

**NO. 64734-2-I**

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

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**STATE OF WASHINGTON  
Respondent,**

**v.**

**WILLIS CHAD MOORE**

**Appellant.**

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

**The Honorable David Needy, Judge**

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**RESPONDENT'S BRIEF**

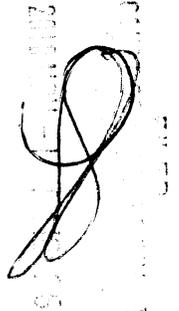
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**ORIGINAL**

A handwritten signature in black ink, appearing to be "Melissa W. Sullivan", is written over a faint, vertically oriented stamp that reads "RECEIVED".

## TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT .....	3
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
III. STATEMENT OF THE CASE .....	5
1. STATEMENT OF PROCEDURAL HISTORY .....	5
2. STATEMENT OF FACTS .....	6
IV. ARGUMENT .....	12
V. CONCLUSION .....	25

## TABLE OF AUTHORITIES

### Page

#### WASHINGTON STATE CASES

<i>State v. Byrd</i> , 30 Wn. App. 794, 638 P.2d 601 (1981).....	13
<i>State v. Casbeer</i> , 48 Wn. App. 539, 740 P.2d 335 (1987).....	18, 19
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850, 855 (1990).....	18
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	22
<i>State v. Dhaliwal</i> , 113 Wn. App. 226, 53 P.3d 65 (2002).....	12, 14
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	21
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	18
<i>State v. James</i> , 48 Wn. App. 353, 739 P.2d 1161 (1987).....	12
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993). ....	18
<i>State v. Lingo</i> , 32 Wn. App. 638, 649 P.2d 130 (1982).....	14
<i>State v. Martinez</i> , 53 Wn. App. 709, 770 P.2d 646 (1989).....	12
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	21
<i>State v. Regan</i> , 143 Wn. App. 419 177 P.3d 783 (2008).....	11, 12, 15
<i>State v. Robinson</i> , 79 Wn. App. 386, 902 P.2d 652 (1995) .....	13, 14
<i>State v. Rosborough</i> , 62 Wn. App. 341, 814 P.2d 679 (1991).....	12
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	18, 21, 22
<i>State v. Shilling</i> , 77 Wn. App. 166, 889 P.2d 948 (1995).....	22

<i>State v. Skenandore</i> , 99 Wn. App. 494, 994 P.2d 291 (2000).....	23
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254 (1980).....	22
<i>State v. Tjeerdsma</i> , 104 Wn. App. 878, 17 P.3d 678, 680 (2001)....	14
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	18

**FEDERAL CASES**

<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).....	12,13
<i>Glasser v. United States</i> , 315 U.S. 60, 75, 62 S.Ct. 457, 86 L.Ed. 680 (1942).....	14
<i>Michens v. Taylor</i> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984).....	11, 13

**RULES, STATUTES, OTHER AUTHORITY**

RCW 9A.04.110(6).....	22
Rule of Professional Conduct (RPC) 1.7(b).....	13
U.S. Const. amend. VI.....	11

## **I. SUMMARY OF ARGUMENT**

On April 6, 2008, Ms. Debbie Wyman was travelling on Ershig Road in Skagit County when she noticed a pickup driver, Mr. Willis Chad Moore, driving very close to her tailgate. Ms. Wyman was followed by Mr. Moore for approximately two miles. Ms. Wyman noticed that Mr. Moore started to back off from her tailgate and she believed the encounter to be over. However, Mr. Moore then accelerated and rammed into the back of Ms. Wyman's vehicle. Mr. Moore repeated the same action a second time. Ms. Wyman did not suffer from physical injury, but her vehicle sustained minor damages. Mr. Moore was tried by a jury of his peers and found guilty of Assault in the Second Degree with a deadly weapon and non-felony Hit and Run Attended.

