convict the

defendant of the crime of assault, you must find beyond a reasonable doubt that he “intentionally intentionally touched or struck another person.” The double reference to “intentionally” would render the instruction unclear and only confuse the jury.

4. Any error in the “to-convict” instruction was harmless.

Because the “to-convict” instruction correctly stated the law, and included all of the essential elements of the crime, there is no need to engage in a harmless error analysis. The following argument is presented simply for the sake of completeness.

First, Bushaw is wrong when he initially states that a missing element in the “to-convict” instruction is never subject to harmless error analysis. Harmless error analysis in this context has been specifically approved by the United States Supreme Court. See Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (“an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”).

The test to be applied for determining constitutional error is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Neder,

527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Neder, 527 U.S. at 18.

The Washington Supreme Court adopted the Neder harmless error test for evaluating instructional error in State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); see also State v. DeRyke, 149 Wn.2d 906 (2003); State v. Hochhalter, 131 Wn. App. 506 (2006); State v. Shouse, 119 Wn. App. 793 (2004).

Here, any error in omitting the term “intentionally” from the “to-convict” instruction was clearly harmless. The definition of the term “assault” made clear that the striking or touching had to be intentional. CP 51. The term intentional was properly defined for the jury. CP 52. The jury is presumed to have understood and followed all of these instructions, which properly stated the law. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Moreover, in this case, it is not necessary to presume that the jury was aware that assault requires intent; there is direct evidence that they were actively considering this language. In an inquiry to the trial court during its deliberations, the jury asked:

“Can ‘intent’ be resisting pulling away or does it have to be grabbing/hitting/ touching? ‘Offensive’ – is offensive forcible resisting?” CP 58. Without doubt, the jury was focusing on the intent instruction.

Moreover, the jury hung on Count II, which involved an almost identical charge of assault in the third degree against a second officer. This suggests that the jury was applying the definition of assault and making the factual determination that the State had proved beyond a reasonable doubt that one officer had been intentionally assaulted but that the State had failed to meet this burden as to the second officer.

Finally, the evidence overwhelmingly supports the conclusion that Bushaw intentionally assaulted a law enforcement officer. Ofc. Smith testified about Bushaw’s resistance to being handcuffed, the fact that Bushaw grabbed his belt, Bushaw’s strength, the struggle on the ground, the fact that Bushaw was trying to and did grab the officer’s hands and that Bushaw refused to cease struggling. Bushaw’s wife testified and confirmed that the struggle occurred. Ofc. White, arriving on the scene, testified that he saw Ofc. Smith and Bushaw struggling on the ground, that Bushaw would not comply with repeated commands to stop

resisting, and that he was forced to use a wrist lock to subdue Bushaw. Lastly, Bushaw himself admitted that he refused to keep his hands on the patrol car, that he refused to let himself be handcuffed, and that Ofc. White and he struggled on the ground (although he claimed that he did “not touch” the officer).

In these circumstances, the uncontroverted evidence establishes beyond a reasonable doubt that Bushaw intentionally assaulted Ofc. Smith and any error in not including the word “intentionally” in the “to-convict” instruction is harmless.

B. BUSHAW’S RIGHT TO BE PRESENT AT TRIAL WAS NOT VIOLATED.

Bushaw argues that his constitutional right to be present at trial was violated when the trial court responded to a written jury inquiry outside his presence. This argument fails because, even if Bushaw was not present, the court discussed the matter with counsel and provided a written response to the inquiry. Because the inquiry presented a purely legal issue, Bushaw’s presence during the court’s brief discussion with counsel was not required. Assuming Bushaw’s presence was required, defense counsel was present to protect his interests and any error was harmless.

1. Factual background: right to be present.

The jury began deliberations at the end of the day on September 25, 2008. 4RP 126. The next day, at 9:55 a.m., the jury submitted two written questions to the trial court:

1. Can we share personal experiences re: people outside of this case that may add knowledge to this case.
2. Can “intent” be resisting/pulling away or does it have to be grabbing/hitting/touching” Offensive – is offensive forceful resisting?

CP 58.

The trial court – “after affording all counsel/parties opportunity to be heard” – responded in writing. CP 59, 105. The trial court’s response stated:

1. No, you must only consider the evidence presented and the instruction as to the law.
2. It is not possible to further define “intent” or “offensive” beyond what is already provided in your instructions. Please re-read the instructions.

