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COURT OF APPEALS

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STATE OF WASHINGTON

DEPUTY

NO. 34251-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

WILLIAM HENRY MOTTER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02000-8

BRIEF OF RESPONDENT
AND
RESPONSE TO PERSONAL RETRAINT PETITION

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I. STATEMENT OF CASE

The Court of Appeals has consolidated the brief of respondent on his main appeal with the personal restraint petition filed by the defendant.

Concerning the statement of facts, the State will present the statement of facts in the argument section of the brief because the main issue raised on direct appeal deals with sufficiency of the evidence and requires a detailed analysis of testimony.

II. RESPONSE TO ASSIGNMENTS OF ERROR #1, #2, AND #3

The first three assignments of error raised by the defendant basically deal with sufficiency of the evidence to convict the defendant of burglary in the first degree. Issue 1 questions whether there is sufficient independent evidence to support an inference of criminal intent; Issue 2 deals with the sufficiency of the evidence as it relates to the question of assault by the defendant against the owner of the property; Issue 3 deals with sufficiency of the evidence on the charge itself.

The office burglarized belonged to Doctor David Dixon, M.D. It was located on Highway 99, Suite 108 in Hazel Dell. (RP 30). Dr. Dixon keeps normal business hours Monday through Friday from approximately 8:00 am until somewhere between 4:00-5:30 pm depending on the caseload. (RP 31). The doctor testified that the building has an alarm

system and he explained to the jury how the alarm system would normally work. (RP 33).

Dr. Dixon was notified on September 7, 2005, of a triggering of the alarm. He had been at a meeting in Portland, had gone home very briefly, and then gone on to the office to check on the alarm. (RP 35-36).

He went to his office somewhere around 10:00 pm on that evening, parked with his lights facing the door so that he could unlock it and went inside. (RP 37).

The doctor testified that as he entered his office, the defendant was behind an exam room door. The doctor testified as follows:

QUESTION (Mr. Senescu, Deputy Prosecutor): Okay. What happened when you first walked in that door?

ANSWER (Dr. Dixon): Well, the – he pushed the door at me and – and I thought I saw something in his hand, something black, and I started – I pushed the door back several times against him and tried to hold him there.

And he ducked down and got out the door and got around to room 2 exit door, where the car was, and – and then I grabbed him again there and he tore my shirt at that point, and then he tried to run – he got out the door – my legs aren't good because I've had a lot of surgery on them in the past. So I couldn't run.

But, now, I had been calling out at the same time to the alarm service to call the police. As soon as I saw him, I said, you know, an expletive, and then, "what are you doing behind – what are you doing in here?" and then – and then called the police, "there's an intruder in the office." That

was my comment several times so that the alarm service would get the police.

RP 40, L.8 - 41, L.2

QUESTION (Mr. Senescu, Deputy Prosecutor): Doctor, were you concerned for your safety at any point?

ANSWER (Dr. Dixon): When he swung that door at me and I saw that in his right – whatever that was in his right hand – it turned out later to be a sap – yes, I was – I was definitely apprehensive.

QUESTION: Did Mr. Motter say anything to you during this incident?

ANSWER: He said something about some gang let him in. That was – he was – and there was no gang around there to let him in the –

QUESTION: Any – anything else that you remember him –

ANSWER: That was about all he –

QUESTION: - saying?

ANSWER: - all he said, yes.

QUESTION: Okay. How – how quick was this from when you walked in the building and?

ANSWER: Well, in – the police actually had apprehended by 10:40, I believe.

QUESTION: Well, how quick was the –

ANSWER: The interaction –

QUESTION: - incident –

ANSWER: - between he and I probably lasted maybe three to four minutes at the maximum.

RP 42, L.5 – 43, L.3

The doctor further testified that, when the defendant was finally apprehended, he had a sack of credit cards from other people that he stuffed in a bush out in the back behind the office with some drug paraphernalia. (RP 45-46). The doctor testified that he sustained injuries which consisted of a broken fingernail, some bruising, and a torn shirt. (RP 47, L.10-14). He testified that the defendant started the physical confrontation between the two of them by pushing the door into the doctor. (RP 47). Dr. Dixon is seventy-two years old.

