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COURT OF APPEALS
DIVISION II

NO. 34023-2

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

FLOYD WAYNE DRANE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 03-1-05262-2

BRIEF OF RESPONDENT

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Appendix "B"

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court have sufficient evidence to support its findings of fact?
2. Did the court properly find defendant guilty of kidnapping V.M. and T.J. in the first degree?
3. Did the court properly find defendant guilty of robbing T.J. in the first degree and of a firearm enhancement for that robbery?
4. Did the court properly find defendant guilty of raping V.M. in the first degree, of raping T.J. in the first degree, and of a firearm enhancement for the rape of T.J.?

B. STATEMENT OF THE CASE.

1. Procedure

On November 10, 2003, the Pierce County Prosecutor's Office filed an information in Cause No. 03-1-05262-2, charging appellant, FLOYD DRANE, hereinafter "defendant," with assault in the first degree, kidnapping in the first degree, robbery in the first degree with a firearm enhancement, and rape in the first degree with a firearm enhancement, all against T.J.¹ CP 1-5. The State amended this information several times, filing the final information on May 16, 2003. CP 14-19, 45-49, 131-138.

¹ To protect her privacy, Theresa Jacques will be referred to as T.J. throughout this brief.

The final information charged defendant with seven counts of crimes committed against T.J. and V.M.² CP 135-138. In this final information, the State charged defendant with committing Counts I through IV against T.J.: I) assault in the first degree, II) kidnapping in the first degree, III) robbery in the first degree, and IV) rape in the first degree. CP 135-138. Counts II and IV also charged firearm enhancements. CP 135-138. The State charged defendant with committing counts V-VII against V.M.: V) kidnapping in the first degree, VI) assault in the first degree, and VII) rape in the first degree. CP135-138. The matter proceeded to a bench trial on May 17, 2005, before the Honorable Rosanne Buckner. RP 93.³ The court found defendant guilty of all seven counts and both firearm enhancements as charged. RP 842, 887, 888; CP 193-205.

On October 14, 2005, the court sentenced defendant to the high end of the range of 612-772 months with 706 days credit. RP 887, 888; CP 206-219. The court also imposed monetary penalties and prohibited defendant from contacting his victims for life. RP 887, 888; CP 206-219. From entry of this judgment, defendant filed a timely notice of appeal. CP 220-242.

² To protect her privacy, Valerie Mattern will be referred to as V.M. throughout this brief.

2. Facts

a. V.M.

V.M. met defendant on September 18, 2003, when she was working as a prostitute near the Bay Motel in Tacoma, Washington. RP 159, 593. V.M. was 18, suffered from fetal alcohol syndrome, and was in an accident in 2001 that caused brain damage. RP 307, 308. She was five feet, four inches tall and weighed 100 pounds. RP 307, 332. Defendant was six feet, two inches tall and weighed 230 pounds. RP 156, 593.

Defendant was in his car behind the motel when V.M. saw and approached him. RP 308, 309. Defendant ordered her to get into his car. RP 311, 312. Defendant was buying crack cocaine from a woman in the front seat of his car, so V.M. got into the back seat. RP 311, 312. When defendant was finished buying the drugs, V.M. got into the front seat and he told her that they were going to “get high.” RP 311, 312. V.M. agreed to consume the drugs with defendant. RP 312. Defendant began to drive around, stopping periodically so that he and V.M could consume the drugs he had bought. RP 315, 316, 497. Defendant made many turns as he drove, so V.M. could not tell where they were going. RP 315, 316, 497. Unbeknownst to V.M., defendant was driving to his house. RP 313, 312. V.M. did not know where defendant’s house was located and did not want

³ RP refers to the Report of Proceedings number consecutively beginning May 11, 2005.

to go to his house; she did not know where she was when they arrived in defendant's neighborhood. RP 315, 497.

Defendant made V.M. lay on the floor of the car when they were near his house so that no one would see her. RP 315. He drove into his attached garage, where V.M. discovered that she could not get out of the car unless she rolled down the window and opened it from the outside. RP 314-316. Once inside the house, defendant and V.M. smoked crack cocaine for ten to fifteen minutes. RP 321. Defendant left the house and returned with a pack of cigarettes for V.M., gave her \$30, and then left again and did not return for two to three hours. RP 321, 322. While defendant was gone, V.M. left the house, intending to get away from the neighborhood. RP 322 She returned to the house, however, when she realized that she did not recognize the area and thus could not find her way back to the Bay Motel. RP 322.

When defendant returned, he and V.M. went up to the master bedroom on the second floor, took off their clothes, and smoked crack cocaine on his bed. RP 322, 323. When the drugs were gone, defendant became angry and accused V.M. of stealing "a big chunk" of his crack cocaine. RP 324. After asserting that V.M. had hidden the crack cocaine in her vagina, defendant forced her to look around the room for it. RP 324, 325. Defendant then used his fists, his feet, a metal broom stick, and a looped electrical cord to repeatedly beat V.M.'s arms and legs while demanding that she return his drugs. RP 325-327, 496. These beatings

continued for a long period of time in the upstairs and downstairs of the house. RP 327. Back in the master bedroom, defendant handcuffed V.M. to the bed frame and heated up a clothes iron in the adjacent bathroom. RP 327, 496. When the iron was hot, he again accused her of hiding his drugs and then used the iron to burn V.M.'s legs and back several times, leaving large, iron-shaped burn marks; these assaults left permanent scars. RP 325, 327, 328, 300, 349, 417, 496, 699, 700; CP 140-149 (P135-142, P159, P163, P155, P156, P148, P132, P134).

Defendant retrieved a handgun from the hallway closet and threatened to kill V.M. unless she gave him the missing crack cocaine. RP 330. While standing four to five feet from V.M., he pointed the gun at the top half of her body. RP 335. Defendant told V.M. that because the doors and windows were locked, she would not be able to escape from the house. RP 330. He then ordered her to have sex with him. RP 327, 331. V.M. did not want to have sex at that time, but she was too afraid to resist him; defendant then penetrated her vagina with his penis. RP 331, 332, 495, 496.

After defendant forced V.M. to have intercourse with him, V.M. went to take a bath. RP 334, 335. Defendant came into the bathroom and again demanded his drugs. RP 334. He threatened V.M. with drowning unless she returned the crack cocaine; he then pushed her head under the water two to three times. RP 334, 336.

Defendant continued to demand the return of his drugs, and when V.M. could not produce them, he ordered her to sit in the second floor hallway. RP 332, 333. He used a cord to strangle her until she lost consciousness. RP 332, 333. V.M. woke up hours later and walked downstairs just as someone was arriving at the house. RP 335, 336. Defendant took V.M., who was naked, into the garage and handcuffed her wrists; he told her that he would kill her if she screamed. RP 333, 336, 337. V.M. did not consent to being handcuffed. RP 338. Defendant left her handcuffed in the garage for twenty minutes. RP 338.

V.M. was confined in defendant's house for three days. RP 338. During that time, defendant used a belt to drag V.M. around the house. RP 420. At some point, defendant took back the \$30 he had given her. RP 339, 340, 495, 496. He also put chemicals on V.M.'s vagina that made her vagina burn because he was still convinced that she had his crack cocaine. RP 341, 342. She told him to stop, but he did not. RP 341, 342. V.M. still felt this burning days later when she was in the hospital. RP 342.

During her captivity, V.M. told defendant that she wanted to leave several times; defendant angrily responded that she could not leave unless she gave him his drugs. RP 347. Defendant did not give V.M. anything to eat for two days. RP 496. V.M. testified that she did not consent to any of the beatings or attacks she underwent in defendant's house. RP 343.

On the third day of V.M.'s confinement, defendant drove her to downtown Tacoma in his Mercury Sable and let her out of the car, threatening to kill her if she went to the police. RP 339. Officer John Robillard found V.M. in a state of delirium at the Handy Mart in downtown Tacoma and took her to the hospital. RP 340, 489, 491.

At the hospital, V.M. cried out in pain any time she was moved, lightly touched, or examined. RP 422. Her body was cut and covered in blood stains. RP 490. Her left elbow was swollen, and her right shoulder was swollen. RP 490. She had dried blood around her nose; she was "very drowsy;" and she continuously lapsed in and out of consciousness. RP 417, 419, 422, 423. There were several large, iron-shaped burns on her legs and back. RP 417, 496, 699. Her eyelids were swollen, and her eyes showed hemorrhages consistent with strangulation. RP 490. She had bruises around her neck that were consistent with manual and ligature strangulation; the location and severity of the bruises also indicated that this strangulation could have killed V.M. RP 417, 490, 758-766. V.M. has many scars as a result of these injuries. RP 349, 700.

The injuries to V.M.'s vagina made it too painful to swab, so the forensics nurse had to anesthetize V.M. in order to conduct a rape examination. RP 424, 425. The nurse found blood clots in V.M.'s vagina, a 5 mm vaginal tear, and a 3 mm rectal tear; these wounds were all consistent with sexual assault. RP 425, 426. There were chemical burns

on V.M.'s labia from the chemicals that defendant sprayed on her. RP 428.

b. T.J.