At trial, Mr. Moore was represented by Mr. Corbin Volluz. Mr. Volluz is a private attorney. Over a decade ago, Mr. Volluz prosecuted Mr. Moore for Assault in the First Degree while working for the Skagit County Prosecutor's Office. At the time of the trial commencement, neither Mr. Volluz nor Mr. Moore remembered their previous interaction. Mr. Moore met with separate private counsel during a recess from trial to discuss any possible conflicts of interest,

after their prior interaction came to light. The trial court reconvened and determined there was no actual conflict of interest present. Mr. Moore also indicated on the record that he had no concerns with Mr. Volluz continuing to represent him. Mr. Moore did not sign a formal waiver of conflict. Mr. Moore appeals his convictions and alleges to this Court that there is an actual conflict of interest with Mr. Volluz's representation. He also alleges that the victim in this case, Ms. Wyman, was not credible and made inconsistent statements and that the vehicle he used against Ms. Wyman should not be considered a deadly weapon due to the lack of damages sustained by both Ms. Wyman and her vehicle.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether an actual conflict of interest exists when a defendant retains private counsel and it is discovered that the private attorney served as prosecutor over a decade before and convicted the defendant of a felony and that defendant meets with separate private counsel and then reveals to the court he has no problem with his retained attorney.

2. Whether this Court should disturb a conviction when the appellant claims the victim's testimony was not credible.
3. Whether a vehicle should be considered a deadly weapon when the appellant accelerated and rammed into the victim's vehicle twice and the victim was not substantially injured nor was her vehicle totaled.

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

<sup>1</sup>On October 15, 2009, Willis Chad Moore was charged by amended information with Assault in the Second Degree with a deadly weapon and non-felony hit and run of an attended vehicle. CP 65-66. Mr. Moore had previously been convicted of Assault in the First Degree in 1996. CP 135-136. Mr. Moore was tried by a jury before the Honorable Judge David Needy. Mr. Moore was found guilty of both counts. CP 97-98. Mr. Moore was represented by the undersigned attorney, Mr. John Henry Browne, at sentencing. CP 134-142.

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

On December 31, 2009, Mr. Moore timely filed his notice of appeal. CP 143.

## **2. Statement of Facts**

### Facts Pertaining to Alleged Actual Conflict

On October 19, 2009, Mr. Moore's jury trial commenced. 10/19/2009 RP 2. On the second day of trial, the prosecutor brought to the court's attention the fact that the Mr. Moore had previously been prosecuted by his defense attorney, Mr. Corbin Volluz. 10/20/2009 RP 6. The prior prosecution was for an Assault in the First Degree charge in which Mr. Moore pled guilty to and in which Mr. Volluz signed off as prosecutor on the judgment and sentence. 10/20/2009 RP 6-8. The conviction dated back to 1996. 10/20/2009 RP 8. Mr. Volluz worked as a prosecutor from January 1990 until February 1998. 10/20/2009 RP 17. Neither Mr. Volluz nor Mr. Moore had any recollection of their prior interaction. 10/20/2009 RP 7. Judge Needy recalled that in 1996 he was elected Skagit County Prosecutor and Mr. Volluz worked in his office. 10/20/2009 RP 8-9. The parties discussed the possible conflict on the record with Judge Needy stating the following:

With a thirteen year gap, I don't know what that conflict would necessarily be, if there were any knowledge gained by

the prior prosecution that would somehow affect his abilities here. 10/20/2009 RP 10.

Later on in the discussion of a possible conflict Judge Needy stated the following:

Let me just say this, Mr. Moore, even if there is a conflict—and I'm not convinced that there is—it's a conflict that you can waive, if you wish. If you know already that you want to stick with Mr. Volluz and you believe he's working to do the best for you—and you and I can go through a question and answer. We can make sure that you understand—you can knowingly and voluntarily waive any conflict that might be there. If you're not at that point yet and still feeling like you can't decide or don't know, then I'll hear from the State, and we'll discuss it. But the first prong is that there is an actual conflict. That Mr. Volluz is put in a point of serving two masters and he's torn between those two, and that tearing or conflict may cause him not to do the best job for you. I'm having trouble seeing the two masters in this situation. He prosecuted you thirteen years ago. He is now a private attorney. His livelihood is built upon his representation and his ability to do well in representing criminal defendants in the courtroom, and I can't see any particular motivation or split loyalties in him doing anything other than that in this case. 10/20/2009 RP 20-21.

The court decided to break from trial and allow Mr. Moore to meet with separate, private counsel in order to get counseling from an outside attorney not immediately entwined with the current proceedings. 10/20/2009 RP 29-42. The court continued trial from Tuesday, Oct 20, 2009, until Friday, Oct 23, 2009, in order for Mr. Moore to meet the private attorney of his choosing. 10/20/2009 RP 46, 10/23/2009 RP 4.