CP 59. The court’s response was returned to the jury at 10:04 a.m.

CP 59. The morning session in which the response to the jury inquiry was considered was not reported in the record. 4RP 131.

The record is clear that Bushaw was not in custody during the trial. Bushaw posted bond well before trial commenced.

CP ____ (Sub. 7). The omnibus order indicates that he was out-of-

custody. CP ____ (Sub. 19). Bushaw was ultimately remanded into custody at sentencing. 5RP 33; CP ____ (Sub. 45). The record is not clear whether Bushaw was present during the trial court's discussion with counsel about the jury inquiry.

2. Legal analysis: right to be present.

Defendants have a right under the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and article I, § 22 of the Washington constitution, to be present during all critical stages of trial.⁴ Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Wilson, 141 Wn. App. 597, 603-04, 171 P.3d 501 (2007); CrR 3.4. The core of the constitutional right is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . .'" Gagnon, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

⁴ Constitutional questions are reviewed *de novo*. State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

But a defendant does not have the right to be present if legal matters are at issue rather than the resolution of facts. In the Matter of the Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, clarified on other grounds, 123 Wn.2d 737 (1994). Thus, the defendant has no right to be present during in-chambers or bench conferences between the court and counsel on legal matters where those matters do not require a resolution of disputed facts. See, e.g., In re Lord, 123 Wn.2d 306-07; United States v. Williams, 455 F.2d 361 (9th Cir. 1972); People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836 (1992).

The brief discussion between the trial court and counsel to discuss the jury inquiry is akin to a bench conference on a legal matter. There was no resolution of disputed facts (and, of course, testimony was not being presented nor were jury instructions being read to the jury). Pursuant to Lord, the defendant's presence at such conference is not required. Lord, 123 Wn.2d at 306-07. This conference was not a "critical stage" of the trial.

That responding to a jury inquiry is not a critical stage of a criminal trial can be seen from the criminal rules, which explicitly allow a judge to respond to such an inquiry after providing the

parties (not the defendant) with an opportunity to respond.

CrR 6.15 states:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. *The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.* Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. *The court shall respond to all questions from a deliberating jury in open court or in writing.*

CrR 6.15(1) (emphasis added). The structure of this rule makes it clear that a judge may receive a written jury inquiry, notify the parties of its content – perhaps by telephone – and then, after providing the parties an opportunity to comment, provide a written response. This can be accomplished without the jury being present and, so long as defense counsel has been notified, outside of the defendant's presence.⁵ The general procedure set forth in CrR 6.15 – that is, responding to a jury question after notice has been provided to the parties – has been approved by the courts.

⁵ As a practical matter, this procedure makes eminent sense. Delaying deliberations while the parties are contacted and make their way to court, only to confirm that the jury needs to reread the instructions provides no systemic benefit and would only result in unneeded delay and expense. This burden would only increase if the defendant's presence was required as well. Of course, in some situations a jury inquiry might raise issues that would require the defendant's presence.

See State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302 (1978);
State v. Brown, 29 Wn. App. 11, 16, 627 P.2d 132 (1981).

This was the exact procedure followed here. The jury made a written inquiry. There is no allegation on appeal that the trial court failed to provide notice to the parties.⁶ Nor is there an allegation that the court failed to give the parties an opportunity to comment. The court then provided a written response to the jury inquiry. This is precisely equivalent to the trial court ruling on an evidentiary issue at a bench conference outside the defendant's presence.

The facts of this case are essentially identical to State v. Brown, *supra*. In Brown, the jury submitted a question to the trial court and both the deputy prosecutor and the defense counsel were present to discuss possible answers. Brown himself was not present. After considering all of the suggested answers, the trial judge answered the question in writing in a manner defense counsel objected to. Brown asserted that he had a right to be present during the consideration of the jury's question, arguing that he could have aided counsel by suggesting additional arguments

⁶ The record is unclear as to whether this communication occurred by telephone or in court.

against the judge's response. The Court of Appeals held that defense counsel's presence protected Brown's interests and that the trial court did not err in answering the jury's question in Brown's absence. Brown, 29 Wn. App. at 15-16.