On October 3, 2003, T. J. took a bus to a 76 gas station near the Bay Motel to buy some chicken. RP 104-106, 594. At the time, she was five feet, five inches tall and weighed 135 pounds. RP 156. As she was leaving the gas station, she encountered defendant, who was standing at an outside phone booth. RP 106, 110. Defendant offered T.J. a ride home, which T.J. reluctantly accepted, getting into defendant's white, four-door Mercury Sable. RP 107, 108. Defendant drove to the Red Apple Market on 56th Street to buy some beer. RP 111, 112, 600. On the way to the market, T.J. became worried that defendant was not taking her straight home and told him that she was anxious and wanted to go home; defendant replied that he would not take her home. RP 111, 112. Defendant then took T.J. to his house in North East Tacoma, but took an indirect route so that T.J. was unsure of where they were going. CP 196-205 (FOF⁴ VIII).

Defendant took T.J. into the living room of his house and ordered her to sit on the couch. RP 123. Defendant insisted that T.J. drink beer

⁴ Findings of Fact Re: Bench Trial (October 14, 2005) will be cited as "FOF" followed by the finding number (e.g. "FOF V") throughout this brief. These findings have been attached as "Appendix A."

and smoke some crack cocaine with him, which she did because she was afraid defendant might get violent if she refused. CP 196-205 (FOF IX). T.J. smoked just enough crack cocaine to be “high” for about a half hour; defendant smoked considerably more crack cocaine. RP 125-128. When defendant consumed all of his supply of crack cocaine sometime after dark, he and T.J. left to go buy more. RP 128, 129. Defendant left T.J. in the car while he bought the cocaine and then brought T.J. back to his house. RP 129. T.J. once again asked to leave, but defendant told her that she wasn’t going anywhere. RP 129. Defendant smoked more crack cocaine; when the drugs were gone, T.J. again asked to go home. RP 129. Defendant told her she was not going home, “period.” RP 130.

At this point, defendant became very angry and started shouting at T.J., accusing her of stealing his money. CP 196-205 (FOF X). He said that she was hiding it “inside” her and that he was going to search for it and see if it was there. RP 130; CP 196-205 (FOF X). He also threatened to put a hot curling iron into her vagina. RP 136. He hit T.J. in the face with his hands until she fell to the ground; he then repeatedly stomped on her legs, arms, and chest with his boots. RP 132; CP 140-149 (P55, P56, P102-106, P108, P110, P113, P117), 196-205 (FOF X). Defendant dragged T.J. into the laundry room by her hair and continued to beat her in that location. CP 196-205 (FOF X).

After this beating, defendant spread a dark blue comforter on the living room floor and ordered T.J. to lay down on it; T.J. complied with

this demand. RP 148, 240. Defendant stripped off all of T.J.'s clothing on the lower half of her body. RP 148, 149. He undressed himself completely and lay down on top of her. RP 148-152. T.J. testified that she did not want to have intercourse with defendant, that she tried to physically resist defendant, and that she informed him that she had AIDS. RP 148-156. Defendant lay on top of T.J. for four minutes despite her resistance; T.J. cannot remember if defendant had intercourse with her at this time. RP 151, 152, 156. Defendant began to weep, and T.J. tried to console him in hopes of convincing him to take her home, but to no avail. RP 152, 153. Over the next few days, T.J. continued to ask defendant to take her home, and he continued to refuse to do so. RP 238.

After this first sexual assault, T.J. was so sore, beaten, and bloody that she defecated on herself, on the living room floor, and on the couch. RP 146, 155. When T.J. defecated, defendant got angry and tried to make her clean up the mess. RP 146. Her failed efforts to do so made defendant even angrier. RP 146.

Defendant did not allow T.J. to put her clothes on or clean herself after she defecated. RP 155-157. Instead, he put a choker chain around T.J.'s neck and forced her into the laundry room, which was located at the heart of the house, between the attached garage and the living room. RP 116, 133, 134; CP 196-205 (FOF XI, XII). There, he shackled her hands and feet, put an additional belt on her feet, and put tape over her mouth. RP 133, 134; CP 196-205 (FOF XI). He began to tighten the choke chain;

T.J. began to cry. RP 144. Defendant got emotionally excited by T.J.'s reaction and tightened the choke chain again, causing T.J. to lose consciousness. RP 144, 145; CP 196-205 (FOF XII). This type of strangulation could have caused T.J.'s death. CP 196-205 (FOF XII).

Defendant left T.J. alone in the laundry room; T.J. tried unsuccessfully to escape. RP 135. When defendant returned to the laundry room, he began threatening T.J., telling her that he would pour bleach down her throat and into her vagina. RP 136. Defendant then sprayed T.J.'s vagina with bleach. RP 136, 137, 428, 429.

Defendant confined T.J. to the laundry room for twenty-four hours. RP 137, 138. He got a BB gun and positioned himself on the couch in the living room. RP 138. Every time T.J. began to fall asleep, defendant shot her with the BB gun; he did this 27 times. RP 138-140, 430, 431, 264. Then defendant left her alone for a moment, returned, produced a handgun, and threatened to shoot T.J. with it. CP 196-205 (FOF XI). Defendant placed the gun against her head and pulled the trigger; the gun did not fire. RP 141; CP 196-205 (FOF XI). The gun was apparently loaded, however, because T.J. saw a bullet fall out of the gun after defendant pulled the trigger. RP 141. When defendant placed the gun against T.J.'s head, she believed that the gun would fire and that she would die. RP 141-143. Defendant, upset that the gun did not fire, accused T.J. of sabotaging the gun. RP 141, 142.

On Sunday, October 5, 2006, defendant untied T.J. and forced her onto the blue comforter; he undressed himself and lay on top of her again for some minutes. RP 153-155, 157. Defendant rubbed his penis against T.J. until he obtained an erection, penetrated her vagina with his penis, and ejaculated inside her. RP 161, 431. T.J. was still naked with splotches of fecal matter on her from night before. RP 155, 156. She testified that defendant had a gun nearby and believed that he would kill her if she resisted him. RP 155, 161. Defendant also penetrated T.J.'s anus with his finger. RP 467.

After defendant ejaculated, he tied her up again. RP 162. Two hours later, he untied her, telling her that he was bored and that she wasn't worth hurting or killing. RP 162. Defendant ordered her to get dressed again; T.J. could not find her socks, shoes, or underwear. RP 163. Defendant would not let her look for those items, which the police later found in defendant's house. RP 163-170.

Defendant took T.J.'s watch, silver rings, chain with a cross, silver earrings, and bus pass without her consent while she was at his house. RP 168-170, 178. Although T.J. was unclear as to the exact sequence of events regarding this taking, she knows that defendant took these items after he first beat her. RP 170.

T.J. testified that defendant may have bound her hands after she got dressed. RP 170. Defendant forced T.J. to lie facedown in the back seat of his car, and he ordered her not to speak. RP 170. Defendant drove

T.J. to Min's Market on Portland Avenue in Tacoma, Washington. RP 171. On the way, he passed a house belonging to Sharon Gastelum. RP 472. Ms. Gastelum, her daughter Leslie Jenkins, and her brother Michael Trabert were in the yard of that house when defendant's car passed. RP 282, 283. As the car passed, Ms. Gastelum saw T.J. sit up in the back seat, scream, and waive her crossed hands. RP 472, 473. Ms. Jenkins testified that defendant had a gun; she also said that defendant made a gesture indicating he had a gun. RP 282, 283, 305. When defendant stopped at the stop sign at the end of the block, T.J. kicked open the back door of the car. RP 286. Defendant got out of the car, went to the back door of the car, punched T.J., and slammed the back door shut before driving away. RP 286, 473, 474. Ms. Jenkins and Mr. Trabert got into Ms. Jenkins's car and followed defendant's car to Min's Market. RP 284-286, 288, 474.

Defendant stopped at Min's Market.⁵ RP 171, 288. Defendant told T.J. that he would kill her and her family if she told anyone what he had done to her. RP 171. Then he opened the rear door of his car, removed T.J.,⁶ and went into the store. RP 171. Ms. Jenkins and her uncle arrived at the scene and helped T.J. into the back seat of Ms.

⁵ Ms. Jenkins called the gas station "Mike's," but it is clear from the record that she meant Min's. RP 288.

⁶ T.J. said defendant threw her out of the car. RP 170. Leslie Jenkins testified that T.J. staggered out of the back seat. RP 288.

Jenkins's car. RP 173, 290. As they were doing this, defendant came out of the store and told Ms. Jenkins, "that bitch deserves everything that she got." RP 291, 292. He told Ms. Jenkins, "I know what you drive and I know where you live," and then he drove away. RP 291, 292. Ms. Jenkins and Mr. Trabert took T.J. back to Ms. Gastelum's house and called 9-1-1. RP 293, 474, 475. T.J. still had her own feces on her and had dried blood on her face. RP 474, 475. An ambulance took T.J. to the hospital. RP 173, 293.