Mr. Moore met with private attorney Dave Wall to discuss the issue of any possible conflict and Mr. Wall addressed the court regarding their discussions on Oct 23, 2009. 10/23/2009 RP 4. As to any potential conflict with his attorney, Mr. Volluz, Mr. Wall said, "So while my client is not that worried about the conflict with Mr. Volluz....we have a new issue." 10/23/2009 RP 5. The issue Mr. Wall referenced was the fact that Judge Needy was serving as the elected prosecutor at the time of Moore's prior conviction and was currently sitting as the trial judge in the instant matter. 10/23/2009 RP 4. Mr. Wall's input to the court hinged on any potential conflict with Judge Needy; he did not espouse on the record any indication that he believed there was an actual or potential conflict with Mr. Volluz. 10/23/2009 RP 4-10. The State reiterated its position that there was no potential or actual conflict of interest and that from the sounds of

what Mr. Wall was stating on the record, there no longer appeared to be any conflict issues with Mr. Volluz continuing to represent Mr. Moore. 10/23/2009 RP 9. Judge Needy found no conflict prohibiting the continuation of trial, stating:

Unless there is any other strict legal argument, I'm going to find that based on the evidence before me that, one, there is no conflict between Mr. Moore and his attorney, Mr. Volluz. 10/23/2009 RP 17.

The trial resumed with the same jury and Mr. Moore was convicted on both counts. 10/23/2009 RP 97-98. At Mr. Moore's sentencing, Mr. John Henry Browne acted as lead counsel with Mr. Volluz assisting, and with Mr. Browne signing off on Mr. Moore's judgment and sentence. CP 134-142. Mr. Browne did not contest that Mr. Moore had a prior felony conviction. 12/11/2009 RP 3-6. There is nothing that precluded Mr. Browne from contesting the court's consideration of the prior conviction under Mr. Volluz' prosecution, yet he remained silent to that matter. 12/11/2009 RP 3-6. There is nothing on the record that indicates Mr. Moore ever objected to Mr. Volluz remaining his counsel. There was also nothing on the record that made a showing that Mr. Volluz was in the appearance of or actually in the position of serving to masters.

### Facts Pertaining to Trial Testimony

The victim in the instant case, Mr. Debbie Wyman, testified in trial that on April 6, 2008, she was driving northbound on Ershig Road in Skagit County when she noticed, “a small older pickup come flying up behind” her. 10/19/2009 RP 32. The pickup came up on her suddenly and stayed “right on my tailgate.” 10/19/2009 RP 33. Ms. Wyman testified that she could see that the driver behind her was flipping her off, yelling, and sticking his head out the window of his pickup. 10/19/2009 RP 33. The pickup continued to follow her for approximately two miles. 10/19/2009 RP 33. Ms. Wyman testified that the driver of the pickup, Mr. Moore, stayed on her tailgate and was so close that she thought he was going to hit her. 10/19/2009 RP 34. Ms. Wyman sped up and gestured to the other driver as if “I give up...I don’t know what I did.” 10/19/2009 RP 35. A separate car pulled out in front of Ms. Wyman, forcing her to slow down. 10/19/2009 RP 36. Ms. Wyman saw that the pickup driver had slowed down as well too and she thought the incident was over, but, “then he accelerated and hit me.” 10/19/2009 RP 36. Ms. Wyman testified that when the pickup hit her it scared her to death, jolted her car and stunned her. 10/19/2009 RP 36. She felt the collision with her body, but was able to keep control of her vehicle. 10/19/2009 RP

36. After the first collision, Ms. Wyman testified that, "he did the exact same thing he did the first time. He let off the brake and went back, and then accelerated and hit me again." 10/19/2009 RP 37. Her body jerked inside her vehicle with the second hit. 10/19/2009 RP 37.

The collision caused minor damage to Ms. Wyman's vehicle. 10/19/2009 RP 49. Glass material from impact was transferred from Mr. Moore's vehicle to Ms. Wyman's. 10/19/2009 RP 47. Deputy Caulk investigated the incident. 10/26/2009 RP 30. Deputy Caulk realized upon contacting Ms. Wyman that she was upset because she had puffy red eyes, she was choked up and frustrated and not speaking in a chronological manner to him. 10/26/2009 RP 32. Deputy Caulk testified that Ms. Wyman was emotional and very upset, "she was mixing her directions, her road names, and how the incident had occurred." 10/26/2009 RP 98. Deputy Caulk testified at trial that on the date in question, Ms. Wyman indicated that she had mistakenly believed that cross traffic on Ershig Road had to stop, when in fact they did not. 10/26/2009 RP 90. At trial, Ms. Wyman testified that she knew on the date in question that drivers on Ershig Road did have to stop, while cross traffic on Bow Hill Road did not. 10/19/2009 RP 66. Deputy Caulk admitted during testimony that he

did not take notes while talking to Ms. Wyman on April 6, 2008.  
10/26/2009 RP 100. The trial testimony occurred over eighteen  
months after the incident of arrest.

