

Nº. 33326-1-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

ERNEST ANDREW SYLVIA,
Appellant.

STATE OF WASHINGTON
BY 
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COURT OF APPEALS
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OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 04-1-00097-3
The Honorable Vicki Hogan, Presiding Judge

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Trial court abused its discretion in allowing Mr. Sylvia to withdraw his plea where there was insufficient evidence that enforcing the plea agreement would be a manifest injustice.
2. There was insufficient evidence that Mr. Sylvia intended to commit murder.
3. There was insufficient evidence of that Mr. Sylvia interfered with the reporting of a domestic violence phone call.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the fact that Mr. Sylvia's offender score was miscalculated by one point in determining his sentencing range for purposes of a plea bargain sufficient evidence that not allowing Mr. Sylvia to withdraw his guilty plea would have been a manifest injustice where sentencing Mr. Sylvia with the correct offender score would still give him a lesser sentence than a guilty verdict on the original charges? (Assignment of Error No. 1).
2. Is there sufficient evidence of intent to commit murder where Mr. Sylvia didn't kill Mr. Strom when had the chance and where Mr. Sylvia did not attempt to injure Mr. Strom for 20-30 minutes and ate a plate of food prior to confronting Mr. Strom the second time? (Assignment of Error No. 2).
3. Are the statutory elements of the crime of interfering with the reporting of a domestic violence incident met where the defendant had not committed a crime of domestic violence at the time the telephone call was interfered with? (Assignment of Error No. 3).

C. STATEMENT OF THE CASE

Factual and Procedural Background

On January 6, 2004, the defendant, Ernest Sylvia was spending the night at the home of his biological mother and stepfather. RP 61-63, 156-157. Mr. Sylvia's stepfather, Mr. James Strom, had gone to bed early that evening because he had to work the following morning. RP 64. After Mr. Strom had gone to bed upstairs, he heard Mr. Sylvia being loud downstairs so Mr. Strom went back downstairs to tell Mr. Sylvia to keep the noise down. RP 65. Mr. Sylvia agreed to be quieter and Mr. Strom went back upstairs to bed. RP 66.

Sometime later that evening, Mr. Strom was again disturbed by noise coming from the downstairs area of the house and went back downstairs to remind Mr. Sylvia to be quiet. RP 66-67. The second time that Mr. Strom confronted Mr. Sylvia about the noise it was obvious to Mr. Strom that Mr. Sylvia was acting under the influence of alcohol or some other substance. RP 67. Mr. Strom asked Mr. Sylvia if he had been drinking and Mr. Sylvia acknowledged that he had. RP 68. Mr. Strom told Mr. Sylvia that if Mr. Sylvia could not be quiet and control himself that Mr. Sylvia would have to leave. RP 69. Mr. Sylvia became belligerent and disrespectful to Mr. Strom and told Mr. Strom that he would leave when he was ready. RP 69-71. Mr. Strom told Mr. Sylvia

that he couldn't have any more alcohol and then went back upstairs to bed.

RP 71.

After Mr. Strom went back upstairs to bed, Mr. Sylvia and his brother, Joseph, got into a fight. RP 71, 380. Joseph was angry with Mr. Sylvia because Mr. Sylvia had been drinking, so Joseph took Mr. Sylvia outside and started a fight with Mr. Sylvia. RP 380. During the course of the fight Joseph got a bloody mouth when he headbutted Mr. Sylvia. RP 73, 380. Joseph and Mr. Sylvia were wrestling on the ground when Mr. Strom came outside to break up the fight. RP 72-73, 380. After Mr. Strom pulled Mr. Sylvia off of Joseph, Mr. Sylvia told his brother, "I will kill you. I will kill you." RP 74. Mr. Strom, who has broken up fights between the brothers in the past (RP 72-73), testified that it was not uncommon for the boys to threaten to kill each other when they were fighting. RP 75. After the fight was over, Joseph went back into the house, changed his clothes, and left the house five minutes later. RP 381.