When she arrived at the hospital on October 5, 2003, T.J. had not slept nor eaten in three days. RP 174. She had a weak pulse, was mentally unstable, and could not communicate well because she was delirious. RP 174, 175, 243, 266, 288. When she could communicate, she categorized her pain level as a nine on a scale of one to ten. RP 430, 431. She had bruises from being beaten and welts from being shot with the BB gun. RP 174, 288, 289, 474, 475, 591. Each circular welt was about three inches in diameter with a puncture wound in the middle; the welts covered her body. RP 264, 430, 431. Each welt left a scar. RP 177. She had ligature marks around her neck consistent with strangulation. RP 264, 430, 431. She had a 2 mm vaginal tear and a 3 mm vaginal tear. RP 440. She also had a foul-smelling, yellowish discharge in her vaginal vault and a red abrasion on her vaginal wall. RP 441. A forensic nurse found sperm in T.J.'s vagina that was linked to defendant through DNA analysis. RP

547-561, 570. T.J. spent a day and a half in the hospital before she was released. RP 174.

c. Defendant's arrest

Sergeant John Rosenquist retrieved a surveillance video tape from Min's Deli. RP 595, 596. He produced a photograph of defendant from this video tape. RP 595, 596. This photo was published to the public. RP 598, 599, 645. Detective Jeffrey Shipp, who worked with defendant in King County Corrections, called in defendant's identification. RP 598, 599, 645. When Officer Rosenquist saw defendant, defendant was wearing the same clothes he had worn in the surveillance photo. RP 606. V.M. identified defendant as her assailant from a photo montage. RP 619. Officer Frank Richmond arrested defendant in front of defendant's house in Federal Way, Washington on November 7, 2003. RP 405, 514, 517.

Detective Miller conducted the post-arrest interview of defendant; Detective Shipp also attended this interview. RP 650-652. When Detective Shipp arrived at the interview room, defendant recognized him and asked to be allowed to speak to him alone. RP 653. Detective Miller agree to leave. RP 651, 652. When Detective Miller was gone, defendant denied raping or kidnapping anybody before Detective Shipp asked him any questions about V.M. or T.J. RP 653. Defendant said that he had been smoking crack cocaine for some time in order to relieve the stress in his life. RP 652-657. He also said he had been spending time with "shady

people,” including a woman named Theresa. RP 657. He claimed to have had intercourse with Theresa three times. RP 665. Defendant said that Theresa once poisoned him so that he would pass out for two days. RP 658. According to him, she made a copy of his house key so that she could break into his house. RP 658. He stated that after this incident, he started finding fecal matter and female footprints in his house. RP 658, 669. Defendant also admitted that he owned a dog chain, a Makarov handgun, and a bb gun. RP 668. He claimed that someone had broken into his house and broken his handgun. RP 668.

Defendant said that two white women had been to his house in the month before his arrest. RP 665. He had met one of these women at the Bay Motel and the other one at a 76 Station. RP 665, 666. When Detective Shipp showed defendant a photograph of T.J., defendant said that she was the woman he met at the 76 Station and that her name was Tina. RP 665, 666, 671. He said he took her to his house, had intercourse with her, “smoked” with her, “partied” with her, and then brought her back to the 76 Station after four or five hours. RP 665, 667, 670, 671, 672. When Detective Shipp suggested that defendant had beaten, kidnapped, and raped her, defendant became very upset and then vomited in the interview room. RP 673.

During the interview, defendant frequently said that he had had many “whores” over to his house. RP 674.

d. Search of defendant's home

After arresting defendant, Officer Richmond searched defendant's home and found a handgun magazine in the upstairs master bedroom; it was partially loaded with .380 caliber ammunition. RP 519, 733, 734, 745. Police officers later found a Makarov .380 caliber handgun on a shelf in the garage. RP 507, 688, 745. This handgun was only eight to ten feet from the laundry room in which T.J. had been held. RP 505, 507. The firing pin of the gun had been removed, which prevented the gun from firing. RP 576-586. Firearms expert Brenda Robinson testified that someone could easily replace the pin, however, and make the gun operable within minutes. RP 576-586.

Police found considerable evidence consistent with V.M.'s and T.J.'s testimony. They found a BB gun and a box of BBs hidden under insulation in defendant's attic. RP 486, 521, 681. When police moved the washing machine in the laundry room, they found two BBs. RP 611, 612, 714. They found blood on the laundry room wall that was connected to T.J. through DNA analysis. RP 569, 570, 614, 714. In the garage, the police found handcuffs, a handgun, a kit for smoking rock cocaine, other evidence of rock cocaine use, a dog chain, and corrections officer gear (a holster, a belt, handcuff cases, and a set of handcuffs in a bag). RP 504, 509, 611, 727-733. Police did not find a clothes iron in the home, but they did find an uncovered ironing board. RP 521, 522. They also found various cords and cables in defendant's kitchen and bedroom, and they

found a blue comforter in a small, second floor bedroom. RP 612, 627, 679, 680, 735-737, 739, 740. T.J. later recognized defendant's boots, handgun, BB gun, and dog leash. RP 611, 615, 616.

Defendant did not call any witnesses or testify at trial. RP 768.

C. ARGUMENT.

1. THE FINDINGS OF FACT SHOULD BE TREATED AS VERITIES AS THEY ARE UNCHALLENGED OR SUPPORTED BY SUBSTANTIAL EVIDENCE.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. Id. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In applying the above law to the case now on appeal, the court should treat the unchallenged findings of fact as verities. Defendant has

assigned error to ten findings of fact. There is no argument in his brief, however, as to how findings III, IV, VI, and VII are unsupported by the evidence. In Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence, made no cites to the record to support its assignments, and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Id. at 244; see also State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998). Because defendant has failed to support these assignments of error to the trial court's findings of fact with argument, citations to the record, or citations to authority, this court should treat the assignments as being without legal consequence. The findings should be considered as verities on appeal.

Each of the findings to which defendant assigns error and for which he provides argument is supported by substantial evidence. Appellant provides argument for six findings of fact to which he assigns error: Findings of Facts V and XIII-XVI, and Finding of Fact Re: Same

Criminal Conduct I⁷. Br. of Appellant at 41-46. Part of Finding of Fact XIV and the entirety of both Finding of Fact XIII and Finding of Fact Re: Same Criminal Conduct I will be addressed in this section; the remaining findings and the rest of Finding of Fact XIV will be addressed in the sections that discuss sufficiency of the evidence (sections two through four below).

Defendant argues that the court had insufficient evidence to conclude that “[d]uring the beating, [T.J.] became so terrified that she defecated on her self and the laundry room floor.” CP 196-205 (FOF XIII). He also argues that it had insufficient evidence to conclude that

[a]fter the victim defecated, the defendant became so angry with her that he insisted she clean up [the] laundry room. [T.J.] was unable to clean the laundry room to the defendant’s satisfaction.

CP 196-205 (FOF XIV). Defendant’s argument against these two findings focuses on the location in which T.J. defecated, but it fails to explain why the location is critical in this case. Br. of Appellant at 42, 43. It is true that T.J. testified that she defecated on the living room floor and the couch. RP 146. She also testified that defendant tried to force her to clean it up and that he got angry when she could not do so. RP 146. Findings of Fact XIII and XIV may be mistaken as to the location of the defecation,

⁷ Throughout this brief, Findings of Fact Re: Same Criminal Conduct will be cited as “SCC” followed by the finding number (e.g. “SCC I”). These findings have been attached as “Appendix B.”

but the critical point of the findings is supported by the record: defendant terrorized T.J. to the point that she defecated, tried to make her clean up the mess, and got angry with her when she could not clean it up to his satisfaction. RP 144-146.

Defendant also argues that the court had insufficient evidence to find that “the act of strangulation (Assault 1) of [T.J.] (Count I) occurred and was completed before the act of rape” and that “the rape was completed before the robbery, the assault was completed before the robbery and before the rape.” CP 193-195 (SCC I). Defendant’s argument against this finding is concerned with the order in which the crimes were committed. Appellant’s Br. at 45, 46. The primary thrust of SCC I, however, is that the crimes were each separate and distinct criminal acts; the order in which they occurred is not the primary purpose of the finding. Defendant offers no argument as to why the crimes listed in this finding were not the same course of conduct.

Furthermore, there is sufficient evidence to find that defendant committed these crimes in this order. T.J. testified that she was strangled when she was first tied up in the laundry room, which was October 3 or 4, 2003. RP 144. She testified that she was not raped until defendant forced her to lie on the blue comforter a second time, which occurred on Sunday October 5, 2003, when she was released from the laundry room for the first time. RP 153-161. Thus, T.J. was raped after she was strangled.

T.J. was robbed after she was raped. Defendant took T.J.'s clothing when he stripped her on the blue comforter the first time, which was before he tied her up in the laundry room. RP 147-149. He took her jewelry before he shot her with the BB gun, which occurred before he raped her. RP 153-155, 168-170. Although defendant took this property prior to the rape, robbery includes retaining as well as taking property. See RCW 9A.56.190. Defendant completed the act of robbing T.J. when he retained her property, which happened after he had raped her, bound her hands, and driven her to Min's Market. RP 168-171. Thus, although he took T.J.'s property before raping her, he retained the property after he had driven her to Min's. Thus, defendant robbed T.J. after the rape and the assault.

2. THE COURT HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF TWO COUNTS OF KIDNAPPING IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). 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 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Salinas, 119 Wn.2d 192; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent to inflict bodily injury on that person. RCW 9A.40.020(1)(c). A person abducts another if he “restrain[s that] person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(2).

“Restrain” means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is ‘without consent’ if it is accomplished by... physical force, intimidation, or deception.

RCW 9A.40.010(1)(a). The term “threat” means the communication of an intention to inflict injury. State v. Bright, 129 Wn.2d 257, 266-67, 916 P.2d 922 (1996). “Bodily injury” means “physical pain or injury, illness, or an impairment of physical condition.” RCW 9A.04.110(4)(a).

Thus, the State proved kidnapping in the first degree if it proved that defendant (1) intentionally restricted the victim’s movements by physical force, intimidation, or deception in a manner that interfered substantially with her liberty, (2) either (a) hid the victim in a place where

she was not likely to be found or (b) used or threatened to use deadly force, and (3) intended to inflict bodily injury on his victim.

a. Kidnapping of V.M.