#### **IV. ARGUMENT**

##### **A. THERE WAS NO CONFLICT OF INTEREST PRESENT IN THIS CASE; THUS, MOORE WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment provides a criminal defendant with the right to effective assistance of counsel at trial. U.S. Const. amend. VI. This right includes representation that is free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419 425-26, 177 P.3d 783 (2008), review denied, 165 Wn.2d 1012, 198 P.3d 512 (2008)(citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984)). The trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. *Regan*, 143 Wn. App. at 425-26, 177 P.3d 783 (citing *Michens v. Taylor*, 535 U.S. 162, 167-72, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). To establish a violation of that right, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Michens v. Taylor*, 535 U.S. 162 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002).

Our courts have repeatedly held that bar complaints, lawsuits, and claims of ineffective assistance only create a potential conflict of interest. *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991). There must be a showing that "counsel actively represented conflicting interests." *State v. Dhaliwal*, 113 Wn. App. 226, 237, 79 P.3d 432 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). The conflict necessary to require reversal must be readily apparent and will not be inferred. *Martinez*, 53 Wn. App. at 715, 770 P.2d 646; *State v. James*, 48 Wn. App. 353, 365-66, 739 P.2d 1161 (1987).

Courts will reverse a defendant's conviction if he timely objected to a claimed attorney conflict at trial and the trial court failed to conduct an adequate inquiry. *Regan*, 143 Wn. App. at 425-26, 177 P.3d 783. But when a defendant does not timely object in the trial court, his conviction will stand unless he can show that his attorney had an actual conflict that adversely affected the attorney's performance. *Id.* at 426. When a defendant successfully makes this showing, reversal is required, regardless of whether any prejudice is shown. *Dhaliwal*, 150 Wn.2d at 568, 79 P.3d 432. A harmless error analysis is not required. *Regan*, 143 Wn. App. at 426.

Courts engage in the following two-part inquiry to determine whether an actual conflict of interest deprived a defendant of effective assistance of counsel: (1) was there an actual conflict of interest; and (2) if so, did the conflict adversely affect the performance of defendant's attorney?

The rule in conflict cases is not quite the per se rule of prejudice that exists for [other] Sixth Amendment claims. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). Rather, [p]rejudice is presumed only if the defendant demonstrates that the counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. *Strickland*, 466 U.S. at 692 [104 S.Ct. at 2067] (quoting *Cuyler*, 446 U.S. at 348, 350 [100 S.Ct. at 1718, 1719]).

An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. *State v. Byrd*, 30 Wn. App. 794, 798, 638 P.2d 601 (1981). Rule of Professional Conduct (RPC) 1.7(b) prohibits an attorney from representing a client if the attorney's duties to another materially limit that representation.

An actual conflict of interest occurs if, during the course of representation, the parties' interests diverge with respect to a material

factual or legal issue, or a course of action. *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995). To demonstrate that the lawyer's performance was adversely affected by the actual conflict, the defendant must show the conflict hampered his defense. *Robinson*, 79 Wn. App. at 395, 902 P.2d 652 (quoting *State v. Lingo*, 32 Wn. App. 638, 649 P.2d 130 (1982)). The defendant must point to specific instances in the record suggesting that the attorney is caught in a struggle to serve two masters. *State v. Robinson*, 79 Wn. App. at 395, 902 P.2d 652 (quoting *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 86 L.Ed. 680 (1942)); *State v. Tjeerdsma*, 104 Wn. App. 878, 882-83, 17 P.3d 678, 680 (2001).

Where there is a potential conflict of interest, the court ought to explore thoroughly, on the record, the nature and full extent of the potential conflicts. Where there is an actual or potential conflict, the Court must engage in a colloquy with the defendant explaining his right to a conflict free attorney and that he can receive outside legal advice about perhaps waiving the conflict, if any, and that the defendant can ask questions of the court. *State v. Dhaliwal*, 113 Wn. App. 226, 232 (2002). The defendant must make a timely objection to any perceived conflict and if he does not, "conviction will stand unless the defendant can show that his lawyer had an actual conflict

that adversely affected the lawyer's performance." *State v. Regan*, 143 Wn. App. 419, 426 (2008).