In sum, the defendant's presence at the brief discussion of how to respond to the jury inquiry does not bear "a reasonably substantial relation to the fullness of his opportunity to defend against the charge." Rather, it is akin to a sidebar to discuss a legal issue. The trial court did not err in answering the jury's question in Bushaw's absence.

3. Any error in responding to the jury inquiry is harmless.

Assuming *arguendo* that the trial court erred in not having Bushaw present while the jury inquiry was discussed, the error was harmless. The denial of a defendant's right to be present during criminal proceedings is a "trial error" (as opposed to a "structural" error) and is therefore subject to harmless error analysis. In re Lord, 123 Wn.2d at 306-07; In re Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); Rice v. Wood, 44 F.3d 1396, 1441 (9th Cir. 1995), vacated in part, 77 F.3d 1138 (9th Cir. 1996); accord Hegler v.

Borg, 50 F.3d 1472, 1476 (9th Cir. 1995); Rushen v. Spain, 464 U.S. 114, 117-18, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983)).

Error requires reversal only if it is prejudicial. Prejudice to the defendant who alleges that his right to be present was violated will not simply be presumed. Rushen v. Spain, 464 U.S. 114, 117-20, 104 S. Ct. 453, 455-56, 78 L. Ed. 2d 267 (1983); see also State v. Rice, 110 Wn.2d 577, 615 n. 21, 757 P.2d 889 (1988). The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475-76, 596 P.2d 297 (1979). Nonetheless, the defendant must first raise at least the possibility of prejudice. See, e.g., United States v. Ford, 632 F.2d 1354, 1379 n. 28 (9th Cir. 1980); State v. Smith, 85 Wn.2d 840, 853, 540 P.2d 424 (1975); State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983).

There was no prejudice here because the written answers provided by the court were correct. Most basically, they simply referred the jurors back to the original jury instructions. That is certainly the case with the second answer (“It is not possible to further define ‘intent’ or ‘offensive’ beyond what is already provided in your instructions. Please re-read the instructions.”). On appeal, Bushaw does not appear to assign any error to this response.

Instead, Bushaw argues that this first response incorrectly instructed the jurors that they could not consider their prior personal experiences. But this is not what the jury actually asked. The jury asked: "Can we share personal experiences re: *people outside of this case* that may add knowledge to this case." CP 58 (emphasis added). That suggests the jurors wanted to consider and discuss opinions of individuals who had not testified at trial.⁷

The trial court correctly responded: "No, you must only consider the evidence presented and the instruction as to the law." This answer mirrors the language contained in the first sentences of Jury Instruction 1, which stated: "It is your duty to decide the facts in this case based upon the evidence presented at trial. It is also your duty to accept the law from my instructions. . . ." and that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses and the exhibits I have admitted during trial." CP 40. The trial court's response to the jury inquiry simply reflects this fundamental principle and was not error.

⁷ One can only speculate what individuals the jury had in mind: mental health experts? law enforcement officers? drug users?

Thus, this case is similar to State v. Langdon, 42 Wn. App. 715, 713 P.2d 120 (1986). In Langdon, the court instructed the jury on the elements of first and second degree robbery, as well as accomplice liability and theft. The jury sent a note to the judge asking, "Does 'committing' mean aid in escaping?" The judge replied, without consulting with the parties, "You are bound by those instructions already given to you." Langdon, 42 Wn. App. at 717, 713 P.2d 120. Langdon contended this communication violated his right to be present at all stages of the proceedings. The appellate court disagreed and found any error was harmless because the communication was neutral and simply referred the jury back to the previous instructions. Langdon, 42 Wn. App. at 717-18. Similarly, the court in the present case – after consulting with counsel – referred the jury back to the previous instructions. As such, the error was harmless.

In addition, Bushaw's interests were protected by the presence of his attorney during the court's consultation with the parties. Significantly, Bushaw's attorney did not object to the trial court's written response and Bushaw does not assert that the attorney was ineffective for failing to do so.

The key cases relied upon by Bushaw are distinguishable. The presence of Bushaw's attorney distinguishes this case from those prior cases in which the court has found prejudice from the fact that the defendant was not present when the court responded to a jury inquiry. See, e.g., State v. Shutzler, 82 Wash. 365, 144 P. 284 (1914) (prejudice found when court gave jury additional instructions without notice to defendant or his attorneys).