The State proved that defendant kidnapped V.M. in the first degree when he refused to take her home and then restrained her in his home for three days.

First, defendant intentionally restrained V.M. when he used physical force, intimidation, and deception to substantially interfere with her liberty. Although V.M. willingly got into defendant's vehicle, defendant refused to take her home when she asked. RP 347. Defendant then used physical force and intimidation to hold V.M. in his house against her will; he created an atmosphere of terror in the house by repeatedly assaulting her for three days, and he told her that the doors and windows of his house were locked. RP 312, 315, 316, 330, 497. Defendant also used deception to hold her against her will. He drove to his house by an indirect route, impaired V.M. by giving her crack cocaine to smoke on the way to his house, and took V.M. to a neighborhood she did not recognize. RP 315, 316, 497.

Second, defendant hid V.M. in a place where she was not likely to be found. Defendant disoriented V.M. by smoking cocaine with her so that she did not know where she was going. RP 315, 316, 497. V.M. did not recognize defendant's neighborhood and could not lead police officers

back to it, so it is reasonable to infer that she had never been to the neighborhood before defendant brought her there. RP 315, 497. If V.M. had never been to defendant's neighborhood, then no one would ever think to look for her there. While driving into his neighborhood, defendant made V.M. lie down on the floor of his car so that no one would know that she was with him. RP 315. There is no evidence that defendant had ever met V.M. before September 18, 2003; this fact made it even less likely that anyone would think to look for her in defendant's home. RP 307-310. Defendant told V.M. that the doors and windows were locked so that she wouldn't leave the house where other people might see her. RP 330. When a person came to visit defendant during V.M.'s captivity, defendant hid V.M. in the garage and threatened to kill her if she screamed. RP 333, 336, 337. V.M. thus was not likely to be found at defendant's house because V.M. did not know where she was, no one else knew where she was, and defendant prevented her from contacting anyone who could help her.

In addition to hiding V.M. in a place where she was not likely to be found, defendant threatened to use deadly force on V.M. during her captivity. Apart from threatening to kill her when she was in the garage, defendant tried to drown V.M., beat V.M. severely, and pointed a gun at V.M.'s chest. RP 325-336. Each of these acts was severe enough to communicate an intention to inflict deadly force. See State v. Bright, 129 Wn.2d at 266, 267.

Third, it is reasonable to infer from the evidence that defendant intended to inflict bodily harm on V.M. when he picked her up at the Bay Motel. The manner in which he took V.M. to his house and the repeated beatings over a three day period reflect a design to acquire a captive victim to be tortured. RP 300, 325, 327, 328, 334, 336, 349, 417, 488, 496, 699, 700; CP 140-149 (P135-142, P159, P163, P155, P156, P148, P132, P134); CP 196-205 (FOF X).

The State thus proved that defendant kidnapped V.M. in the first degree when it provided evidence that he intentionally abducted V.M. with the intent of causing bodily injury.

b. Kidnapping of T.J.

The State proved that defendant kidnapped T.J. in the first degree when he confined her to the laundry room for twenty four hours.

First, defendant intentionally restricted T.J.'s personal movement by physical force when he placed a choker chain around her neck, shackled her feet and hands, and put a belt around her feet. RP 133, 134; CP 196-205 (FOF XI, XII). This restriction substantially interfered with T.J.'s liberty because it prevented her from escaping from the laundry room. RP 135.

Second, defendant hid T.J. in a place where she was not likely to be found. Defendant hid her in his house in a neighborhood T.J. did not recognize. CP 196-205 (FOF VIII). It is reasonable to infer that because

T.J. did not recognize the neighborhood, she had never been to that neighborhood before he took her there. If she had never been to the neighborhood, no one would think to look for her there. Moreover, there is no evidence that T.J. had contact with defendant prior to October 3, 2003, which made it even less likely that anyone would think to look for her at his home. RP 102-110. Finally, defendant chose to handcuff her in the laundry room in the heart of his house, where no one would see her through a window or hear her scream. RP 116, 133, 134; CP 196-205 (FOF XI). T.J. was not likely to be found in defendant's house because defendant hid her in an especially secluded room and because no one would think to look for her in his neighborhood.

Third, defendant intended to inflict emotional distress and bodily injury on T.J. when he confined her. He placed a choker chain around her neck, shackled her hands and feet, tied a belt around her feet, and placed tape over her mouth. RP 133, 134; CP 196-205 (FOF XI, XII). While she was confined, defendant sat on a couch with a BB gun for the express purpose of shooting T.J. to keep her awake and deprive her of sleep. RP 138-140, 430, 431, 264. These acts caused bodily injury to T.J. by causing her pain and preventing her from sleeping. RP 174, 175, 243, 266, 288, 289, 264, 430, 431, 474, 475, 591.

The State thus proved that defendant kidnapped T.J. in the first degree when it provided evidence that he intentionally abducted T.J. with the intent of causing bodily injury.

3. THE COURT HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ROBBING T.J. IN THE FIRST DEGREE WHILE ARMED WITH A FIREARM.

a. Robbery

A person is guilty of robbery in the first degree if, in the commission of a robbery, he (a) displays what appears to be a firearm or other deadly weapon or (b) inflicts bodily harm. RCW 9A.56.200(1)(a)(ii). RCW 9.41.010(1) defines a firearm as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.”

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person Such force or fear must be used to **obtain or retain possession of the property**, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial.

RCW 9A.56.190 (emphasis added). Robbery also includes the intent to steal the objects taken. State v. Byers, 136 Wash. 620, 622, 241 P. 9, (1925).

Thus, the State proved that defendant committed robbery in the first degree if it proved that defendant (1) intended to steal T.J.’s property, (2) took T.J.’s property against her will, either from her person or in her presence, (3) used or threatened to use immediate force, violence, or fear of injury to either take the property, retain the property, or prevent T.J.

from resisting him in taking or retaining the property, and (4) inflicted bodily harm or displayed a firearm or other deadly weapon while committing the robbery.

Defendant argues that the court had insufficient evidence to find that “the evidence supports findings for both deadly weapon or bodily injury and that the court would return a verdict of guilty to robbery in the first degree based on either basis.” CP 196-205 (FOF XV). The State provided sufficient evidence from which the court could conclude that defendant had committed robbery in the first degree either by displaying a firearm or by inflicting bodily harm.

i. Intent and Taking

Defendant intended to steal T.J.’s undergarments, boots, jewelry, and bus pass. He took those items without asking permission, and T.J. did not want to give them to him. RP 168-170, 178. Defendant took T.J.’s clothing, jewelry, and bus pass off of her in her presence and from her person. RP 163-165, 168-170, 178.

ii. Use of Force and Fear of Injury

“[D]efendant took [T.J.’s] personal items by the use or threatened use of force or actions that caused [T.J.] to fear she would be injured if she did not comply.” CP 196-205 (FOF XV). Defendant assigns error to Finding of Fact XV, but this finding is clearly supported by the record. Br. of Appellant at 43, 44. T.J. testified that defendant took her personal

items twice: once when he forcibly stripped off her clothing and once when he told her to give him her jewelry and bus pass. RP 149, 168-170. Defendant used force when he forcibly removed T.J.'s clothing on the blue comforter. RP 148, 149.

He also acted in a way that made T.J. believe that defendant would injure her if she did not give him her possessions: he hit her with his fists, stomped her with his boots, and dragged her by her hair. RP 132; CP 196-205 (FOF X). T.J. said these beatings made her afraid that defendant would beat her again if she did not give him her possessions. RP 169, 170. This fear also prevented her from trying to recover these items. RP 163-170. Defendant thus used force and fear of injure to take and retain T.J.'s possessions.

iii. Bodily Harm and Deadly Weapon

Fourth, defendant inflicted bodily harm and displayed a firearm or deadly weapon when committing the robbery. He inflicted bodily harm when he beat T.J. into submission by hitting her with his fists, stomping her with his boots, and dragging her by the hair. RP 132; CP 196-205 (FOF X, XV).

In addition to inflicting bodily harm, defendant displayed a firearm when he committed the robbery because he used his gun to instill fear in T.J. in order to retain her possessions. Defendant assigns error to two

sentences in Finding of Fact XV and one in Finding of Fact XVI that support this conclusion.

Defendant argues that the court had insufficient evidence to find that “during the course of taking [T.J.] property, or in the immediate flight therefrom, the defendant was armed with a deadly weapon (handgun) or displayed what appeared to be a deadly weapon (bb-gun or handgun).” CP 196-205 (FOF XV). The record supports Finding of Fact XV, however, because defendant displayed both a deadly weapon and what appeared to be a deadly weapon.⁸ Defendant displayed a deadly weapon when he pointed the gun to T.J.’s head. RP 140, 141. He displayed what appeared to be a deadly weapon when he shot her with the BB gun because the BB gun looks like a gun. RP 138-140. Though defendant displayed the gun and the BB gun after *taking* T.J.’s property, he did so before he *retained* her property. T.J. even testified that she remembered the gun when she was raped, which happened before defendant retained her property. RP 161.