In the instant case, first and foremost, the appellant failed to make an objection on the record as to any perceived conflict with his attorney of record, Mr. Volluz. In fact, at the October 20, 2009, hearing, the appellant expressed confidence in his counsel's abilities. At the October 23, 2009, hearing the appellant disavowed any possible conflict with Mr. Volluz and instead focused discussion of any potential conflict on the fact that the trial judge was the elected prosecutor at the time of his previous prosecution. At no time did the appellant expressly object to any potential conflict on the part of his defense counsel, Mr. Volluz.

Furthermore, there is no indication in the instant case that there is any actual conflict of interest. Mr. Volluz had prosecuted the appellant approximately thirteen years prior to the trial date. Mr. Volluz had not worked at the prosecutor's office for nearly a decade. Neither the appellant nor Mr. Volluz recalled that they had ever interacted in that capacity. In fact, it was the prosecutor in this case that brought the issue to the trial court's attention. Once the prior prosecution of the appellant by Mr. Volluz was brought to the trial court's attention, much time and consideration was spent on the

record deliberating this issue. The court went through a colloquy with Mr. Moore to see what course he wanted to take given the circumstances and whether he wanted to consult with a public defender. Mr. Moore elected to hire a private attorney of his own choosing so that he may receive an outside opinion as to any potential conflict. The trial court allowed for a break from trial on Tuesday, October 20, 2009, in order for the appellant to meet with a private attorney of his choosing the following Friday, October 23, 2009—the first available meeting time of the selected attorney—Mr. Dave Wall. The appellant met with Mr. Wall about any potential conflict of interest. Mr. Wall appeared in court with the appellant at a status hearing regarding any potential conflict. Mr. Wall indicated that while the appellant was not worried about a potential conflict with Mr. Volluz, he was concerned about a conflict with the trial judge, who was the elected prosecutor at the time of the prior conviction thirteen years before. Given that the trial judge specifically inquired with independent counsel whether the appellant had espoused any further concerns with Mr. Volluz's representation and given that the answer was that the appellant was not worried about Mr. Volluz continuing to represent him, the appellant waived any potential conflict.

Even if this Court finds that the appellant did not waive the conflict through Mr. Wall, there is nothing on the record connoting a specific instance suggesting that Mr. Volluz was caught in a struggle to serve two masters. There is nothing on the record to indicate that Mr. Volluz owed duties to a party whose interests were adverse to those of the appellant. Mr. Volluz had not worked at the Skagit County Prosecutor's office for years, thus he owed no duty to the prosecutor's office. There is nothing else on the record indicating Mr. Volluz did anything but avidly represent the interests of his client. No showing has been made by the appellant that there is an actual conflict of interest.

Finally, there was no conflict of interest at sentencing hindering proper representation of the appellant. The appellant alleges that "the conflict was manifest at sentencing" because Mr. Volluz was precluded from challenging his client's criminal history. Interestingly, the undersigned, Mr. John Henry Browne was present and appeared as counsel for Mr. Moore at sentencing. Mr. Browne had the opportunity to challenge his client's criminal history, but chose not to do so. Because Mr. Browne acted as lead defense counsel at sentencing, there is no conflict present in this case.

**B. THERE WAS SUFFICIENT EVIDENCE TO CONVICT MOORE; FURTHER, THE DETERMINATION OF WITNESS CREDIBILITY IS LEFT SOLELY TO THE TRIER OF FACT**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences therefrom be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime can be shown by circumstantial evidence as well as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In reviewing the evidence, courts give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850, 855 (1990); *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d

335, *review denied*, 109 Wn.2d 1008 (1987). The jury was free to believe the victim, disbelieve the defendant and give no weight whatsoever to alleged inconsistencies in statements. Credibility is left solely to the trier of fact.

Here, the court provided the following instruction as a definition for assault, which is the third option for assault definitions in the WPIC:

As assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intent to inflict the bodily injury.  
10/27/2009 RP 4-7, CP 85.