Mr. Strom told Mr. Sylvia that he would have to leave immediately and brought him some clothes since his were wet from wrestling outside. RP 76. Mr. Sylvia told Mr. Strom that Mr. Strom couldn't make him leave, that he was not going to leave, and told Mr. Strom to "go back upstairs, old man." RP 76-77. Mr. Strom told Mr. Sylvia that if Mr. Sylvia didn't leave then Mr. Strom was going to call the police. RP 77.

Mr. Sylvia responded that he still wasn't going to leave and Mr. Strom went back upstairs. RP 77.

After Mr. Strom went upstairs, Mr. Sylvia went outside to the telephone junction box and disconnected the phone lines to the house. RP 78, 462. Mr. Sylvia then went back into the house and told Mr. Strom that he had disconnected the phones. RP 78, 462. Mr. Strom tried a phone line upstairs, discovered that the phones did not work, and told Mr. Sylvia that he was going to use a cell phone to call the police. RP 78. Mr. Sylvia responded by telling Mr. Strom, "I will kill you. You can't make me go." RP 78-79.

Mr. Strom tried to use his daughter's cell phone but the battery was dead (RP 219-220), so he went back downstairs and went to a neighbor's house and called the police. RP 80. Mr. Strom told the 911 dispatcher that Joseph and Mr. Sylvia had had a fight and that Mr. Sylvia refused to leave. RP 81.

After Mr. Strom left to call the police, Mr. Strom's daughter and Mr. Sylvia's sister, Jamie Strom (199-200), found Mr. Sylvia in the garage. RP 220. Mr. Sylvia was armed with a knife. RP 226. Mr. Sylvia asked where Mr. Strom was, and when Jamie stated she did not know, Mr. Sylvia asked her if Mr. Strom was at the neighbor's house calling the police. RP 223. Jamie eventually told Mr. Sylvia that Mr. Strom had

indeed gone to the neighbor's house to call the police. RP 224. Mr. Sylvia then told Jamie that Mr. Strom deserved to die because Mr. Strom had made Mr. Sylvia use pornography when Mr. Sylvia was little. RP 223. Shortly thereafter Mr. Sylvia told Jamie that he was sorry, he was scared, and that he was not going to hurt Mr. Strom. RP 221, 224. Mr. Sylvia and Jamie then went back inside the house. RP 230.

As Mr. Strom went back to his house, his daughter, Jamie, called out to him and told him not to come back into the house. RP 83. Shortly thereafter Mr. Sylvia appeared from the door between the garage and the house and ran at Mr. Strom saying he had a surprise for Mr. Strom, Mr. Strom would like it, and that he was going to kill Mr. Strom. RP 83-84.

Mr. Sylvia chased Mr. Strom around the driveway and the men ended up at the front door of the house. RP 85. Mr. Strom tried to open the front door but found that it was locked. RP 85. Mr. Sylvia then ran up behind Mr. Strom and touched the knife against Mr. Strom's chest, RP 85. Mr. Sylvia again told Mr. Strom that he was going to kill him. RP 89. Mr. Sylvia's eyes were glassy and he had a panicked look. RP 91.

Mr. Strom told Mr. Sylvia that he had not called 911, and Mr. Sylvia calmed down and threw the knife away. RP 92-93. Jamie was peeking around the corner of the garage and ran up and grabbed the knife out of the snow and ran back inside the garage. RP 94-95. Mr. Strom

then jumped off the porch and ran inside the house through the garage.
RP 95.

Once back inside the house, Mr. Strom gathered everybody up and took them upstairs to his bedroom and locked the door. RP 96-97. Mr. Strom and his family stayed in the bedroom for 20 to 30 minutes before the police arrived. RP 99.

As Mr. Strom was waiting for the police he heard Mr. Sylvia calling to him asking him to come out of the bedroom so Mr. Sylvia could talk to him. RP 99-100. Mr. Strom heard Mr. Sylvia ranting and raving downstairs and making a lot of noise. RP 100. While Mr. Sylvia was downstairs he warmed up a plate of ribs and ate them. RP 423. Plaintiff's exhibit No. 6 was a photograph of the plate he was eating off of with ribs still on it. RP 423.