The next witness called by the State of Washington in its case-in-chief was one of the deputy sheriff's that first responded to the scene, Deputy Lindsay Schultz. Deputy Schultz indicated that she came in contact with Dr. Dixon immediately there at the scene and noted that his shirt was ripped, a button was broken off and that he had some blood on his hand and on his shirt. (RP 71).

The next witness called by the State in its case-in-chief was from the Vancouver Police Department, Todd Schwartz, who is a canine handler for the Vancouver Police Department. He testified that he used the tracking the dog to find the defendant who was hiding in some

blackberry bushes approximately 75 feet from the office building. (RP 91-94).

The final witness called in the case was Deputy Sheriff Brent Waddell. Officer Waddell indicated that once the defendant was apprehended, that there was a show up with the doctor who positively identified him. The doctor identified him as the person who he had fought with in his office. (RP 116). The officer testified that in the defendant's backpack, that he had with him, was a object that was black electric tape wound around rocks and looked like a long teardrop. (RP 122).

Finally, the general questions had been asked of various witnesses concerning the relationship between the doctor and the defendant. The doctor indicated that he had never met this man before and that the man had never been a patient. He further indicated that the finding of the defendant in his offices was after the close of business and, as far as he knew, all his doors had been locked. There was no apparent forced entry into the building. The doctor further testified that at no time had he ever given permission for this man to be on his premises after business hours.

In reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the State and asks whether any rationale trier of fact could have found guilt beyond a reasonable doubt. State v. Hepton, 113 Wn.App. 673, 681, 54 P.3d 233

(2002). Circumstantial and direct evidence are equally reliable. State v. McNeal, 98 Wn.App. 585, 592, 991 P.2d 649 (1999). All reasonable inferences 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). Credibility determinations are left to the trier of fact and cannot be reviewed on appeal. State v. McPherson, 111 Wn.App. 747, 756, 46 P.3d 284 (2002); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1999).

If the State of Washington has proven unlawful entry, the intent to commit a crime may be inferred, unless the evidence demonstrates the entry was without criminal intent. State v. Bennett, 20 Wn.App. 783, 788-789, 582 P.2d 569 (1978). The State need only establish that criminal intent was “more likely than not.” State v. Brunson, 76 Wn.App. 24, 30, 877 P.2d 1289 (1994). The finder of fact is allowed to look at all the facts and circumstances surrounding the act. The inference of criminal intent is supported by common knowledge and experience. Brunson, 76 Wn.App. at 27. “Non-criminal reasons for unlawfully entering a dwelling are few.” State v. Bishop, 90 Wn.2d 185, 189, 580 P.2d 259 (1978). The State need not establish that the defendant intended to commit any specific crime while in the building. State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985). The intent to commit a crime may be inferred from all the facts

and circumstances surrounding the defendant's conduct. State v. Lewis, 69 Wn.2d 120, 123, 417 P.2d 618 (1966). Conduct which plainly indicates the required intent as a matter of logical probability supports an intent inference. State v. Bergeron, 105 Wn.2d at 20.

Under Washington law, the specific crime intended is not an element of burglary; rather, the State need prove only "the intent to commit any crime against a person or property inside the burglarized premises." State v. Bergeron, 105 Wn.2d at 4. What constitutes a crime against "a person or property therein" for purposes of burglary is not statutorily defined. Courts have applied a "common sense" analysis, broadly construing the requirement in light of the purposes underlying the burglary statutes. State v. Snedden, 149 Wn.2d 914, 919, 73 P.3d 995 (2003); State v. Stinton, 121 Wn.App. 569, 576, 89 P.3d 717 (2004). The person or property element reflects the purpose of the burglary statutes "to prohibit and punish conduct creating a risk of or actual harm to persons and property within a building." State v. Wentz, 149 Wn.2d 342, 356, 68 P.3d 282 (2003).