In the instant case, the convictions should remain undisturbed because the jury had the opportunity to weigh the credibility of each witness's testimony and then decide to give weight or fail to give weight to what was heard on the record. In the instant case, Ms. Wyman testified that she witnessed a pickup truck driven by Mr. Moore come up close to her tailgate and follow her closely for about two miles. Just when she thought he was backing off from tailgating her vehicle, he accelerated and slammed into the back of her vehicle. Mr. Moore then did the exact same thing again—accelerate into her

vehicle causing a collision. Ms. Wyman testified that she was “scared to death” and was jolted by the contact. She was able to maintain control of her vehicle, but she felt the impact in her car and through her body. The appellant alleges that Ms. Wyman made inconsistent statements and that her trial testimony “diverged dramatically” from that of her statements on the date of incident. The inconsistency that the appellant mainly points to is whether or not Ms. Wyman knew there was a four way stop at the intersection of Ershig and Bow Hill Road and stopped, or if she did not realize there was a four way stop and that intersection and proceeded through without heeding to Mr. Moore’s vehicle. The appellant fails to recognize that the jury was the trier of fact in this case and issues with credibility are left with the trier of fact; rather than an appellate court. The jury heard Ms. Wyman’s testimony and Deputy Caulk’s and presumably weighed any inconsistent statements in their deliberation. Furthermore, Ms. Wyman was extremely emotional on the date of the collision—and understandably so given the facts and circumstances in the case. Deputy Caulk testified that she was emotional, frustrated and choked up when speaking to him, and that she had trouble relaying the events in a chronological manner. Is it possible that in her great emotion state she made a statement to Deputy Caulk on April 6,

2008, and eighteen months later her trial testimony slightly diverged from that of her statement? Yes. Given the emotionally trying time Ms. Wyman was going through on April 6, 2008, and given the amount of time that had passed prior to trial, the inconsistencies are minimal. Furthermore, the jury heard all of the testimony and great deference is given to the trier of fact when weighing conflicting testimony. This case should be treated no differently, thus this Court should deny the appellant's request of reversal.

**C. THERE WAS SUFFICIENT EVIDENCE TO FIND MOORE'S VEHICLE WAS USED AS A DEADLY WEAPON.**

The test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Partin*, 88 Wn.2d 899, 567

P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980).

The term "Deadly Weapon" is defined as follows:

"Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.  
RCW 9A.04.110(6).

An item may be either a deadly weapon per se, such as a firearm or explosive, or a deadly weapon in fact, due to the manner of its use. *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995). A vehicle is not a deadly weapon per se. To justify a deadly weapon instruction, the State had to show that the vehicle had both the inherent capacity to cause substantial bodily injury or death and that it

was readily capable of causing such injury or death under the circumstances of its use. *State v. Skenandore*, 99 Wn. App. 494, 499, 994 P.2d 291 (2000). The circumstances of a weapon's use include the intent and ability of the user, the degree of force, the part of the body to which it was applied, and the actual injuries that were inflicted. *Id.* at 171-172.

In the instant case, a reasonable trier of fact could have found that the vehicle, as wielded by Mr. Moore, constituted a deadly weapon. According to Ms. Wyman's testimony, Mr. Moore accelerated and rammed his pickup into the back of the SUV Ms. Wyman was driving, both scaring her to death and jolting her vehicle and her body. Due to the force collision accompanied by the fact that Mr. Moore then accelerated and rammed into Ms. Wyman a second time, a reasonable person could infer that Mr. Moore intended to commit great bodily harm or death with his vehicle. While Ms. Wyman was able to skillfully maintain control of her vehicle and her vehicle sustained only minor damage, the result of the two impacts from Mr. Moore and his vehicle could have been serious if Ms. Wyman was not able to maintain focus and control of her vehicle. On the whole, the evidence is substantial that Mr. Moore's vehicle constituted a deadly weapon under the circumstances of its use.

There was sufficient evidence to find that Mr. Moore's vehicle was used as a deadly weapon here, thus his request for reversal should be denied by this Court.

**V. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Mr. Moore's requests for reversal be denied. Mr. Moore had competent, conflict-free counsel at trial; and sufficient evidence was presented to the jury to convict him of Assault in the Second Degree with a deadly weapon. Additionally, credibility is left to the trier of fact, thus, this Court should leave the convictions undisturbed.

DATED this 29th day of October, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
MELISSA W. SULLIVAN, WSBA#38067  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: JOHN HENRY BROWNE, addressed as, 821 Second Avenue, Suite 2100, Seattle, Washington 98104-1516. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 29th day of October, 2010.

  
KAREN R. WALLACE, DECLARANT