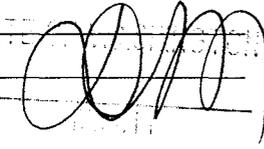


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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

PHYRA NORNG, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 05-1-00181-1

BRIEF OF RESPONDENT

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Appendix "B"

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

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2. Assuming the trial court's instructions set out alternative means for committing witness intimidation, did the jury have sufficient evidence to convict defendant under either means?
3. Did the trial court properly exercise its discretion when it denied defendant's motion for a new trial after finding that defense counsel was effective?

B. STATEMENT OF THE CASE.

1. Procedure
 - a. Charging and trial

On January 11, 2005, the Pierce County Prosecutor's Office filed an information in Cause No. 05-1-00181-1, charging appellant, PHYRA NORNG, hereinafter "defendant," with one count of assault in the second degree, one count of tampering with a witness, and one count of malicious mischief in the third degree. CP 1-4. The State amended this information twice, filing the final information on June 6, 2005, and charging defendant with one count of assault in the second degree, two counts of intimidating a witness, and one count of malicious mischief in the third degree. CP 8-12.

The matter was originally scheduled to come before the Honorable Stephanie Arend. CP 70-73. Judge Arend held a CrR 3.5 hearing on June 9, 2005 after which she entered Findings of Fact and Conclusions of Law. CP 70-73, 74-76. These findings included a finding that defendant understood that he had a right to remain silent and that defendant had waived that right when he decided to speak with police officers after his arrest. CP 70-73, 74-76. The matter proceeded to trial, but the court declared a mistrial on June 15, 2005 when illness reduced the jury to 11 members. RP 8; CP 70-73.

The retrial proceeded before the Honorable Linda CJ Lee on August 25, 2005. RP 1. The State informed Judge Lee of the cause of the mistrial and that a CrR 3.5 hearing had already been held. RP 8. Judge Lee noted that Judge Arend's findings on this hearing were in the court's file. RP 8. After hearing the evidence, the jury in this second proceeding found defendant guilty of all four counts as charged. RP 320; CP 16-19.

b. Motion for a new trial

Defendant immediately moved for a new trial under CrR 7.5(a)(8), claiming that substantial justice had not been done because his defense counsel, Travis Currie, had been ineffective at trial. RP 341. Defendant claimed that Mr. Currie did not spend enough time meeting with defendant during trial, did not return his phone calls, did not bring him up-to-date about the progress of the case, and did not inform him of trial strategies,

the right to testify, or the right to remain silent at trial. RP 343, 344.

Defendant was provided new counsel, Scott Messinger, and Judge Lee set a hearing regarding this motion for December 2, 2005. RP 338. Mr. Currie and defendant testified at this hearing. RP 350-394.

Both defendant and Mr. Currie agreed that defendant is from Cambodia, and his primary language is Cambodian. RP 358, 359, 390. All his proceedings were conducted in English; defendant speaks English but does not speak it not perfectly. RP 165-167, 358, 359. The court thus provided two court-certified Cambodian interpreters to translate for the defendant during trial. RP 33-38, 353, 354. The court also provided a third Cambodian interpreter named Sarith Tim whose court-certification had lapsed because of his failure to maintain continuing education credits. RP 33-38. Because Mr. Tim had translated for defendant at the original trial, defendant felt that Mr. Tim was an adequate interpreter. RP 33-38. Defendant thus stipulated that Mr. Tim could also help interpret for him during the trial. RP 33-38.

Defendant was also assisted by an interpreter during meetings with Mr. Currie. RP 353, 354. While an interpreter was present at most of the meetings between Mr. Currie and defendant, Mr. Currie admitted that he met with defendant a few times without an interpreter. RP 353, 354. Mr. Currie only had meetings without an interpreter when he needed to quickly inform his client of continuances he had obtained. RP 353, 354.

Mr. Currie testified that he had met with defendant beginning before the first trial. RP 352. He reviewed a statement of the facts that defendant had written in Cambodian and which a court-certified interpreter had translated into English. RP 365. Mr. Currie continually met with defendant before each of the two trials, during each trial, and between the trials. RP 362. Mr. Currie estimated that he met with defendant about ten times. RP 353. Each of these meetings lasted anywhere from a half hour to more than an hour. RP 377. In total, Mr. Currie spent several hours with defendant in preparation for these trials, always giving defendant enough time to fully address any concerns or theories he had about his case. RP 355, 362, 377.

Mr. Currie testified that these meetings always occurred in places that were private enough to discuss defendant's case. RP 355. He always met with defendant in one of two rooms in the County-City Building in Tacoma, Washington. RP 354. One of these rooms has several tables where clients can meet with their attorneys. RP 354, 355. The other room has tables with glass partitions that run between defendants and their attorneys. RP 354, 355.