RCW 9A.52.040 reads as follows:

Inference of intent. In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or

remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

The court's instructions to the jury (CP 41) are attached hereto and by this reference incorporated herein. The defendant's first claim is that the instructions were faulty in providing the jury with the inference of criminal intent when he claims that there was no independent evidence to support it. The State submits that there was substantial independent evidence to support an inference of criminal intent in this matter. The unlawful entry was during the evening hours; the defendant assaulted the business owner when he came to check on his premises; the defendant was armed with some type of weapon that he had in his right hand; the defendant bloodied the 72 year old doctor and than fled the scene and hid from police. No evidence was produced for the jury to explain the defendant's conduct on the evening in question. The only explanation is that he was there for purposes of committing some type of crime against person or property.

The second alleged assignment of error deals specifically with the jury instructions (CP 41) and the claim that Instruction No. 14 invited the jury to find that the defendant committed an assault by merely defending himself from an assault. The State would submit, as a threshold matter, that the defendant, who is a burglar, caught in the act by the owner of the

property, has no right to a claim of self defense in the first place. Further, this particular instruction was discussed in detail with the court and the trial defense attorney decided, for tactical reasons, to keep the instruction in the jury packet. (RP 129-130; RP 153). His claim is that he wanted it in there because there was no evidence of an assault and therefore his client could only be guilty of being a trespasser (RP 157).

As the jury instructions provided to the jury clearly indicate, an assault is not merely the touching but also intentionally putting someone in fear or apprehension. Dr. Dixon talked about both of those prongs when he testified in front of the jury.

Finally, the defendant argues in assignment of error #3 that the state had failed to present substantial evidence of the charge of burglary in the first degree. As set forth previously and in the requisite case law, the State has shown adequate evidence of an unlawful entry into a business for purposes of some type of criminal activity against person or property therein, and while in the course of this burglary, the defendant assaulted the owner of the business in the premises. This would clearly constitute a burglary in the first degree in the State of Washington.

III. RESPONSE TO ASSIGNMENT OF ERROR #4

The fourth assignment of error raised by the defendant in his brief is that the court imposed as part of community custody conditions that it

was not allowed to implement. Specifically, the claim is that the court did not have authority to require the defendant to complete alcohol treatment or participate in mental health treatment.

As part of any terms of community placement, the trial court may order the offender not to consume alcohol, regardless of whether alcohol related to the offense. RCW 9.94A.700(5)(d); State v. Jones, 118 Wn.App. 199, 206-207, 76 P.3d 258 (2003). In addition, the court may order the offender to comply with “any crime related prohibitions.” RCW 9.94A.700(5)(e). There need be no causal link between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. State v. Llamas-Villa, 67 Wn.App. 448, 456, 836 P.2d 239 (1992). In our case, the defendant, not only in his personal restraint petition, but also in correspondence to the trial court has indicated that he has mental health issues and wishes to have those addressed. For example, the defendant wrote to the trial court prior to sentencing. The letter was filed October 26, 2005 (CP 73) and, in part, the defendant indicated that he has mental health issues, he knows that he needs some help and he asks the court “have mercy on me judge”. The State submits that the court did nothing more than acquiesce to the defendant’s request for help for mental health treatment and counseling.

Concerning the requirement for alcohol treatment, there does not appear to be anything in the record to support the alcohol treatment. With that in mind, the State is in agreement that a re-sentencing to reanalyze that aspect of the sentence would be appropriate.

IV. RESPONSE TO PERSONAL RESTRAINT PETITION

The defendant has filed a personal restraint petition alleging fifteen grounds for reversal of the conviction.

A. RESPONSE TO #1-5

The first five grounds raised by the defendant deal with the permissive inference of criminal intent which is also Issue 1 in his direct appeal. The State submits that this has been adequately discussed in that section of the brief.

B. RESPONSE TO #6

The sixth ground raised by the defendant is a claim that the prosecutor gave his personal opinion to the jury. Where prosecutorial misconduct is claimed, the defendant bears the burden of establishing the impropriety of the prosecuting attorney's comments and the prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Any comments are reviewed in the totality of the circumstance taking into account the argument and instructions provided. Failure to object to an

improper comment constitutes a waiver of the error unless the comment is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Russell, 125 Wn.2d at 85-86.

The defendant in this claim of error has taken minuet snippets of argument and made claim that this is the prosecutor giving his personal opinion as to the matter. No objections were made concerning this argument at the time of trial. In order to prevail on an allegation of prosecutorial misconduct, the defendant must show both improper conduct and prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672 904 P.2d 245 (1995). The State submits that this has not been demonstrated in this personal restraint petition.