Pierce County Sheriff's Deputies were dispatched to Mr. Strom's home at 12:24 a.m. on January 7, 2004. CP 1-5, RP 257-262. When the police knocked on the front door Mr. Sylvia was afraid that Joseph had come back so Mr. Sylvia grabbed a meat cleaver and answered the door. RP 424. Mr. Sylvia chose the meat cleaver because it looked intimidating and answered the door holding the cleaver behind him. RP 424.

When Mr. Sylvia opened the door the Deputies informed Mr. Sylvia that they were responding to a domestic violence call. CP 1-5. Mr.

Sylvia responded that he was not the one who had called, but that he would go and get the person who had. CP 1-5. Mr. Sylvia then shut the front door. CP 1-5. Mr. Sylvia ran upstairs holding the cleaver and saying that he was going to kill Mr. Strom because Mr. Strom had lied about calling the police. RP 104-105. The police heard screams from inside the house and broke the door open and saw Mr. Sylvia trying to break into the upstairs bedroom. CP 1-5.

When Mr. Sylvia got to the bedroom door it was shut and he couldn't open it. RP 434. Mr. Sylvia then pressed his weight against the door with his left shoulder and pressed his feet against the wall behind him. RP 434. The door to the bedroom was actually a set of french doors - a pair of doors that hook in the middle. RP 108. Mr. Strom attempted to keep Mr. Sylvia from opening the door by leaning against it, but eventually Mr. Strom let go of the door in order to gain control of Mr. Sylvia. RP 109-109. Mr. Sylvia succeeded in forcing the door open about seven inches, and stuck his hand through the opening with the cleaver. RP 435. Mr. Sylvia was squirming to get through the opening when he was startled by someone grabbing his forearm and he dropped the knife. RP 436-437. The door to the bedroom opened at that point and Mr. Sylvia burst into the bedroom and fell on the floor. RP 113, 437. Mr. Strom

immediately grabbed Mr. Sylvia's arms so that Mr. Sylvia could not move. RP 438.

By the time the deputies arrived at the bedroom Mr. Sylvia was wrestling with Mr. Strom. CP 1-5. The police put Mr. Sylvia in handcuffs and as he was being put in handcuffs Mr. Sylvia said that it was a good thing that the police arrived when they did. RP 118, 439.

On January 8, 2004, Mr. Sylvia was charged with attempted murder in the first degree while armed with a deadly weapon, interfering with the reporting of domestic violence, and failure to register as a sex offender. CP 1-5.

On June 2, 2004, Mr. Sylvia pled guilty to one count of assault in the first degree and the charges in the case were amended to include just this one count. CP 6-15. The charge of failing to register as a sex offender was severed from the present case and ultimately dismissed. CP 28, RP 597.

Mr. Sylvia filed a motion to withdraw his plea on grounds that the miscalculation of his offender score as a three instead of a four was a manifest injustice because he was not informed of the actual standard range sentence he would be eligible for. CP 114-121. The motion was granted and trial on the original charges of attempted murder and

interfering with the reporting of a domestic violence incident commenced on April 12, 2005. RP 3, 23.

On April 19, 2005, the jury found Mr. Sylvia guilty on both counts and found that he was armed with a deadly weapon at the time of the attempted murder. CP 63-65. On May 31, 2005, Mr. Sylvia was sentenced to 242.25 months on count one, the low end of the standard range plus the mandatory 24 month deadly weapon enhancement, and received a suspended sentence on the interfering with the reporting of a domestic violence incident charge. CP 98-103.

Notice of appeal was filed on May 31, 2005. CP 66-80.

D. ARGUMENT

1. The fact that Mr. Sylvia's offender score was miscalculated by one point in determining his sentencing range for the plea bargain is insufficient evidence that not allowing Mr. Sylvia to withdraw his guilty plea would have been a manifest injustice.

Pre-trial, Mr. Sylvia entered a plea agreement with the State where he pled guilty to one count of first degree assault. CP 8-15. Mr. Sylvia subsequently filed a motion to withdraw his plea of guilty alleging that because his offender score had been improperly calculated as a 3 instead of a four, he did not enter into the plea bargain knowingly and voluntarily. CP 114-120. The trial court ultimately allowed Mr. Sylvia to withdraw his plea. RP 3.