Mr. Currie testified that during those meetings, he listened to defendant's theories of the case, directed defendant away from unworkable theories, communicated the State's plea offers to defendant, discussed the significance of the plea offers and whether to accept them, and reviewed discovery materials with defendant. RP 355-364, 370, 382,

383. During one meeting, Mr. Currie reviewed a printed plea offer with defendant, writing out the possible ranges that defendant might have to serve if he was found guilty of his crimes. RP 363, 364. Mr. Currie had defendant sign the printed document to indicate that he understood the document and did not want to accept the plea offer. RP 364. Mr. Currie explained that he typically reviews plea offers with his clients in this way. RP 360. During such plea offer meetings, Mr. Currie typically asks his client whether the client understands the form ten to twenty times. RP 360. Mr. Currie also asked the court-certified Cambodian interpreter to review this particular document with defendant in Cambodian, and the interpreter did so. RP 359.

Mr. Currie said that he did receive phone calls from defendant while defendant was in the Pierce County Jail. RP 366, 367. Mr. Currie did not return some of these calls because they provided no new information. RP 367, 368. If Mr. Currie did not return a call and the call provided new information or raised issues with which defendant was concerned, Mr. Currie always took notes and addressed that new information when he next met with defendant. RP 368.

Mr. Currie met with defendant about his right to testify. Before the CrR 3.5 hearing in front of Judge Arend, Mr. Currie explained the significance of the hearing to the defendant with the help of a Cambodian interpreter. RP 368. Defendant did not ask any questions after Mr. Currie explained the CrR 3.5 hearing to defendant. RP 369. Before defendant

testified at trial, Mr. Currie thoroughly reviewed defendant's version of the facts with him and explained the procedure involved in testifying on one's own behalf. RP 369, 370, 378.

Defendant testified at the hearing that he was confused at the trial, but did not want to interrupt Mr. Currie. RP 393. He claimed that he instead wrote notes to Mr. Currie which were never answered. RP 394. Defendant also said that Mr. Currie did not return his phone calls or keep him informed about his trial. RP 386, 390. Defendant said that Mr. Currie did not meet with him very many times, that the meetings were very short, that the meetings never occurred at the jail, and that there was not always an interpreter present during the meetings. RP 390, 393, 395. He also claimed that although the plea offer contained his signature, the form was blank when Mr. Currie presented it to him. RP 392.

Judge Lee denied defendant's motion for a new trial and entered written findings of fact regarding that ruling. RP 399-404; CP 42-58¹.

c. Sentencing and appeal

After denying defendant's motion for a new trial, the court proceeded to sentence defendant to a total of 27 months with credit for 336 days served. RP 410, 411; CP 36-47. The court also ordered

¹ These findings are attached as Appendix "A."

defendant to pay monetary penalties. RP 410, 411; CP 36-47. From entry of this judgment, defendant filed a timely notice of appeal. CP 53-65.

2. Facts

On Saturday, January 8, 2005, defendant was living in an apartment with his girlfriend Sopheap Sok² and her friend Sakoeun Soth, who was seven months pregnant. RP 70, 71. That night, the three went to the Acapulco Club in Tacoma, Washington. RP 70. At the club, defendant bought food for Sopheap and Ms. Soth. RP 186. Ms. Soth testified that defendant had more than 5 shots of Hennessy liquor that evening. RP 70. At some point during the evening, defendant noticed that Sopheap was talking to another man, which made him jealous. RP 72, 73.

The three of them returned to defendant's home after the club closed. RP 71, 72. Inside the bedroom of the apartment, defendant confronted Sopheap about talking to another man, and they began to argue loudly. RP 72-74. Defendant began to hit Sopheap in her face and on her arms. RP 75. Sopheap could not recall how many times defendant hit her, but she did remember that he had hit her with an open hand and that he tried to punch her, but missed and hit the wall behind her. RP 76. After defendant punched the wall, Sopheap told him to stop hitting her. RP 76.

² As Sopheap Sok and her sister Sophorn Sok both testified at trial, the State will refer to them as Sopheap and Sophorn respectively in order to avoid the confusion that would be caused by referring to either of them as "Ms. Sok."

Defendant grabbed Sopheap by the hair and slammed her head into the wall. RP 76. Defendant then grabbed Sopheap around the neck and began to choke her so badly that she could not speak or breathe well. RP 78, 79. Sopheap yelled for help and Ms. Soth came into the room. RP 79. Defendant said, "You not going to help her. I beat you up too if you call the police. Nobody call the police." RP 79. Defendant later threatened Sopheap specifically, telling her he would hit her some more if she called the police. RP 81.

Defendant eventually released Sopheap and then he went into the kitchen; the only exit and the only telephone in the apartment were located in the kitchen. RP 80-82. Defendant watched over the door and the telephone until he had to go to work on Monday morning. RP 82. When defendant left for work Monday morning, Sopheap watched him go through the apartment window. RP 83. Sopheap saw defendant walk up to her car, open the hood, and pulled something out of the engine. RP 83. Defendant then went to work. RP 83.