C. RESPONSE TO #7

The seventh claim in the personal restraint petition is that there was no investigation into the defendant's mental health status to proceed to trial. This is interesting in that the Issue 4 raised by his attorney on appeal is that the trial court could not order mental health counseling and treatment and yet here the defendant is making claim that they should have investigated his mental health.

A competency evaluation is required whenever there is reason to doubt the defendant's competency. RCW 10.77.060(1)(a). When the

defense raises the issue, the defense bears the threshold burden of establishing a reason to doubt the defendant's competency. State v. Lord, 117 Wn.2d 829, 903, 822 P.2d 177 (1991). A motion to determine competency must be supported by facts and will not be granted merely because it was filed. State v. Lord, 117 Wn.2d at 901. There has to be a legitimate question of competency brought to the trial court's attention and the trial court's decision on whether to require a competency evaluation is reviewed for abuse of discretion. In Re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

There is absolutely nothing in the official record to indicate that this matter was ever brought to the court's attention prior to the defendant's letters being sent to the court after the time of trial. There is nothing at any pretrial hearings to indicate that there were concerns being voiced by the prosecution or defense concerning the competency of the defendant to stand trial. Thus, there was nothing for the trial court to rule on or to exercise its discretion about. It simply was never raised.

D. RESPONSE TO #8, #9, #11 AND #13

The defendant has filed in his personal restraint petition under grounds 8, 9, 11, and 13, a claim of ineffective assistance of counsel. Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court de novo. To prevail on a claim of

ineffective assistance of counsel, the defendant must show: 1. counsel's performance was deficient, and 2. the deficient performance prejudiced the defense. Strickland v. Washington, 46 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Under ground #8 the defendant maintains that his counsel was ineffective because he did not object to the use of the permissive inference. He also discusses it as in terms of "mandatory rebuttal presumptions" and "mandatory conclusive presumptions". Concerning this matter it has previously been discussed in the briefing. The other concepts of mandatory presumptions makes no sense to the State and does not appear to be present in the record.

The defendant claims ineffective assistance of counsel under ground #9 that his attorney failed to move for a bill of particulars and failed to investigate the State's case. This particular allegation does not appear from the record. There were only four witnesses called in the case and only one of them, Dr. Dixon, appeared to be a substantive witness and, the indications in the record, would indicate that he was interviewed prior to trial. Further, there is nothing to indicate that the defense did not have the underlying police reports concerning the nature of the case.

The defendant claims in ground #11 ineffective assistance of his attorney because of questioning of one of the deputies there at the scene. His argument appears to be that the questioning should have been more geared towards the lack of assault against the doctor by the defendant. Likewise, the defendant in ground #13 is objecting to the representation because the defense attorney did not move for a Knapsted hearing. The State submits that there is nothing to indicate that any of this prejudiced the defense nor would of it necessarily have accomplished anything. The questioning of a witness at the time of trial often times is a matter of tactics. Likewise the Knapsted issue also is one that usually is left to the trial attorney as to whether or not it is appropriate under the circumstances. Given the nature of the evidence in this case, the State submits that there is no way a Knapsted motion would have been granted even if it had been requested.

E. RESPONSE TO #10

The tenth ground in the personal restraint petition appears to be a claim that the prosecutor has created some kind of error in filing of the charges or of offering a plea bargain to the defendant. The State has no further response to this particular allegation other than to say that it appears to be without any merit whatsoever.

F. RESPONSE TO #12

The twelfth ground raised by the defendant in his personal restraint petition deals with cumulative error. The cumulative error doctrine applies when several trial errors occur which, standing alone, may not be sufficient to justify reversal but when combined may deny the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000). It does not apply where the errors are few and have little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 929. As previously argued, the State submits that there has been no error in this trial and thus the cumulative error doctrine would not apply.

G. RESPONSE TO #14 AND #15

The fourteenth and fifteenth grounds are claims that the prosecutor withheld exculpatory evidence and has violated the ABA discovery standards.