CrR 4.2 provides, in pertinent part, “The court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice...” See State v. Branch, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996). CR 4.2 imposes a demanding burden on the defendant to demonstrate a manifest injustice. Branch, 129 Wn.2d at 641, 919 P.2d 1228. A bare assertion of manifest injustice does not overcome this burden. State v. Arnold, 81 Wn.App. 379, 385-386, 914 P.2d 762, review denied, 130 Wn.2d 1003, 925 P.2d 989 (1996). A manifest injustice is one that is “obvious, directly observable, overt, [and] not obscure.” Branch, 129 Wn.2d at 641, 919 P.2d 1228.

Four non-exclusive criteria exist for determining a “manifest injustice”: (1) denial of effective counsel; (2) the plea was not ratified by the defendant or one authorized by the defendant to do so; (3) the plea was involuntary; and (4) the plea agreement was not kept by the prosecution. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). Any one of these criteria can independently establish manifest injustice. State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974).

There is no constitutional right to withdraw a plea of guilty and to enter a plea of not guilty. State v. Olmstead, 70 Wn.2d 116, 118, 422 P.2d 312 (1966). A motion for withdrawal of a guilty plea is addressed to the

discretion of the trial court. Olmstead, 70 Wn.2d 116, 118, 422 P.2d 312. Thus, the standard of review is whether the trial court abused its discretion in granting such a motion. Olmstead, 70 Wn.2d 116, 118, 422 P.2d 312. In order to show that a trial court abused its discretion, the record must show that the discretion exercised was “predicated upon grounds clearly untenable or manifestly unreasonable.” Olmstead, 70 Wn.2d at 119, 422 P.2d 312.

In order for a guilty plea to be valid, it must be made voluntarily, intelligently, and with knowledge of the consequences. Branch, 129 Wn.2d at 642, 919 P.2d 1228. This determination is made through an examination of the totality of the circumstances. Branch, 129 Wn.2d at 642, 919 P.2d 1228.

Here, Mr. Sylvia argued that because he agreed to the plea bargain based on a miscalculation of his offender score, requiring him to comply with his plea bargain would be a manifest injustice since the plea bargain was not “knowingly and voluntarily entered into.” CP 114-121.

i. *Mr. Sylvia entered into the plea agreement “knowingly”*

There is a presumption that a plea of guilty is voluntary, knowing, and intelligent when an information notifies the defendant of the nature of the crime to which he pleads guilty. In re Ness, 70 Wn.App. 817, 821, 855 P.2d 1191 (1993), review denied, 123 Wn.2d 1009, 869 P.2d 1085

(1994). A defendant is adequately informed of the nature of the charges if the information details the acts and the state of mind necessary to constitute the crime. In re Ness, 70 Wn.App. 817, 821, 855 P.2d 1191 (1993).

Here, the State filed an amended information clearly detailing the elements of the new first degree assault charge. CP 6. The amended information clearly details the "acts and the state of mind necessary to constitute the crime." Mr. Sylvia entered into the plea agreement with full knowledge of the charges to which he was pleading guilty.

Mr. Sylvia argues that because his offender score was miscalculated he did not enter the plea agreement knowingly since his standard range sentence would have been longer than the one listed in the plea agreement. However, the Statement of Defendant on Plea of Guilty reads as follows,

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty is binding upon me. I cannot change my mind even if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

CP 8-15.

The language of the Statement of Defendant on Plea of Guilty clearly addresses the exact issue later raised by Mr. Sylvia. Mr. Sylvia was aware that, should his offender score change, he would be bound by his plea to whatever the new standard range sentence might be. Mr. Sylvia signed this document below the paragraph stating, “My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this ‘Statement of Defendant on Plea of Guilty.’ I have no further questions to ask the judge.” CP 8-15. Mr. Sylvia clearly entered into the plea bargain knowing full well what the consequences of the discovery of additional criminal history would be.

ii. *Mr. Sylvia entered the plea agreement voluntarily*

When a defendant completes a plea form and admits to reading, understanding, and signing it, “the written statement provides prima facie verification of the plea’s voluntariness.” State v. Stephan, 35 Wn.App 889, 893, 671 P.2d 780 (1983).