Sopheap could not make her car start when she tried. RP 83. She called her sister Sophorn Sok to come and help her. RP 83. Sophorn paid someone \$10 to take her to Sopheap's apartment. RP 117. When Sophorn arrived at the apartment, Sopheap was sitting staring at the floor; she was bruised and bloody. RP 117-119. Sopheap called the police. RP 83. Sophorn called friends to come and fix Sopheap's car. RP 120. Sophorn testified that defendant had left his car at the apartment, and her friends

were able to make Sopheap's car operable by putting a wire in her car that they found in the trunk of defendant's car. RP 120, 121, 133.

Officer Brian Market responded to the apartment after Sopheap's phone call. RP 159. When Officer Market arrived, he saw that men were working on a car in front of the apartment building. RP 162, 163. Officer Market noticed that Sopheap was crying and hugging herself when he arrived. RP 160. He interviewed the women in Sopheap's apartment and others at the scene. RP 162, 163. Officer Market then obtained a photograph of defendant and left the apartment. RP 163. As he left, he noticed that the car that the men were working on was now running and the hood of the car was closed. RP 163. Officer Market went to a factory in Fife where defendant worked and arrested him. RP 164, 165. In the course of the arrest, Officer Market gave defendant instructions in English and advised defendant of his rights in English. RP 166. Defendant followed these instructions well, seemed to understand his rights, and waived his right to remain silent. RP 166.

At trial, defendant testified on his own behalf. RP 184. He said that did not assault Sopheap. RP 184-218. He claimed he was allergic to alcohol and did not drink on January 8 or 9, 2005. RP 187. He said that Sopheap and Ms. Soth each drank three "little cups" of alcohol at the Acapulco Club and that Sopheap kept falling down when she got to her apartment. RP 187-191. Defendant claimed that he kept trying to hold her up when she was falling down, but she fell into a closet and fell

against a wall, hitting her face. RP 189-191. He said that when she fell into the closet, he may have grabbed her roughly around the neck to keep her from falling. RP 190. He did admit that he “tapped” her face a couple times that evening. RP 216, 217. Defendant did not call any other witnesses. RP 184-225.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF MALICIOUS MISCHIEF IN THE THIRD 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 commits the crime of malicious mischief in the third degree when he or she knowingly and maliciously causes physical damage to the property of another.” RCW 9A.48.090(1)(a). “For the purposes of RCW 9A.48.090, ‘Physical damage’, in addition to its ordinary meaning,... includes any diminution in the value of any property as the consequence of an act.” RCW 9A.48.100(1). “‘Malice’ and ‘maliciously’ shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another.” RCW 9A.04.110(12). This type of inference is valid when there is a “rational connection” between the proven fact and the inferred fact, and the inferred fact flows “more likely than not” from the proven fact. County Court of Ulster Cy. v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); State v. Johnson, 100 Wn.2d 607, 616, 674 P.2d 145 (1983), overruled on other grounds in, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

Thus, the State proved that defendant committed malicious mischief in the third degree if it proved that defendant (1) caused physical damage to Sopheap Sok’s vehicle and (2) acted knowingly and maliciously in causing that damage.

Defendant caused damage to Sopheap Sok’s vehicle when he pulled out the wire and locked it in his trunk. RP 83, 120-131. This act meets any normal definition of “physical damage” because it is reasonable

to say that someone causes physical damage to another person's vehicle when he removes a part so that the vehicle will not operate. Defendant's also meets the statutory definition of physical damage because it made Sopheap's vehicle inoperable, and therefore less valuable. See RCW 9A.48.100(1). Sopheap's vehicle was useless until her sister's friends had worked on the vehicle for some time. RP 83, 120-131.

Defendant caused this damage knowingly and maliciously. Before pulling out the wire, defendant had guarded the only phone and the only entrance in his apartment so that Sopheap and Ms. Soth could not call for help or escape. RP 80-82. It is reasonable to infer that he pulled out the wire in order to disable Sopheap's vehicle and further hinder any escape. His intent to confine her to the apartment and disable her of a previous means of escape clearly indicates an "evil intent." RCW 9A.04.110(12). This act was also clearly designed to "vex [or] annoy" Sopheap by making her helpless and unable to leave the apartment or put any significant distance between the two of them. Id.

Because defendant damaged Sopheap's vehicle with an evil intent to confine, vex, and annoy her, he committed the crime of malicious mischief in the third degree.

2. THE TRIAL COURT HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ALL THE CHARGED MEANS OF COMMITTING WITNESS INTIMIDATION.

A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). He is not entitled to jury instructions “which inaccurately state the law or for which there is no evidentiary support.” Id.