Concerning exculpatory evidence, the defendant appears to indicate that the defendant did not have a “sap” on him and that this was not developed until the day of trial. However, as the evidence clearly indicated, there was an object found in his position which would certainly appear to be similar to a sap or club type object. It is black in color and would fit the general description of what the doctor had testified the defendant had in his right hand at the time of the assault. There is nothing

to indicate that this was suppressed or withheld from the defense. Concerning the violation of ABA discovery standards, the State would submit that there has been no violations. This was a straightforward case with very little tangible evidence to be produced. All indications are that the defense had the police reports prior to trial and that the defendant had adequate representation at the time of trial.

V. CONCLUSION

The State submits that the defendant received a fair trial. Concerning the question of sentencing, the State agrees that a re-sentencing is necessary on the question of the prohibitions of being in places where alcohol is sold or consumed. The question of mental health treatment was asked for by the defendant and should be honored. In all other respects the trial court should be affirmed.

DATED this 15 day of September, 2006.

Respectfully submitted:

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APPENDIX

24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

v.)

WILLIAM HENRY MOTTER,)

Defendant)

NO. 05-1-02000-8

COURT'S INSTRUCTIONS TO THE JURY

Robert A. ...

SUPERIOR COURT JUDGE

24 October 2005
Date

FILED
OCT 24 2005
Read at 5:05 P.M.
JoAnne McBride, Clerk, Clark Co.
Janice McNeil
Deputy Clerk

16
9

INSTRUCTION NO. 4

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any

remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely. _____

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of ~~the opinions~~ of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 6

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person intentionally assaults any person.

INSTRUCTION NO. 7

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7th day of September, 2005, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

~~(3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person; and~~

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 9

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 10

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 11

The term premises includes any building, structure or dwelling.

INSTRUCTION NO. 12

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

INSTRUCTION NO. 13

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

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the act did not actually intend to inflict bodily injury.

INSTRUCTION NO. 14

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 15

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 16

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Burglary in the First Degree necessarily includes the lesser crimes of Burglary in the Second Degree and Criminal Trespass in the First Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 17

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.

INSTRUCTION NO. 18

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 7th day of September, 2005, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

A person commits the crime of criminal trespass in the first degree when he or she knowingly enters or remains unlawfully in a building.

INSTRUCTION NO. 20

To convict the defendant of the crime of criminal trespass in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about September 7, 2005, the defendant knowingly entered or remained in a building;

(2) That the defendant knew that the entry or remaining was unlawful; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with any exhibits admitted in evidence, these instructions, and three verdict forms, Verdict Form "A", Verdict Form "B" and Verdict Form "C".

When completing the verdict forms, you will first consider the crime of Burglary in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form "A".

If you find the defendant guilty on Verdict Form "A", do not use Verdict Form "B" or Verdict Form "C". If you find the defendant not guilty of the crime of Burglary in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Burglary in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form "B" the words "not guilty" or the word "guilty", according to the decision you reach.

If you find the defendant guilty on Verdict Form "B", do not use Verdict Form "C". If you find the defendant not guilty of the crime of Burglary in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Criminal Trespass in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form "C" the words "not guilty" or the word "guilty", according to the decision you reach.

If you find the defendant guilty of the crime of Burglary but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is

your duty to find the defendant not guilty on Verdict Form "A" and to find the defendant guilty of the lesser included crime of Burglary in the Second Degree on Verdict Form "B" *or Verdict Form C.*

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.



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CLARK COUNTY
WASHINGTON

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PROSECUTING ATTORNEY

CURT WYRICK
CHIEF DEPUTY

JAMES R. MILLER
CHIEF CRIMINAL DEPUTY

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MARY K. YOUNG
ADMINISTRATOR

September 15, 2006

John A. Hays
Attorney at Law
1402 Broadway, Suite 103
Longview, Washington 98632

Re: State of Washington v. William Henry Motter
Court of Appeals No. 34251-1-II
Clark County No. 05-1-02000-8

Dear Mr. Hays:

Enclosed please find the Verbatim Report of Proceedings with regard to the above-entitled case. Thank you for sending them to our office for use in preparation of the State's brief.

Sincerely,

Abby Rowland

Abby Rowland
Legal Assistant to Michael C. Kinnie,
Senior Deputy Prosecuting Attorney

cc: Court of Appeals

Encs. 1 volume

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