Defendant argues that the court had insufficient evidence to conclude that “the defendant used the firearm to instill fear in [T.J.] so that he could commit the robbery.” CP 196-205 (FOF XVI). Robbery can be committed either by taking property or retaining it. Defendant displayed

⁸ Whether the defendant was *armed* with the deadly weapon is explained below under the next section entitled “firearm enhancement.”

his gun to T.J. after he had taken her undergarments, boots, jewelry, and bus pass. RP 140. He retained this property, however, when he forced T.J. to leave his house without those items, which was after he displayed the gun. RP 170. T.J. testified that she asked for her clothes, but defendant would not let her look for them. RP 163. Because defendant retained T.J.'s property by frightening her with his gun, he used the gun to instill fear and commit the robbery.

Defendant argues that the court had insufficient evidence to find that "the defendant's handgun was readily capable of causing death or substantial injury" CP 196-205 (FOF XV). It is true that Brenda Robinson testified that the gun's firing pin had been removed by the time she examined it. RP 584. Ms. Robinson received the gun from Officer John Ringer, who found it while searching defendant's home on November 7, 2003. RP 500-507. This evidence only establishes that the firing pin had been removed by November 7, 2003, which was 33 days after T.J.'s escape from defendant on October 5, 2003. RP 472.

There is no evidence that the firing pin had been removed before T.J.'s captivity, and Mrs. Robinson testified that someone could easily remove and replace the firing pin in minutes. RP 585. Thus, one of two scenarios can be reasonably inferred. First, the gun could have been operable while defendant held T.J. captive, and defendant later took out the firing pin. Second, the firing pin could have been missing when defendant robbed T.J., but defendant replaced the firing pin in minutes and

fire a bullet at her. Either way, the gun was readily capable of causing substantial bodily injury or death when defendant took and retained T.J.'s possessions.

iv. **State v. Handburgh**

The robbery in this case is similar to the robbery that occurred in State v. Handburgh, 119 Wn.2d 284, 830 P.2d 641 (1992). 12-year-old Zyion Handburgh took 12-year-old Chaska Leonard's bicycle when Chaska was not present. Id. at 285. When Chaska discovered that he was riding her bicycle, Chaska demanded it back. Id. at 286. Handburgh refused and instead dropped the bike into a ditch. Id. When Chaska tried to recover the bicycle, Handburgh threw rocks at her. Id. Chaska then fought physically with Handburgh and left, without the bicycle. Id. The court held that Handburgh robbed Chaska, even though he only used force after he had already taken possession of the bicycle. Id. at 292, 293. In this case, defendant used force after he had already taken T.J.'s clothing, jewelry, and bus pass when he confined her in the laundry room, put the gun to her head, and shot her with the BB gun. RP 134-141. The force of defendant's beating overcame T.J.'s ability and desire to recover her property, just as Handburgh's force overcame Chaska's ability and desire to recover her bicycle. RP 170.

Because defendant intended to steal T.J.'s possessions, took and retained those items against her will and in her presence, used force and fear of injury to compel her to give him those items, and both inflicted

bodily harm and displayed a firearm, the court had sufficient evidence to convict defendant of robbing T.J. in the first degree.

b. Firearm enhancement

Defendant assigns error to Finding of Fact XVI, which says that “during the commission of the Robbery...against T.J., the defendant was armed with a firearm as defined under RCW 9.41.010.” CP 196-205 (FOF XVI); See also CP 196-205 (FOF XV). The legislature provided for firearm enhancements in RCW 9.94A.510(3)(formerly 9.94A.310), which states in the relevant part:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010...

Case law has provided the following definition of armed: A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition to the test announced in Valdobinos, when assessing the sufficiency of the evidence to support an enhancement in a constructive possession case, the Supreme Court has said there is also a nexus requirement: “Under a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime.” State v. Schelin, 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002). To meet this test, the courts have looked to whether the

weapons were readily available and easily accessible at the time of the crime to establish this nexus. See State v. Schelin, 147 Wn.2d at 573-575, State v. Johnson, 94 Wn. App. 882, 892-93, 974 P.2d 855 (1999); State v. Mills, 80 Wn. App. 231, 236-37, 907 P.2d 316 (1995).

The Washington Supreme Court recently addressed the nature of what must be shown in a constructive possession case for a weapon to be “easily accessible and readily available.” State v. Gurske, 155 Wn.2d 134, 137, 118 P.3d 333 (2005)(also found at 2005 Wash. LEXIS 682)(Slip Opinion Case No 75156-1, filed August 25, 2005). It stated:

This requirement means that where the weapon is not actually used in the commission of the crime, it must be there to be used. In adopting the ‘easily accessible and readily available’ test, we recognized that being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. This is consistent with the legislature’s obvious intent to punish those who are armed during the commission of a crime more severely than those who are unarmed because of the risk of serious harm to others is greater....

....

The accessibility and availability requirement also means that the weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police. The use may be for either offensive or defensive purposes, whether to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police.

Gurske, 155 Wn. 2d at 138, (2005 Wash. LEXIS at *6-8).

Thus, to prove that defendant was armed with a firearm when he robbed T.J., the State had to show that (1) the gun was easily accessible and available for use during the robbery, and (2) there was a nexus between the gun and defendant and between the gun and the robbery.

Defendant's gun was easily accessible and available for use during the robbery. T.J. testified that while she was tied up in the laundry room, defendant left her alone for only a minute before he returned carrying the gun. RP 140, 141. Moreover, police later found the gun on a shelf only eight feet from the laundry room in which defendant confined T.J. RP 116, 133, 134, 505, 517, 519, 688, 733, 734, 745. Because defendant could so easily retrieve the gun, he either kept the gun in an accessible location in his house or he kept it on his person. Thus, defendant robbed T.J. either while he was carrying a gun or after bringing her to the house where his gun was located. Thus, the gun was easily accessible to him for use while he took and retained T.J.'s property.

There was a nexus between the gun and defendant. Defendant loaded a round of ammunition in the gun, displayed the gun to T.J., pointed the gun at her head, and pulled the trigger. RP 141-143; CP 196-205 (FOF XI). T.J. never forgot that defendant was willing to use the gun on her. RP 155, 161. Nor did she forget the ease with which he had retrieved the gun, placed it to her head, and pulled the trigger. RP 141-143, 155, 161; CP 196-205 (FOF XI).

There was also a nexus between the gun and the crime because defendant relied on all his past intimidation to prevent T.J. from trying to recover her jewelry, bus pass, and clothing. It is reasonable to infer that he relied this past intimidation included his use of the gun, especially considering T.J. remembered that he had the gun when he was raping her in the living room. RP 141-143, 155, 161. T.J. even said that she gave him the jewelry because she believed that if she did not, defendant would shoot her. RP 168-170, 178. T.J. also allowed defendant to keep her jewelry, bus pass, and clothing after he had displayed the gun to her. RP 163.

Thus, the State proved a firearm enhancement for the robbery count because the gun was easily accessible and readily available for defendant's use and because there was a nexus between the gun and defendant and between the gun and the crime.

4. THE COURT HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF TWO COUNTS OF RAPE IN THE FIRST DEGREE, ONE WHILE ARMED WITH A FIREARM.

A person is guilty of rape in the first degree when that person engages in sexual intercourse with another person by forcible compulsion where the perpetrator (a) uses or threatens to use a deadly weapon or what appears to be a deadly weapon, (b) kidnaps the victim, or (c) inflicts

serious physical injury, including injury which renders the victim unconscious. RCW 9A.44.040(1).

“Sexual intercourse” occurs upon “any penetration of the vagina or anus however slight, by an object, when committed on one person by another.” RCW 9A.44.010(1)(b). “Forcible compulsion” means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself, or in fear that she will be kidnapped. RCW 9A.44.010(6). To find forcible compulsion, the evidence must be “sufficient to show that the force exerted was directed at overcoming the victim’s resistance and was more than that which is normally required to achieve penetration.” State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989).

A victim’s resistance can be either physical or verbal. McKnight, 54 Wn. App. at 525. A jury may imply a “threat” from the circumstances. State v. Weisberg, 65 Wn. App. 721, 725-27, 829 P.2d 252 (1992); State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996) (finding an implied threat where the attacker placed a gun next to victim without pointing it at her or verbally threatening her). Where there is no evidence of physical force or an express threat, a finding of forcible compulsion cannot be based solely on the victim’s subjective reaction to the defendant’s particular conduct. Weisberg, 65 Wn. App. at 725. To prove forcible compulsion by threat, the State must at least present evidence from which the jury could infer

that the victim perceived a threat along with evidence that the defendant communicated an intention to inflict physical injury in order to coerce compliance. Id. at 726.

Thus, to prove that defendant raped either V.M. or T.J., it had to prove that (1) defendant penetrated her anus or vagina with an object, (2) defendant either (a) used physical force to overcome her resistance or (b) threatened her in a way that placed her in fear of death, serious physical injury, or kidnap, and (3) defendant either (a) used a deadly weapon, (b) kidnapped her, or (c) inflicted serious physical injury on her, including injury that rendered her unconscious.

To prove that defendant was armed with a firearm when he raped and T.J., the State had to show that (1) the gun was easily accessible and available for use during the rape, and (2) there was a nexus between the gun and defendant and between the gun and the rape.

a. Rape of V.M.

Defendant raped V.M in the first degree. First, he penetrated V.M.'s vagina with his penis against her will while she was on the bed in the master bedroom. RP 331, 332, 495, 496. Second, he used physical force to overcome her resistance by beating and whipping her all over the house and by burning her with an iron. RP 325-330, 349, 417, 496, 699, 700; CP 140-149 (P135-142, P159, P163, P155, P156, P148, P132, P134).