Moreover, in Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890), the trial court not only reread instructions to the jury, *but explained them*, without the defendant being present. Id. That error – expanding on the jury instructions outside the presence of the defendant – did not occur in the present case. Note also that in Linbeck the Court also reversed for failure to give a cautionary instruction concerning the defendant's right not to testify and there were "other errors are founded upon the manner in which the instructions were given." Id.

In State v. Beaudin, 76 Wash. 306, 308-09, 136 P. 137 (1913), the court responded to a jury question by preparing and reading in open court new instructions without the defendant being present. This was held to be error, but significantly the Court emphasized that under the facts of that case there was no way for

the defendant to know what the trial court had actually said to the jury: “Appellant does not personally know that the instruction given in his presence was the identical one given in his absence, and he cannot be compelled to accept the certificate of the trial judge as to what transpired at the trial during his absence.” Id. at 309. This problem does not occur when, as in the present case, the court responds to the jury’s question in writing.

In any event, as discussed above, the courts have more recently recognized that “right to be present” error may be harmless. Indeed, harmless error has been found in situations potentially more serious than the present case. See, e.g., State v. Caliguri, 99 Wash.2d 501, 505, 664 P.2d 466 (1983) (error harmless when court played back tapes for the jury, without defense counsel or the defendant present, and despite the fact that certain portions of the tapes had been previously excluded). Any error in not consulting with Bushaw before providing a written response to the jury inquiry – a response that was made after consulting with defense counsel and simply referred the jurors back to their original instructions – is harmless.

C. A “GUNWALL” ANALYSIS IS NOT REQUIRED.

The State respectfully submits that because any error in providing a written response to the jury inquiry was harmless beyond a reasonable doubt, it is unnecessary to conduct a Gunwall⁸ analysis to determine whether the state constitution provides greater protection than the federal constitution in this context. Moreover, Bushaw never makes clear what “greater protection” he is seeking under the Washington constitution. If Bushaw is requesting the adoption of a “no harmless error” rule that argument has already been rejected. In re Lord, 123 Wn.2d at 306-07; In re Benn, 134 Wn.2d at 921; Rice v. Wood, 44 F.3d at 1441 (9th Cir.1995). Likewise, if Bushaw is suggesting that a defendant must always be present whenever the trial court is considering a jury inquiry, that claim has also been rejected. See, e.g., State v. Jury, 19 Wn. App. 256, 270, 576 P.2d 1302 (1978); State v. Brown, 29 Wn. App. 11, 16, 627 P.2d 132 (1981). For the sake of completeness, however, the State responds to Bushaw’s “Gunwall” analysis in the following section.

⁸ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

D. THE RIGHT TO BE PRESENT AT TRIAL UNDER ARTICLE I, § 22 IS COEXTENSIVE WITH THE SIMILAR RIGHT UNDER THE UNITED STATES CONSTITUTION.

In determining whether the Washington constitution offers greater protection than the federal constitution, courts consider the “Gunwall” factors: (1) the textual language of the state constitution; (2) significant differences in the texts of the parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the subject matter of the constitutional provision presents a matter of particular state interest or local concern. See State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986); see also State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

Applying these factors demonstrates that article I, § 22 of the Washington Constitution does not offer greater protection of a defendant’s right to be present at trial than does the federal constitution.

**1. The language of the parallel provisions:
Factors 1 and 2.**

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

with the witnesses against him. . . .” Article I, § 22, provides similar protection: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” The language of the federal and state provisions is not exactly the same. However, the language of the federal constitution has been interpreted to mean that a defendant has the right to be present at all critical stages of the trial.

While the federal provision does not explicitly guarantee the “right to appear,” the right of a defendant to “confront” witnesses at a public trial necessarily implies the right to be present at trial. Indeed, the United States Supreme Court has long interpreted the protections of the Confrontation Clause to include a defendant’s right to be present at every stage of the trial proceedings. See, e.g., Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”).

Washington law is in accord. See, e.g., 4A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE CRR 3.4, at 237 (6th ed. 2002) (Author’s Comments) (criminal defendant’s right under Wash.