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

Criminal defendants have a right to a unanimous jury verdict, Const. art. 1, § 21, and instructions on jury unanimity are issues of

constitutional magnitude, State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

In an alternative means case, the threshold test is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987). There is sufficient evidence to support the alternative means if, “after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.” State v. Ortega-Martinez, 124 Wn.2d 708.

The jury in the present case was instructed on witness intimidation as follows:

To convict the defendant of the crime of INTIMIDATING A WITNESS, as charged in count [Count Number³], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 9th day of January, 2005 the defendant, by use of a threat against a current or prospective witness, [Witness Name⁴], attempted to induce [Witness Name] not to report the information relevant to a criminal investigation or induce her not to give truthful or complete information relevant to a criminal investigation; and...

CP 77-107 (Instructions 16 and 22). Defendant argues that he was entitled to a unanimity instructions because this instruction establishes alternative means of committing witness intimidation: (1) attempting to induce the witness not to report information and (2) attempting to induce a witness not to give truthful or complete information. Br. of Appellant at 15, 16.

Defendant did not object to any jury instructions or request a unanimity instruction at trial. No Washington case has ever held that “attempting to induce a witness not to report information” and “attempting to induce a witness not to give truthful or complete information are alternative means of committing intimidation of a witness under RCW 9A.72.110⁵. Even assuming that the statute does set out two means of

³ The court issued two identical “to convict” instructions regarding witness intimidation. Instruction 16 referenced Count II of the State’s information; instruction 22 referenced Count IV.

⁴ Instruction 16 named Sopheap as the victim of witness intimidation; instruction 22 named Ms. Soth.

⁵ See Appendix “A” for text of statute.

committing intimidation of a witness, a unanimity instruction was not necessary if there was sufficient evidence to satisfy both means.

There is sufficient evidence on the record for a rational trier of fact to convict defendant of both of the means that defendant claims are set out in instructions 16 and 22. It is clear that defendant did not want either Sopheap or Ms. Soth to report Sopheap's beating to the police. He intimidated them by yelling that they could not call the police. RP 79. He stood watch over the only door and the only telephone in the house, making it physically impossible for them to either call the police or leave to get help. RP 82. When he had to go to work, defendant disabled Sopheap's vehicle so that the two women could not escape or go find the police on their own. RP 83. Clearly defendant tried to prevent the women from reporting to the police that he had beaten Sopheap.

A rational trier of fact could also infer from these events that defendant did not want Sopheap and Ms. Soth to give truthful or complete information to the police about Sopheap's beating. First, by not giving any information to the police the witnesses have failed to give truthful or complete information to the police. Not giving "any reprt" also satisfies not giving "a complete report." Second, the jury could infer from defendant's terrorizing that he would want Sopheap and Ms. Soth to withhold truthful information in the event they were asked about Sopheap's beating.

Defendant was not entitled to a unanimity instruction because a rational trier of fact could have found that he attempted to prevent any reporting relevant to his assault on Sopheap and that he attempted to prevent any *truthful and complete* reporting relevant to his assault on Sopheap.

3. THE COURT PROPERLY DENIED
DEFENDANT'S MOTION FOR A NEW TRIAL
WHEN IT FOUND THAT DEFENDANT
RECEIVED EFFECTIVE ASSISTANCE OF
COUNSEL.

“The decision to grant or deny a new trial based on a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion.” State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

The right to effective assistance of counsel is the right “to require the prosecution's case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered

suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The first prong of the test requires proof of “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” Strickland, at 687; State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Under the second prong, the defendant must show counsel’s deficient performance prejudiced the defendant, i.e., that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The competency of counsel is determined from a review of the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were

meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

There is a presumption of effective representation and a defendant must show in the record “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251(1995). It is the defendant's burden to show from the record a basis for rebutting the presumption of effective representation. Id.

Defendant argues that the trial court abused its discretion when it found that Mr. Currie provided effective assistance to defendant during trial. Defendant claims that Mr. Currie (1) failed to meet with defendant a sufficient number of times in a sufficiently private area, (2) did not discuss the defendant’s own theory of the case with defendant, (3) did not advise defendant about the advantages and disadvantages of testifying on his own behalf, and (4) did not demand a unanimity instruction regarding the intimidating a witness charges.

- a. The trial court's Findings regarding the motion for a new trial are verities on appeal.

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. The court entered findings on its denial of the motion for new trial. CP 48-52 (Appendix "B"). Defendant has assigned error to 16 of the trial courts findings of fact regarding the motion for a new trial. Br. of Appellant at 1-3. There is no argument in his brief, however, as to how these findings 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.

b. Mr. Currie's performance was not deficient.

The trial court had evidence from which it could reasonably conclude that Mr. Currie's representation was not deficient. Mr. Currie (1) frequently met with defendant in a location with adequate privacy, (2) discussed case theories with defendant, (3) advised defendant about testifying on his own behalf, and (4) was not required to request a unanimity instruction. Mr. Currie's performance as defense counsel was thus not deficient. CP 48-52 (Finding 20).