Mr. Sylvia never argued that the plea was involuntarily made, only that he made it without knowledge of the consequences of his proper offender score. Mr. Sylvia clearly entered the plea agreement voluntarily.

- iii. *The trial court abused its discretion in allowing Mr. Sylvia to withdraw his plea of guilty*

As stated above, in order to show that a trial court abused its discretion, the record must show that the discretion exercised was “predicated upon grounds clearly untenable or manifestly unreasonable.” Olmstead, 70 Wn.2d at 119, 422 P.2d 312.

Here, Mr. Sylvia’s argument that his plea was invalid because he was not made aware of the true standard range sentence fails on the language of the plea agreement itself. Mr. Sylvia acknowledged that the standard range sentence set forth in the plea agreement was subject to change should it be discovered that his offender score was greater than calculated. Allowing Mr. Sylvia to withdraw his plea on these grounds was manifestly unreasonable and an untenable decision in light of the fact that Mr. Sylvia stipulated that he understood his offender score, and therefore his standard range sentence, could change.

This court should vacate Mr. Sylvia’s conviction and remand for a new trial.

2. There was insufficient evidence that Mr. Sylvia intended to commit murder.

A person commits the crime of attempted murder in the first degree when, with premeditated intent to cause the death of another

person, he takes a substantial step towards causing the death of that person. RCW 9A.28.020, 9A.32.030.

Evidence is sufficient to support a criminal conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201, 829 P.2d 1068.

As found by the Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979), the Winship doctrine¹ “requires more than a trial ritual” it is an essential of the due process guarantees by the 14th Amendment that “no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof.” Jackson, 397 U.S. at 316-317.

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s

¹ The Constitution prohibits a criminal conviction of any person except upon proof of guilt beyond a reasonable doubt of every element of the crime charged. In re Winship, 397 U.S. 358 (1970).

case. State v. Galisia, 63 Wn.App. 833, 838, 822 P.2d 303, review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992).

A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability. State v. Myers, 133 Wash.2d 26, 38, 941 P.2d 1102 (1997).

Here, there are two possible acts committed by Mr. Sylvia which could be said to have been substantial steps towards killing Mr. Strom taken with the intent to kill Mr. Strom: (1) the confrontation at the front door of the home when Mr. Strom returned from calling the police; and (2) the attempt to break into the bedroom after the police arrived.

- i. *Mr. Sylvia did not intend to kill Mr. Strom during the confrontation at the front door*

After Mr. Strom told Mr. Sylvia he would have to leave, Mr. Sylvia felt frustrated because it was near midnight on a cold snowy night and Mr. Sylvia had nowhere to go. RP 399. Mr. Sylvia became agitated because he did not understand how Mr. Strom could ask him to simply leave the house. RP 399-400.

After Mr. Sylvia fought with Joseph, Mr. Sylvia confronted Mr. Strom and told Mr. Strom that he felt like Mr. Strom was treating him like a piece of trash and was just trying to get rid of him. RP 404. Mr. Sylvia

expressed his frustration that Mr. Strom would ask Mr. Sylvia to leave when Mr. Sylvia had nowhere to go. RP 404-405.

Mr. Sylvia testified that he initially grabbed the knife after his fight with Joseph because he was afraid that Joseph and Mr. Strom might attack him inside the house. RP 403-404.

About five minutes after Mr. Strom left to call the police, Mr. Sylvia went upstairs to his mother's bedroom and spoke with her. RP 161-162. When Mr. Sylvia came up to the bedroom he was holding a kitchen knife. RP 166-167. While Mr. Sylvia spoke to his mother he was nervous, upset, and shaken up. RP 162. Mr. Sylvia told his mother that he was angry and frustrated and that he felt the situation had gotten out of hand. RP 163. As Mr. Sylvia spoke with his mother he told her he wanted to kill Mr. Strom (RP 173) and that he was angry with Mr. Strom for exposing him to pornography when he was 8 years old. RP 168. Mr. Sylvia was in the room with his mother for about three minutes, during which time he set the knife down on a bed stand but picked it up again when he left the room. RP 169-170. Despite Mr. Sylvia's statements, Mr. Sylvia's mother did not have any concern that Mr. Sylvia intended to kill Mr. Strom. RP 195.