V.M. only relented to defendant after he had beaten her, whipped her, and burned her. RP 331, 332.

Defendant also used a deadly weapon to overcome V.M.'s resistance to intercourse with him. Defendant argues that the court had insufficient evidence to conclude that "the defendant's act of pointing what appeared to be a gun at V.M. and threatening to kill her overcame [V.M.'s] resistance to intercourse with the defendant." CP 196-205 (FOF V). V.M. testified, however, that defendant pointed the gun at her, threatened to kill her, and then forced her to have sex with him. RP 331, 332, 335. Because V.M. did not relent to having sex with defendant until after he pointed the gun at her chest, it is reasonable to infer that the act of pointing the gun at V.M. overcame her resistance to intercourse with defendant.

Defendant argues in his brief that V.M. was working as a prostitute and that she had consensual sex with him. Br. of Appellant at 33, 34. There was no testimony at trial to support this claim. Even assuming that V.M. expected to have sex with defendant when she got into his car, she did not intend to have sex with him by the time defendant raped her. V.M. did not want to go to defendant's home in the first place. After defendant gave V.M. \$30, which defendant argues was in exchange for intercourse, V.M. still tried to leave the unfamiliar neighborhood to which defendant had brought her. RP 322. Before he had intercourse with her, defendant accused V.M. of stealing his drugs, beat her with a metal broom stick and

an electrical cord, burned her with an iron, and threatened her with a handgun. RP 324-328, 300, 349, 417, 488, 496, 699, 700; CP 140-149. Even if V.M. expected to have intercourse with defendant when she decided to get into his car, she certainly did agree to intercourse after he had taken her to an unfamiliar place that she did not want to be, held her there against her will, and tortured her.

b. Rape of T.J.

Defendant committed first degree rape against T.J. He penetrated her vagina with his penis against her will. RP 161, 431. T.J. resisted this intercourse when she physically resisted defendant, told him she had AIDS in order to dissuade him, and tried to comfort him so that he would let her go home. RP 151-153, 156. Although these forms of resistance occurred during the first sexual assault, T.J. never indicated that she later wanted to have intercourse with defendant. T.J. testified that she only had intercourse with defendant because she was afraid of the gun and believed he would shoot her if she resisted. RP 155.

Defendant inflicted serious physical injury on T.J. This injury constituted both physical force sufficient to overcome T.J.'s resistance to him and a threat that placed her in fear of death or further serious physical injury. Defendant hit T.J. with his fists, stomped her with his boots, confined her for twenty four hours, strangled her, and tortured her with a BB gun. RP 130-141; CP 140-149 (P55, 56, P78-81, P102-126); 196-205

(FOF X, XI). This torture left her bruised, bloody, and delirious. RP 174, 288, 289, 430, 431, 474, 475, 591. It eventually left permanent scars. RP 177. These injuries clearly constitute “serious physical injury.” See RCW 9A.44.040(1).

Alternatively, defendant used a deadly weapon to overcome T.J.’s resistance to having intercourse with him. RP 140, 141; CP 196-205 (FOF XI). Defendant argues that the court had insufficient evidence to conclude either that “the defendant used the firearm to instill fear in [T.J.] so that he could commit...the rape,” CP 196-205 (FOF XVI), or that “the defendant’s act of pointing what appeared to be a gun at [T.J.] along with his threatening to kill her overcame [T.J.’s] resistance to intercourse with the defendant,” CP 196-205 (FOF XIV). T.J. testified, however, that defendant confined her to the laundry room, put the handgun to her head, and pulled the trigger before raping her on the blue comforter. RP 132-143, 153-155. She also testified that she did not resist him because she knew he had a gun nearby and believed he would kill her. RP 153-155, 141-143. Thus, defendant used the gun to instill fear in her so that he could overcome her resistance.

This case is similar to State v. Lubers, 81 Wn. App. 614, 915 P.2d 1157 (1996). Lubers and a friend named Joseph called the victim S. and invited her to the park with them. Id. at 617. She agreed, and when they arrived at the park, Lubers and Joseph took out a gun and acted as though they were going to shoot each other with it. Id. Later, Joseph acted

injured in order to lure S. near him. Id. Lubers then grabbed S., threw her to the ground, sat on her, took the gun from her, threw the gun aside, and then held her so that Joseph could rape her. Id. S. said that she only relented to the rape because she remembered the gun and was afraid that Lubers would shoot her.

The present case is similar, if not more severe. Here, defendant tried to use the gun to shoot his victim T.J. before he raped her. RP 140, 141. Then he forced her to the ground, lay on top of her, and raped her. As in Lubers, T.J. admitted that she relented because she remembered that the gun was nearby and was afraid that defendant would shoot her with it. RP 155, 161.

Because defendant overcame T.J.'s resistance to intercourse with him by inflicting serious injury and by displaying a handgun to her, the court had sufficient evidence to convict defendant of raping T.J. in the first degree.

c. Firearm Enhancement for Rape of T.J.

The State provided enough evidence to sustain a firearm enhancement for the rape of T.J. Defendant argues that the court had insufficient evidence to find that “during the commission of the Rape against T.J., the defendant was armed with a firearm as defined under RCW 9.41.010.” CP 196-205 (FOF XVI). There was sufficient evidence in the record to support this finding, however.

First, defendant's gun was easily accessible and readily available to him when he robbed T.J. As argued in the preceding section regarding the robbery of T.J., defendant could easily access and use the gun while T.J. was in the house with him. RP 116, 133, 134, 140, 141, 329, 330, 505, 507, 517, 519, 688, 733, 734, 745; CP 196-205 (FOF XI).

There was a nexus between the gun and defendant. Defendant created a nexus between himself and the gun when he loaded a round, displayed the gun to T.J., pointed the gun at her head, and pulled the trigger. RP 141-143; CP 196-205 (FOF XI). He created this nexus before he ever raped T.J., and T.J. remembered the ease with which defendant retrieved the gun, placed it to her head, and pulled the trigger. RP 141-143; CP 196-205 (FOF XI).

There was also a nexus between the gun and the rape. T.J. saw the gun before defendant raped her, and she said that she allowed defendant to penetrate her because she thought he would shoot her if she resisted. RP 155, 161. Because defendant used the gun to overcome T.J.'s resistance to having intercourse with him, there was a nexus between the gun and the rape.

Each firearm enhancement for which defendant was found guilty is supported by State v. Taylor, 74 Wn. App. 111, 872 P.2d 53 (1994), which was adopted by the Washington Supreme Court in State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002). Police entered Taylor's house with a valid search warrant and found Taylor in the living room on a couch, an

unloaded gun with a loaded clip on the living room table, and drugs and drug paraphernalia in the house. Id. at 115. The Taylor court found that Taylor had easy access to the unloaded gun and upheld the firearm enhancement as well as his conviction under the Uniform Controlled Substances Act. Id. at 125. In the present case, defendant likewise had easy access to a gun at any time, as he demonstrated in the laundry room. RP 141-143. Even if the gun's firing pin was missing at the time that defendant committed the rape and the robbery, the pin could be replaced within minutes, just as the unloaded gun in Taylor could be loaded in minutes. Taylor, 74 Wn. App. at 115.

5. DEFENDANT IMPROPERLY RELIES ON
LOUISIANA V. WARE.

Defendant relies on Louisiana v. Ware, 929 So.2d 240 (3d Cir. 2006) to argue that there is insufficient evidence to uphold a conviction if the evidence comes from a witness who gave inconsistent statements at trial and to the police. Appellant's Br. at 30-32. In Ware, the victim told police that Ware only attempted to rape her and then later claimed that he actually had raped her. Ware, 929 So.2d at 243. The Ware court said that it overturned Ware's conviction for rape because there was "overwhelming physical evidence which militate[d] against the finding of a sexual offense." Id. at 244. Ware does not affect the present case.

The Ware decision directly contradicts established Washington law that requires a reviewing court to assess the evidence in the light most favorable to the State. See Salinas, 119 Wn.2d at 201 and Joy, 121 Wn.2d at 338. Washington law is also clear that the trier of fact may determine issues of credibility. In re Marriage of Pilant, 42 Wn. App. 173, 178, 179, 709 P.2d 1241 (1985) specifically states that a court may “reject opinion testimony in whole or in part in accordance with its judgment of the persuasive character of the evidence presented.” Even assuming that there were inconsistencies in V.M.’s and T.J.’s testimony, the court could legitimately decide that some parts of the testimony was credible while deciding that some of it was not credible.

Not only does Ware contradict established Washington law, but defendant’s application of Ware is inaccurate. The reasoning in Ware is based on Louisiana v. Bernard, 734 So. 2d 687, 691 (3rd Cir. 1999), which also permits “the trier of fact [to] accept or reject, in whole or in part, any portion of a witness’s testimony.” See Ware, 929 So.2d at 244 (citing Louisiana v. Bernard, 734 So. 2d at 691). Thus, the reasoning in Ware is premised on the assumption that a trial court may reject a witness’s testimony in part and still find the defendant guilty. See Bernard, 734 So. 2d at 691. Defendant’s application of Ware would require an appellate court to remove the trial court’s discretion to accept or reject portions of witnesses’ statements based on the appellate court’s own credibility

determinations. There is no support for such a conclusion in Washington law.