First, Mr. Currie met in private with defendant several times both before and during trial. CP 48-52 (Findings 4-14, 17, 18). These meetings occurred nearly every time that defendant went to court. RP 358. Mr. Currie met with defendant during the original trial, after the mistrial was declared, and during the second trial. RP 361, 362. There were at least ten such meetings with defendant. RP 353. Each meeting lasted between 30 minutes and an hour because Mr. Currie wanted to make sure that defendant had enough time to express his own theories about the case, ask questions, and express concerns. RP 377, 358; CP 48-52 (Finding 8). Preparing for these two trials required several hours of meetings between Mr. Currie and defendant. RP 362. Mr. Currie also spoke to defendant on the phone as few as three times and as many as nine times. RP 367. When defendant called Mr. Currie, Mr. Currie either spoke to defendant, called defendant back, or took notes and discussed the subject of defendant's calls with defendant at a future meeting. RP 366, 367.

These meetings were sufficiently private. They occurred in rooms in County City Building in Tacoma, Washington specifically designed for attorney-client interaction. RP 354. Although most of these meetings occurred while other defendants were discussing cases with their attorneys, these rooms were private enough to discuss a case, and there is no evidence that defendant ever objected to the locations in which the meetings took place or that he suggested a better place. RP 355. In fact,

defendant's second attorney Mr. Messinger did not argue this privacy issue when he moved for a new trial on grounds of ineffective assistance by Mr. Currie. RP 343-404.

Second, Mr. Currie frequently discussed the theory of the case with defendant. Mr. Currie spoke to defendant about theories, listening at length to the theories defendant put forward and directing him away from theories that Mr. Currie thought were unsound. RP 355, 356; CP 48-52 (Findings 7, 10, 11). Mr. Currie also asked defendant to write down his own version of events in Cambodian. RP 365; CP 48-52 (Finding 9). He then asked the interpreter to translate that statement into English so that he understood defendant's version of the case. RP 365; CP 48-52 (Finding 9). Mr. Currie obtained this translation before the first trial, so he was well-apprised of defendant's factual theory well before defendant was retried. RP 366; CP 48-52 (Finding 10). Mr. Currie always gave defendant enough time to voice his concerns about the case theory, and Mr. Currie always answered defendant's questions about case theory or any other aspect of his defense. RP 358, 370 CP 48-52 (Findings 5, 7-12, 18).

Mr. Currie made sure that defendant could understand the conversation during these meetings. CP 48-52 (Finding 4-6, 9, 10, 12, 13, 16, 17). Mr. Currie was aware that defendant's first language was Cambodian. RP 358, 359. As a result, he ensured that there was a court-certified Cambodian interpreter at nearly every meeting with defendant.

RP 353, 358, 364, 390; CP48-52 (Findings 4, 6, 16). The interpreter was only absent from a few meetings in which Mr. Currie discussed continuances he had obtained from the court. RP 353, 358, 364, 390.

Third, Mr. Currie made sure that defendant knew the consequences of testifying on his own behalf. With the help of the interpreter, Mr. Currie explained the significance of the CrR 3.5 hearing to defendant. RP 368. Defendant never asked Mr. Currie any questions about this explanation, and the court found that defendant understood his rights under CrR 3.5. RP 369; CP 48-52 (Finding 15). Before defendant took the stand, the interpreter also helped Mr. Currie explain to defendant that he had the right to testify and the right to remain silent at trial. RP 369. Mr. Currie then reviewed defendant's testimony with him and discussed the procedure defendant would undergo before defendant testified on his own behalf. RP 370, 378.

Mr. Currie also discussed miscellaneous trial information with defendant to keep defendant informed of the progress of his case. As he does with all his clients, Mr. Currie reviewed the State's plea offers with defendant at every meeting. RP 359; CP 48-52 (Findings 13, 14). During such meetings, Mr. Currie usually asks ten to twenty times whether his client understands the plea offer. RP 359. At the new motion hearing, Mr. Currie even identified one plea offer that defendant had signed to indicate that defendant understood it. RP 361. Mr. Currie discussed the standard range that defendant would face if he were convicted or pleaded guilty.

363, 364. Mr. Currie also told defendant about other communications Mr. Currie had with the State about defendant's case. RP 362, 3563. Mr. Currie always told defendant about discovery with the help of a certified Cambodian interpreter. RP 382, 383.

Finally, Mr. Currie was not required to request a unanimity instruction. Even assuming that the instructions set forth alternative means of committing intimidation of a witness, there was sufficient evidence to support each of those means. See section 2 above.

c. Defendant was not prejudiced by Mr. Currie's performance.