Prior to Mr. Strom returning, Mr. Sylvia also spoke to Jamie Strom in the garage of the home and told her that he was scared, he was sorry, and that he wasn't going to hurt Mr. Strom. RP 220-221.

At the time of the confrontation at the front door to the house, Mr. Sylvia felt like Mr. Strom was treating him like trash, and Mr. Sylvia wanted to make Mr. Strom feel like he felt. RP 417. Mr. Sylvia testified that he was angry, desperate, at his emotional end, and halfway to a nervous breakdown. RP 466-467. Mr. Sylvia wasn't thinking rationally but wanted to confront Mr. Strom in order to scare him. RP 469. Mr. Sylvia testified that he put the knife against Mr. Strom's chest because he wanted Mr. Strom to see that he had a knife and wanted Mr. Strom to be scared of him. RP 472-473. However, Mr. Sylvia testified that he "was not prepared to kill" Mr. Strom. RP 473.

Mr. Sylvia testified that he threatened to kill Mr. Strom to get a reaction out of his family and to try to get them to intervene in the situation (RP 485-486), but that he never intended to actually kill Mr. Strom. RP 487.

The testimony of Mr. Sylvia, his mother, and his sister all clearly indicate that Mr. Sylvia's intent in grabbing the knife and threatening to kill Mr. Strom was to scare Mr. Strom and intimidate him, not kill him. Perhaps the most telling piece of evidence that Mr. Sylvia had no intent to

kill Mr. Strom during the confrontation at the front door is that Mr. Sylvia did not take advantage of the opportunity to kill Mr. Strom as soon as he could. Instead, Mr. Sylvia walked up to Mr. Strom and began to question him about why he had called the police. RP 416. Rather than immediately kill Mr. Strom when the opportunity presented itself, Mr. Sylvia instead took the opportunity to question Mr. Strom and intimidate him in an effort to make Mr. Strom "feel like trash." RP 417. Ultimately, once Mr. Sylvia's fears about Mr. Strom having called the police were allayed, Mr. Sylvia voluntarily disarmed himself and allowed Mr. Strom to go back inside the house. RP 92-93.

Here, the criminal intent which is plainly indicated as a logical probability from Mr. Sylvia's conduct is that Mr. Sylvia simply intended to scare or intimidate Mr. Strom with the knife, not kill him. Had Mr. Sylvia's intent been to kill Mr. Strom, Mr. Sylvia could have easily accomplished this goal by killing Mr. Strom when he had the chance. Instead, Mr. Sylvia engaged in a conversation with Mr. Strom and ultimately voluntarily disarmed himself. The evidence indicates that Mr. Sylvia's repeated threats to kill both Joseph and Mr. Strom were simply Mr. Sylvia's method of expressing that he was very angry with both of them, not that he actually intended to kill anyone.

There was insufficient evidence that Mr. Sylvia intended to kill Mr. Strom during the confrontation at the front door.

- ii. *Mr. Sylvia did not intend to kill Mr. Strom when he attempted to enter the bedroom*

After Mr. Sylvia confronted Mr. Strom and while the family was locked in the upstairs bedroom, Mr. Sylvia paced around the downstairs of the house. RP 175-179. While it is true that during this time Mr. Sylvia taunted Mr. Strom and continued to yell threats at Mr. Strom, Mr. Sylvia made no attempt to actually enter the bedroom. Rather, Mr. Sylvia simply paced around the downstairs of the home and paused to warm up a plate of ribs and eat them. RP 422-423.

Mr. Sylvia grabbed the second knife after the police knocked on the door in order to defend himself should it have been Joseph at the door. RP 478. After closing the door on the police, Mr. Sylvia ran upstairs and took the knife with him simply because it was already in his hand. RP 481, Mr. Sylvia testified that he assumed that he was going to be going to jail and that he went upstairs to the bedroom simply to confront Mr. Strom and threaten him in order to be a "tough guy" and to "scare the crap out of him." RP 435-436, 481-482.