Even if the court did agree with defendant's reading of Ware and decide that it was applicable, the present case is distinguishable from Ware because V.M. and T.J. gave wholly consistent statements. RP 99-243, 307-349. It is true that other witnesses (like Officer Robillard and Officer Piotrowski) contradicted V.M. and T.J., RP 488-498, 260-278, but when witnesses' testimony conflicts, only the trier of fact may decide which witness is credible and which parts of that witness's testimony to believe. See Camarillo, 115 Wn.2d at 71. Furthermore, Officers Robillard and Piotrowski interviewed V.M. and T.J. shortly after defendant had released them, when they were delirious and in pain from defendant's torture. RP 266, 489. V.M.'s and T.J.'s testimony was much more reliable on the stand after they had had time to eat, sleep, and recover from their injuries.

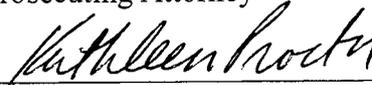
The present case is also distinguishable because the overwhelming physical evidence tends to *support* the conclusion that defendant raped V.M. and T.J., not "militate[] against" it. Ware, 929 So.2d at 244. Ware does not change the standard of review in this case; all reasonable inferences must still be drawn in a light most favorable to the State, and the reviewing court can still consider V.M.'s and T.J.'s testimony. See State v. Barrington, 52 Wn. App. 478.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's sentence.

DATED: AUGUST 29, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney

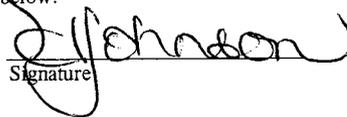


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

John M. Cummings
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/30/06 
Date Signature

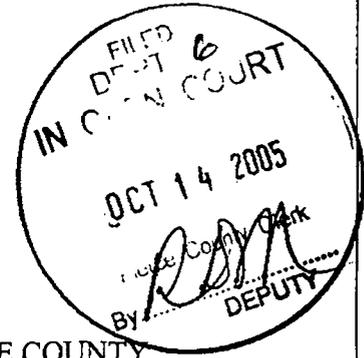
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APPENDIX “A”

Findings of Fact and Conclusions of Law
RE: Bench Trial



03-1-05262-2 23891181 FNFL 10-17-05



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-05262-2

vs.

OCT 17 2005

FLOYD WAYNE DRANE,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable Rosanne Buckner, Judge of the above entitled court, for bench trial on the 11th day of May, 2005, the defendant having been present and represented by attorney JOHN HENRY BROWNE, and the State being represented by Deputy Prosecuting Attorneys KEVIN A. McCANN and GRANT BLINN, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I

That on May 17, 2005 an Amended Information was filed charging the defendant with ASSAULT IN THE FIRST DEGREE; KIDNAPPING IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; RAPE IN THE FIRST DEGREE; KIDNAPPING IN THE FIRST DEGREE; ASSAULT IN THE FIRST DEGREE; RAPE IN THE FIRST DEGREE

II.

1
2
3 That on September 18, 2003, the defendant met Valerie Mattern at the Bay Motel in
4 Tacoma, Washington. He was driving a white 4-door sedan. Valerie got inside the vehicle
5 willingly, and the defendant drove a lengthy, indirect route to his home at 3909 47th Ave NE in
6 Tacoma WA. Mattern had never been to this residence before and did not know where she was.

III.

7
8 That once inside the defendant's home, defendant and Mattern smoked crack cocaine and
9 drank beer. They both removed their clothes. When the crack was gone, defendant became
10 angry and accused Mattern of stealing his crack cocaine. Defendant began to whip Mattern with
11 a looped cable cord. He then plugged an iron into the wall and demanded that Mattern return his
12 drugs. When Mattern was unable to return his drugs, defendant burned her with the iron on her
13 legs. He also pointed a handgun at Mattern, and ~~promised to kill her if she did not return his~~ AB
14 ~~drugs~~. Mattern told defendant that she wished to leave, but defendant refused to allow her to
15 leave. The injuries caused by the whipping and burning caused significant serious permanent
16 disfigurement. Each wound left a scar which on its own would constitute significant serious
17 permanent disfigurement.
18

IV.

19
20 Because Mattern was not allowed to leave and did not know where she was, and because
21 defendant burned her with an iron, whipped her with a cord, and ~~threatened to kill her with a~~ AB
22 ~~gun~~, the court finds that Mattern's movements were restricted without her consent and that this
23 was accomplished by physical force and intimidation and without legal authority and in a manner
24 which interfered substantially with Mattern's liberty. Further, the court finds that Mattern was
25

1 restrained by holding her in a place where she was not likely to be found and by threatening to
2 use deadly force;

V.

3
4 That shortly after defendant whipped Mattern with the cable cord and burned her with an
5 iron and pointed a gun at her, he penetrated Mattern's vagina with his penis. This was without
6 Mattern's consent. That the sexual intercourse was with forcible compulsion in that defendant's
7 acts of physical force enumerated above (burning and whipping) and the defendant's act of
8 pointing what appeared to be a gun at Mattern and threatening to kill her overcame Mattern's
9 resistance to intercourse with the defendant.

VI.

10
11 That after raping Mattern, defendant used a cord, such as a common lamp cord, to
12 strangle Mattern. The cord was placed around Mattern's neck with sufficient force to leave
13 ligature marks and cause hemorrhaging in Mattern's eyes. As a result, Mattern lost
14 consciousness for several hours. Strangulation such as this constitutes a force or means likely to
15 cause great bodily harm or death in that it restricts the flow of blood from (and potentially to) the
16 brain, thereby depriving the brain of oxygen. This is likely to lead to permanent brain damage
17 and death. The court further finds that defendant acted with intent to inflict "great bodily harm"
18 as defined in RCW 9A.04.110, and used force or means likely to inflict "great bodily harm".
19 The court finds defendant guilty of Assault in the First Degree based on his act of strangulation
20 of Mattern, although the court finds that the injuries enumerated above would also support a
21 verdict of guilty for Assault in the First Degree.
22

VII

1 That on October 3, 2004 the defendant met Theresa Jacques at a gas service station on
2 Portland Avenue, near the Bay Motel. After a brief discussion with the defendant, Jacques
3 accepted his offer for a ride in his car back to her house. Instead of taking Jacques home the
4 defendant drove her to his house at 3909 47th Avenue NE, stopping along the way to purchase
5 drugs and beer.

VIII

6
7 The defendant refused to take Jacques to her house when she asked him to take her home
8 and she felt intimidated by the defendant due to his size and his repeated refusal to take her home
9 as he had promised to do. ~~The defendant kept his eye on Jacques while he engaged in a drug~~
10 ~~transaction so that~~ She did not feel as if she were able to escape while he was away from the car. 
11 After purchasing drugs the defendant took Jacques to his house in North East Tacoma but took
12 an indirect route so that Jacques was unsure of where they were going.

IX

13
14 The defendant parked his car in the garage of his house and took Jacques inside with him
15 where he smoked crack cocaine and drank beer. When Jacques asked the defendant to take her
16 home he told her that she was not going anywhere. Jacques smoked crack cocaine and drank
17 with the defendant only because the defendant insisted she engage in that activity with him.
18 Jacques feared the defendant would act violently towards her if she did not agree. Once the
19 drugs were gone the defendant took Jacques with him to purchase more drugs and then brought
20 her back to his house.

X

21
22
23 Once the defendant finished smoking his new supply of crack cocaine he became
24 paranoid and accused Jacques of stealing his drugs and money. The defendant insisted that
25

1 Jacques had concealed his money or drugs in her vagina and that he was not going to let her
2 leave until he got it back. The defendant threatened to check her vagina for his drugs and then
3 began to beat Jacques. The defendant struck Jacques in the face with his fists until she fell to the
4 ground then he began stomping on her with his boots. The defendant dragged Jacques by her
5 hair into the laundry room where he continued to beat her. The beating administered by the
6 defendant left bruises on Jacques body that were visible for an extended period of time and were
7 so prominent that they would be visible even if she were fully clothed.

8 XI

9 Once in the laundry room the defendant restrained Jacques by placing shackles on her
10 legs and a dog choke chain around her neck. In addition to the shackles the defendant also
11 bound Jacques' legs with his belt so that she was unable to stand or walk. When Jacques began
12 to yell for help the defendant placed duct tape around her head and mouth. While in the laundry
13 room the defendant retrieved a small handgun, held it to Jacques head and threatened to shoot
14 her. Jacques' movement was restricted without her consent and that this was accomplished by
15 physical force and intimidation, without legal authority, and in a manner which interfered
16 substantially with Jacques' liberty. Further, the court finds that Jacques was restrained by
17 holding her in a place where she was not likely to be found and by threatening to use deadly
18 force. The court specifically finds that the defendant secreted Jacques in a place where she was
19 not likely to be found and that he restrained her by using deadly force. Further the court finds
20 that either of these basis supports a finding that the defendant abducted Jacques.
21

22 XII

23 The defendant tightened the dog choker chain around Jacques neck with sufficient force
24 to leave ligature marks circumferential to Jacques' neck. As a result, Jacques briefly lost
25

03-1-05262-2

1 consciousness for an unknown period of time. Strangulation such as this constitutes a force or
2 means likely to cause great bodily harm or death in that it restricts the flow of blood from (and
3 potentially to) the brain, thereby depriving the brain of oxygen. This is likely to lead to
4 permanent brain damage and death. The court further finds that defendant acted with intent to
5 inflict "great bodily harm" as defined in RCW 9A.04.110, and used force or means likely to
6 inflict "great bodily harm". The court finds defendant guilty of Assault in the First Degree based
7 on his act of strangulation of Jacques, although the court finds that the injuries enumerated above
8 would also support a verdict of guilty for Assault in the First Degree.