The court had evidence from which it could reasonably conclude that Mr. Currie's representation did not prejudice defendant. CP 48-52 (Finding 21). Defendant does not explain how his case would have been improved by (1) more numerous, private, or detailed meetings with Mr. Currie, (2) further discussion about case theories, (3) further explanation about defendant's right to testify on his own behalf, or (4) a unanimity instruction.

First, defendant's case would not have been improved by more numerous, more private, or more detailed meetings. Mr. Currie met with defendant repeatedly over the course of both trials and even met with defendant between trials. RP 362; CP 48-52. He told defendant about

discover, trial strategy, plea offers, continuances, and all other aspects of his case. RP 353-383; CP 48-52.

Defendant does not explain how more meetings would have improved defendant's case. He does not claim to have withheld important information due to a lack of privacy. He does not claim that he wanted any details that Mr. Currie did not provide him. Defendant cannot point to any specific way in which defendant was prejudiced at trial that would have been remedied by more meetings, more privacy, or more detailed information.

Second, defendant's case would not have been improved if defendant had had more chances to explain his case theories to Mr. Currie. Defendant had ample chances to discuss his case theories with Mr. Currie during the several hours they spent preparing defendant's case. RP 3621; CP 48-52 (Findings 4-11). Mr. Currie actively engaged defendant about these theories, allowing defendant enough time to fully explain the theories and directing defendant away from theories that Mr. Currie believed were unworkable. RP 355, 356; CP 48-52 (Finding 11).

Moreover, defendant does not explain which theories he would have advanced if he had been given a chance. He does not argue that Mr. Currie denied any specific theories or explain how those theories might have aided in his case. Because defendant cannot point to a single theory that he would have advanced and that Mr. Currie ignored, defendant

cannot claim that he was prejudiced by Mr. Currie's refusal to adopt defendant's theories of the case.

Third, defendant was already fully aware of the consequences of testifying on his own behalf. Long before defendant ever testified at his second trial, he was advised of his right to remain silent in a CrR 3.5 hearing before Judge Arend. CP 13-15, 70-73. Judge Arend specifically found that defendant understood his right to remain silent. CP 13-15. Judge Lee acknowledged Judge Arend's finding and also found that defendant was aware of his rights under CrR 3.5. RP 8; CP 48-52 (Finding 15). Mr. Currie spoke to defendant about defendant's version of events early on in the case. RP 365. Mr. Currie advised defendant on the consequences of testifying on his own behalf before the second trial began. RP 368-370. Just before defendant testified at the second trial, Mr. Currie reviewed defendant's version of the facts again and advised him on his testimony. RP 378. Finally, Mr. Currie reviewed the procedure that defendant would undergo while testifying on his own behalf. RP 370.

It is unlikely that any further conversations with defendant would have given him a different understanding than the one he had when he testified at the end of his second trial. Because no further conversations would have changed the outcome of the case, defendant was not prejudiced by any lack of conversation regarding his right to testify or remain silent.

Fourth, if Mr. Currie had requested a unanimity instruction, such a request would not have changed the outcome of this case. The court would likely have rejected such an instruction because a unanimity instruction is not appropriate in an alternative means case when there is sufficient evidence to satisfy both means of committing a crime. Unanimity as to means is not constitutionally required.

- d. The cases on which defendant relies are not on point.

Courts of appeal will not review issues for which inadequate argument has been briefed or only passing treatment has been made. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Defendant provides no authority to support his proposition that a defense attorney commits ineffective assistance of counsel by failing to meet frequently with his client in a private place, failing to listen to his client's theory of the case, or failing to inform defendant about his right to testify or remain silent after a court had determined that defendant understood those rights. Defendant cites State v. Visitacion, 55 Wn. App. 166, 776 P.2d 986 (1989), State v. Maurice, 79 Wn. App. 544, 903 P.2d 514 (1995), and Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1993) in the section of his brief that addresses these issues, but these cases are not on point. Br. of Appellant at 11, 12.

Visitacion is a Division I case holding that trial counsel was ineffective because he failed to call two eye witnesses who could have corroborate Visitacion's version of events. Visitacion, 55 Wn. App. at 172-175. Defendant does not claim that there were eye witnesses who were not called to testify.

Maurice is a vehicular homicide case from Division III holding that trial counsel was ineffective because he failed to have the vehicle in question inspected by a mechanic after Maurice told his trial counsel that he thought a mechanical malfunction had caused him to lose control of the vehicle. Maurice, 79 Wn. App. at 552. Defendant fails to explain how this applies to his case.

In Foster, the 8th Circuit Court of Appeals held that counsel was ineffective because he failed to pursue a second defense theory that bolstered the primary theory that defense counsel did pursue. Foster, 9 F.3d at 726-728. None of these cases speak to the number of meetings defense counsel had with the client, the level of privacy during those meetings, whether the client was informed about counsel's theory of the case, or the defendant's right to testify. Defendant thus offers no authority to support his argument that Mr. Currie's actions showed an "absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." See McFarland, 127 Wn.2d at 335.