Once Mr. Sylvia had gotten to the bedroom door and forced it open far enough to push his arm through, he voluntarily dropped the knife when

he felt someone's hand on his forearm because he was wiggling his hand trying to get through the door and did not want anyone to be injured by the knife. RP 436-437. Mr. Sylvia explained that his statement to the police after they had cuffed him that it was a good thing the police arrived when they did was simply an attempt on his part to appear to be a "tough guy" and to "keep his pride." RP 439-440.

Again, the criminal intent which is plainly indicated as a logical probability from Mr. Sylvia's conduct is that Mr. Sylvia simply intended to scare or intimidate Mr. Strom, not kill him. Mr. Sylvia's actions were admittedly the product of poor decision making which was impaired by Mr. Sylvia having consumed alcohol, but were not evidence of an intent to kill Mr. Strom. Rather than evidencing an intent to kill, Mr. Sylvia's actions evidence immature, prideful, and improper attempts by an individual to act "tough" and with bravado in order to intimidate others to bend to his will.

In the Prosecutor's Statement Regarding Amended Information, the state conceded that the evidence did not support an inference that Mr. Sylvia had formed the premeditated intent to kill Mr. Strom. CP 7. The evidence presented to the trial court simply does not plainly indicate as a logical probability that Mr. Sylvia's intent was anything other than to intimidate and scare Mr. Strom. Not only did Mr. Sylvia, his mother, and

his sister all testify that Mr. Sylvia had no intent to harm anyone that night, but had Mr. Sylvia intended to kill Mr. Strom he either would have done so during the confrontation at the front door or would have commenced his attempt immediately upon returning inside the house rather than pausing to prepare and eat a plate of ribs.

There was insufficient evidence to support the conclusion that Mr. Sylvia acted with the intent to kill Mr. Strom. This court should vacate Mr. Sylvia's conviction for attempted first degree murder.

3. There was insufficient evidence that Mr. Sylvia interfered with the reporting of a domestic violence incident.

RCW 9A.36.150 provides, in pertinent part,

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

Mr. Sylvia had not committed a crime of domestic violence at the time he disabled the phone lines

At the time Mr. Strom called the police, the only act committed by Mr. Sylvia which would meet the definition of an act of domestic violence under RCW 10.99.020 would have been the fight with his brother, Joseph.

While RCW 10.99.020 includes all degrees of assault in the definition of acts which constitute domestic violence, at trial both Mr. Sylvia's brother, Joseph, and Mr. Sylvia testified that it was Joseph who started the fight by punching Mr. Sylvia in the face. RP 380, 386, 401.

Reasonable force, used in lawfully defending oneself, constitutes lawful self-defense and is a complete defense to the charge of assault. State v. Acosta, 101 Wash.2d 612, 616-17, 683 P.2d 1069 (1984).

Here, Mr. Sylvia defended himself against Joseph with the use of reasonable force in order to defend himself against Joseph's attack. Thus, at the time Mr. Sylvia disconnected the telephone lines he had not committed any crime of domestic violence. Therefore, there was insufficient evidence to convict Mr. Sylvia of the crime of interfering with the reporting of a domestic violence incident.

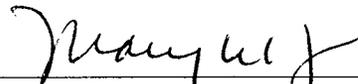
This court should vacate his conviction for interfering with the reporting of a domestic violence incident.

E. CONCLUSION

For the reasons stated above this court should vacate Mr. Sylvia's convictions and dismiss the case.

DATED this 1st day of February, 2006.

Respectfully submitted,



Mary Kay High, WSBA No. 20123
Attorney for Appellant



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

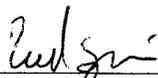
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of February, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Joseph Sylvia 834475
MCC- Washington State Reformatory, Unit A435
P.O. Box 777
Tacoma, WA. 98272

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 1st day of February, 2006.



Reed Speir, WSBA No. 36270
Associate, Law Offices of Mary Kay High

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