XIII

9
10 After binding Jacques in the laundry room the defendant began threatening Jacques that
11 he would pour bleach down her throat or in her vagina and that he would put a hot curling iron in
12 her vagina. Jacques was held in the laundry room for two days while the defendant continued to
13 torture her. During the two days Jacques was held in the laundry room he prevented her from
14 falling asleep by shooting her with a bb-gun each time she started to close her eyes. The
15 defendant shot Jacques with the bb-gun at least 18 times causing significant serious permanent
16 disfigurement. The injuries caused by the shooting appeared about Jacques' entire body below
17 the neck. Each wound left a scar which on its own would constitute significant serious
18 permanent disfigurement. During the beating, Jacques became so terrified that she defecated on
19 her self and the laundry room floor.

XIV

20
21
22 After the victim defecated, the defendant became so angry with her that he insisted she
23 clean up laundry room. Jacques was unable to clean the laundry room to the defendant's
24 satisfaction so he untied her and took her to a bathroom where he allowed her to clean herself.
25

1 The defendant then ordered Jacques into the living room where he demanded that she lie down
2 on a comforter blanket. The defendant then penetrated Jacques' vagina with his penis. This was
3 without Jacques consent. The sexual intercourse was with forcible compulsion in that
4 defendant's acts of physical force enumerated above (beating and kicking) and the defendant's
5 act of pointing what appeared to be a gun at Jacques along with his threatening to kill her,
6 overcame Jacques' resistance to intercourse with the defendant.

XV

8 Once the defendant completed his rape of Jacques he told her that she was not worth
9 killing and directed her to get dressed. Jacques was unable to find several personal items the
10 defendant had taken from her before raping her, including: undergarments, boots, socks, a watch,
11 two silver rings a chain with a cross and her bus pass. Jacques gave the defendant her personal
12 items when he requested them because he had already beaten her and she feared that if she did
13 not do as he asked he would beat her again. The court finds that the defendant took Jacques'
14 personal items by the use or threatened use of force or actions that caused Jacques to fear she
15 would be injured if she did not comply. Jacques told the defendant that she was missing these
16 items and wanted them back. The defendant would not allow her to retrieve her personal items,
17 instead he told her to sit still or he would tie her up again. The court further finds that during the
18 course of taking Jacques property, or in the immediate flight therefrom, the defendant was armed
19 with a deadly weapon (handgun) or displayed what appeared to be a deadly weapon (bb-gun or
20 handgun) and that he inflicted bodily injury upon Jacques. The court finds that the defendant's
21 handgun was readily capable of causing death or substantial bodily injury. The court specifically
22 finds that the evidence supports findings for both deadly weapon or bodily injury and that the
23 court would return a verdict of guilty to Robbery in the first degree based on either basis.
24
25

XVI

1 The court finds that during the commission of the Robbery and the Rape against Theresa
2 Jacques, the defendant was armed with a firearm as defined under RCW 9.41.010. The court
3 further finds that there was in fact a nexus between the firearm and the robbery and between the
4 firearm and the rape. The firearm was accessible to the defendant during both the rape and the
5 robbery and the defendant used the firearm to instill fear in Jacques so that he could commit the
6 robbery and the rape.
7

8 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

9 CONCLUSIONS OF LAW

10 I.

11 That the Court has jurisdiction of the parties and subject matter.

12 II.

13 That all relevant events or at least one element of the crime occurred in Pierce County,
14 Washington.

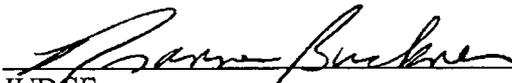
15 III.

16
17
18 That FLOYD WAYNE DRANE is guilty beyond a reasonable doubt of the crimes of
19 ASSAULT IN THE FIRST DEGREE; KIDNAPPING IN THE FIRST DEGREE; ROBBERY
20 IN THE FIRST DEGREE (WHILE ARMED WITH A FIREARM); RAPE IN THE FIRST
21 DEGREE (WHILE ARMED WITH A FIREARM); KIDNAPPING IN THE FIRST DEGREE;
22 ASSAULT IN THE FIRST DEGREE; and RAPE IN THE FIRST DEGREE, in that, during the
23 period between September 18 and September 21, 2003, FLOYD WAYNE DRANE:
24
25

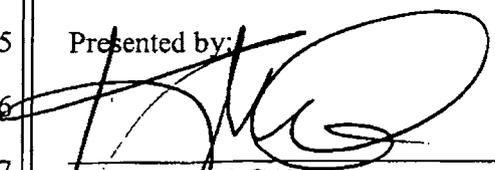
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1 took Valerie Mattern to his house where he burned her with a clothes iron, whipped her with a
 2 cable cord, threatened to kill her using what appeared to be a gun, refused to allow her to leave,
 3 forced Mattern to engage in sexual intercourse without her consent and strangled Mattern with a
 4 cord; and that during the period of time between October 3 and October 5, 2003, FLOYD
 5 WAYNE DRANE took Theresa Jacques to his house in Tacoma, Washington where he strangled
 6 her with a dog choker chain causing her to lose consciousness; shot her with a bb-gun disfiguring
 7 her body; threatened her with a handgun; took her personal belongings with the intention of
 8 keeping them by using physical force and arming himself with a weapon; that the firearm used
 9 during the rape and robbery was readily capable of producing death; the defendant refused to
 10 allow Jacques to leave; and the defendant engaged in sexual intercourse with Jacques against her
 11 will and without her consent.

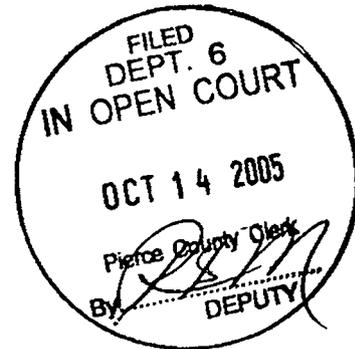
12 DONE IN OPEN COURT this 14 day of October, 2005.

13
 14 
 JUDGE

15 Presented by:

16 
 17 KEVIN A. McCANN
 18 Deputy Prosecuting Attorney
 WSB # 25182

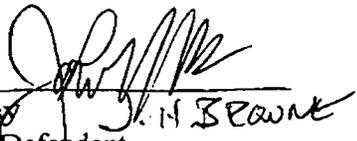
19 
 20 GRANT E. BLINN
 21 Deputy Prosecuting Attorney
 WSB # 25570



03-1-05262-2

Approved as to Form:

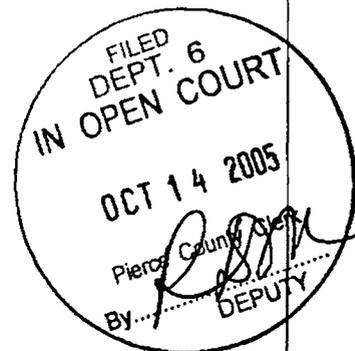
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~~Jessica J Riley~~
 Attorney for Defendant
 WSB # 32705-4677

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APPENDIX "B"

Findings of Fact and Conclusions of Law
RE: Same Criminal Conduct



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-05262-2

vs.

FLOYD WAYNE DRANE,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: SAME CRIMINAL CONDUCT

Defendant.

THIS MATTER having come on before the Honorable Rosanne Buckner, Judge of the above entitled court, for sentencing on the 14 day of Oct, 2005, the defendant having been present and represented by attorney John Henry Browne, and the State being represented by Deputy Prosecuting Attorneys Kevin McCann and Grant Blinn, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I

The court further finds that the act of strangulation (Assault 1) of Jacques (Count I) occurred and was completed before the act of rape and constitutes a separate criminal act unrelated to the rape (Count IV), kidnapping (Count II) and robbery (Count III).

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The court further finds that the intent of the rape of Jacques was intercourse, the intent of the kidnap was to inflict bodily injury, the intent of the robbery was to take property, and the intent of the assault was to inflict great bodily harm. Furthermore, the rape was completed before the robbery, the assault was completed before the robbery and before the rape.

The court further finds that the intent behind the crime of assault in the first degree is to inflict great bodily harm, which is a much greater injury than the bodily injury that is intended for kidnapping.

II.

The court finds that the intent of the rape of Mattern (Count VII) was intercourse, while the kidnap of Mattern (Count V) was committed with intent to inflict bodily injury.

The court further finds that the act of strangulation (Assault 1) of Mattern (Count VI) occurred after the act of rape was completed. The court further finds that the intent behind the crime of assault in the first degree is to inflict great bodily harm, which is a much greater injury than the bodily injury that is intended for kidnapping.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

That each offense is separate and distinct conduct.

DONE IN OPEN COURT this 14 day of October, 2005.

JUDGE

DEPT. 6
IN OPEN COURT
OCT 14 2005
PISCATAWAY COUNTY
NJ

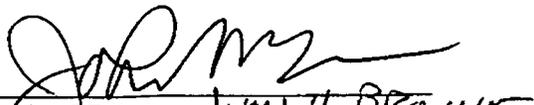
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Presented by:



KEVIN A. McCANN
Deputy Prosecuting Attorney
WSB # 25182

Approved as to Form:


~~Jessica J. Riley~~ JOHN H. BROWNE
Attorney for Defendant
WSB # ~~32705~~ 4697

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