Defendant argues that Stave v. Kruger, 116 Wn. App. 685, 67, P.3d 1147 (2003), a Division III case, supports his argument that he was

entitled to a unanimity instruction. Br. of Appellant at 13, 14. Kruger was charged with third degree assault when he attacked an officer while intoxicated. Kruger, 116 Wn. App. at 689. The Kruger court reversed defendant's conviction on grounds of ineffective assistance of counsel because (1) trial counsel did not request a jury instruction on voluntary intoxication, (2) defendant was entitled to such an instruction, (3) the defense theory was that defendant was too intoxicated to form the intent to assault the police officer, and (4) there was a "reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different" Id. at 690-694. It is true that Mr. Currie did not request a unanimity instruction in this case, but (1) defendant here was not entitled to an alternative means instruction⁶, (2) the alternative means theory was not part of defendant's case theory at trial, and (3) defendant was not prejudiced by the lack of a unanimity instruction⁷.

Because Mr. Currie's representation was not deficient and because his actions did not prejudice defendant, the court properly denied defendant's motion for a new trial on grounds of that Mr. Currie provided ineffective legal assistance.

⁶ See section 2 above.

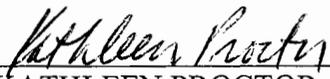
⁷ See Section 2 above.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: SEPTEMBER 18, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney

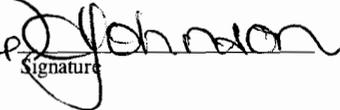


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

John M. Cummings
Appellate Intern

Certificate of Service:

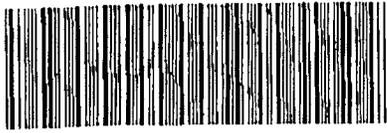
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

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Date Signature

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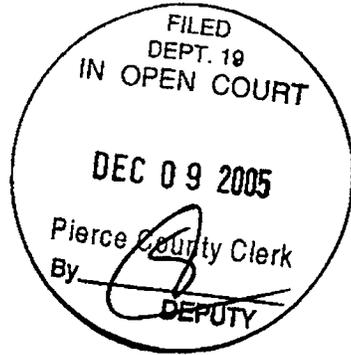
APPENDIX "A"

*Findings of Fact and Conclusions of Law
RE: Denial of Defendant's Motion for New Trial*



05-1-00181-1 24182863 FNFL 12-12-05

ORIGINAL



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-00181-1

vs.

PHYRA NORNG,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: DENIAL OF DEFENDANT'S
MOTION FOR A NEW TRIAL

Defendant.

THIS MATTER having come on before the Honorable Linda CJ Lee, Judge of the above entitled court, for the Defendant's Motion for a New Trial on the 2nd day of December, 2005, the defendant having been present and represented by attorney Scott Messinger, and the State being represented by Deputy Prosecuting Attorney Kevin A. McCann, and the court having observed the demeanor and heard the testimony of the witnesses during that hearing, reviewed exhibits admitted into evidence, reviewed declarations of witnesses, reviewed the court file, and having considered 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 AND CONCLUSION
OF LAW RE: DENIAL OF DEFENDANT'S
MOTION TO WITHDRAW GUILTY PLEA - 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

05-1-00181-1

D) FINDINGS OF FACT:

- 1) On September 2, 2005 the defendant was found guilty at trial of Assault in the Second Degree, two counts of Intimidating a witness and one count of Malicious Mischief in the Third Degree;
- 2) The defendant is a native of Cambodia and speaks, writes, and reads in Cambodian;
- 3) Despite being a native of Cambodia, the defendant is fluent in the English language and is able to communicate efficiently in the English language;
- 4) At the time of the trial, the defendant was represented by attorney Travis Currie. During contacts with the defendant, Mr. Currie used court certified Cambodian interpreters to communicate with the defendant. These interpreters included Vannara Lim and Sarith Tim. Through the use of the interpreters, Mr. Currie did not have difficulty in communicating with the defendant;
- 5) During representation of the defendant, Mr. Currie reviewed all aspects of the case with the defendant very thoroughly. Mr. Currie was able to communicate with defendant and defendant was able to communicate with Mr. Currie. Defendant understood the subject matter, gravity of the circumstances, and his options;
- 6) All discovery was reviewed with the defendant by his attorney and with the assistance of the Cambodian interpreters;
- 7) Mr. Currie discussed with the defendant possible defenses and discussed all offers extended by the prosecutor assigned to this case;
- 8) Mr. Currie met with the defendant in excess of twenty times in preparation for trial. Several of these meetings lasted more than one hour;