Const. Art. I, § 22 to appear and defend in person is “a basic right, derived from the common law and guaranteed by the confrontation clause of the Sixth Amendment”); State v. Maryott, 6 Wn. App. 96, 102-03, 492 P.2d 239 (1971) (accused’s fundamental right to be present at his trial and to confront witnesses against him derives from common law, and is guaranteed by the Sixth Amendment and Wash. Const. Art. I, § 22).

Thus, the Washington Supreme Court has found no significant differences between these two provisions:

Although the language of the Sixth Amendment and this state’s confrontation clause is not word-for-word identical, the meaning of the words used in the parallel clauses is substantially the same. . . . Additionally, the United States Supreme Court has consistently interpreted the language of the Confrontation Clause to mean “face-to-face” confrontation. . . .

We find no significant difference between the language used in the parallel provisions of the state and federal confrontation clauses.

State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998)

(citations omitted). While the language of the federal and state

provisions is different, they have been interpreted consistently.

These factors do not support an independent state analysis.⁹

**2. State constitutional and common law history:
Factor 3.**

As Bushaw concedes, there is no relevant evidence of the framers' intent in crafting the language of article I, § 22. See App. Brief at 24-25; see also Foster, 135 Wn.2d at 461 (review of the limited history of state confrontation clause does not reveal an intent on the part of the drafters to create a broader right than that stated in the Sixth Amendment).

3. Preexisting state law: Factor 4.

To determine the scope of a right under the Washington Constitution, courts look to Washington law in existence in 1889, at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 151, 153, 75 P.3d 934 (2003). As Bushaw points out, Washington law has long protected a defendant's right to be present at his trial. See App. Brief at 25-26. The State does not dispute this. As discussed above, however, the early cases present slightly different factual scenarios. Specifically, they

⁹ Even if this court were to determine that the state provision is significantly distinctive, that fact alone would be insufficient to support independent state interpretation. Foster, 135 Wn.2d at 459.

appear to involve circumstances in which the court is providing additional (and new) instructions to the jury outside the defendants' presence. See supra, p. 28. Moreover, in the other early case relied upon by Bushaw, the court explained the meaning of the instructions to the jury outside the defendant's presence. See supra, p. 29. The State does not disagree that these scenarios are improper under both the federal and state constitutions. But Bushaw can point to no case that involves the precise scenario here and the early case law provides no specific assistance in evaluating the scope of the Washington constitution.

4. Structural differences between the federal and state constitutions: Factor 5.

The United States Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 66; Foster, 135 Wn.2d at 458-59. This difference in structure supports an independent state constitutional analysis in every case. Id.

5. Particular state interest or local concern: Factor 6.

This factor requires the court to determine whether the right at issue is a matter of such "singular" state interest or local concern that the Washington constitutional provision should be interpreted

independently of its federal counterpart. Foster, 135 Wn.2d at 461. Bushaw does not cite any cases that bear directly on the question of whether the right to be present, or even the right to voir dire, is a particularly local concern.¹⁰

The Washington Supreme Court, analyzing a different aspect of article I, § 22, found that “[t]he concern of this state in the fundamental right of an accused to confront witnesses against him or her, in the context of child victim testimony, is not unique to the State of Washington.” Foster, 135 Wn.2d at 465. The Court concluded that, because “Washington’s interest in the protection of a defendant’s confrontation right in this context is comparable to the national interest in this same right,” this Gunwall factor did not support independent state constitutional analysis. Id.

Similarly, there is no basis to conclude that Washington’s interest in protecting a defendant’s right to be present during a jury inquiry (or a side bar to respond to a jury inquiry) is somehow different from the national interest in protecting that same right.

¹⁰ Bushaw’s reliance on State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009), is not on point. Lanciloti addressed a different provision of art. I, § 22:

The Washington constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial *by an impartial jury of the county in which the offense is charged to have been committed.*” CONST. art. I, § 22. . . .

Id. at 667 (emphasis added).

This factor does not support independent state constitutional analysis.

In sum, there is no support in Washington law for an independent state analysis of a defendant's right to be present during a brief discussion of a jury inquiry.

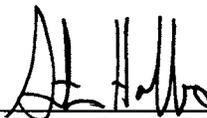
IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully requests that Bushaw's conviction for assault in the third degree be affirmed.

DATED this 4th day of September, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to NANCY COLLINS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. RICHARD BUSHAW, Cause No. 62653-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

9/4/09

Date