05-1-00181-1

- 1 9) Mr. Currie asked the defendant to write out a statement for him describing the incident as
2 he recalled;
- 3 10) The defendant provided Mr. Currie with a written statement that was prepared in
4 Cambodian. After having that statement translated by the court certified Cambodian
5 interpreters, Mr. Currie reviewed that statement for purpose of considering whether it
6 presented any viable trial strategies;
- 7 11) Mr. Currie discussed with the defendant the various theories he intended to present at
8 trial and explained to him why he was not pursuing certain allegations the defendant
9 wished to introduce at trial;
- 10 12) Mr. Currie's decisions were fully discussed with the defendant and were part of his trial
11 strategy;
- 12 13) Prior to going to trial Mr. Currie fully explained to the defendant all of his options,
13 including accepting the State's pre-trial offer to plead guilty to a reduced charge;
- 14 14) After being fully advised of all of his options, the defendant chose to take the matter to
15 trial. The defendant signed a document prepared by Mr. Currie which advised him of the
16 State's offer and the range if he were to be convicted at trial;
- 17 15) The defendant was properly advised by the court of his rights under CrR 3.5;
- 18 16) The defendant was assisted by Cambodian interpreters at all stages of both his criminal
19 trials, including the CrR 3.5 hearing;
- 20 17) The defendant communicated with his attorney, Travis Currie, throughout the second
21 trial;
- 22 18) Mr. Currie was conscientious in his communications with the defendant and consulted
23 with him during and after the testimony of each witness who testified at trial;
24
25

05-1-00181-1

19) The testimony of the State's witness Travis Currie during the hearing for a new trial was credible and the court accepts his testimony as true;

20) Mr. Currie provided effective assistance of counsel to the defendant and exceeded the minimum expectations to provide representation consistent with a reasonable attorney licensed to practice law in Washington State;

21) The defendant has not demonstrated any prejudice due to any deficiencies he perceived on the part of his trial attorney, Travis Currie.

II) CONCLUSIONS OF LAW:

1) Pursuant to CrR 7.5(a), the defendant must prove that his substantial right to a fair trial was materially affected by his counsel's ineffective representation to be entitled to a new trial.

2) To establish that his attorney was ineffective, the defendant must satisfy both prongs of the Strickland test. The defendant must demonstrate that the trial counsel's conduct fell below a minimum objective standard of reasonable attorney conduct and that the deficient performance prejudiced him. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert.denied, 510 U.S. 944, 126 L.Ed. 2d 331, 114 S.Ct.382 (1993).

3) In this case the defendant has not established that his trial counsel fell below the standard of a reasonable attorney. Further, the defendant has failed to demonstrate that any perceived deficient performance by his trial lawyer led to actual prejudice.

05-1-00181-1

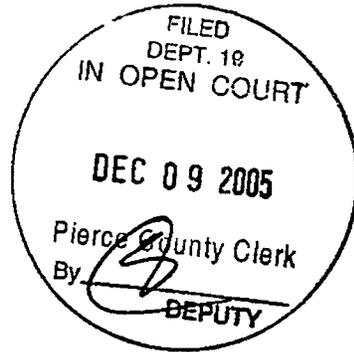
4) The defendant's motion for a new trial is denied.

DONE IN OPEN COURT this 8th day of December, 2005.

JUDGE

Presented by:

[Signature]
KEVIN A. McCANN
Deputy Prosecuting Attorney
WSB # 25182



Approved as to Form with objections noted:

[Signature]
SCOTT MESSINGER
Attorney for Defendant
WSB # 33776

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APPENDIX "B"

RCW 9A.72.110

§ 9A.72.110. Intimidating a witness

(1) A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

- (a) Influence the testimony of that person;
- (b) Induce that person to elude legal process summoning him or her to testify;
- (c) Induce that person to absent himself or herself from such proceedings; or

(d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

(2) A person also is guilty of intimidating a witness if the person directs a threat to a former witness because of the witness's role in an official proceeding.

(3) As used in this section:

(a) "Threat" means:

(i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(ii) Threat as defined in *RCW 9A.04.110(25).

(b) "Current or prospective witness" means:

(i) A person endorsed as a witness in an official proceeding;

(ii) A person whom the actor believes may be called as a witness in any official proceeding; or

(iii) A person whom the actor has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child.

(c) "Former witness" means:

(i) A person who testified in an official proceeding;

(ii) A person who was endorsed as a witness in an official proceeding;

(iii) A person whom the actor knew or believed may have been called as a witness if a hearing or trial had been held; or

(iv) A person whom the actor knew or believed may have provided information related to a criminal investigation or an investigation into the abuse or neglect of a minor child.

(4) Intimidating a witness is a class B felony.

HISTORY: ♦ 1997 c 29 § 1; ♦ 1994 c 271 § 204; 1985 c 327 § 2; 1982 1st ex.s. c 47 § 18; 1975 1st ex.s. c 260 § 9A.72.110.