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COURT OF APPEALS

NO. 34353-3-II

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STATE OF WASHINGTON

BY 19 JN  
DEPUTY

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM L. MATTHEWS, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 05-1-03983-5

**RESPONSE BRIEF**

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

1. Did the trial court properly exercise its discretion by allowing evidence that Ms. Hicks asked defendant to leave her business because she thought he had assaulted her friend when it was relevant to motive?

2. Was evidence sufficient to allow a reasonable jury to find that defendant used “force or means likely to produce great bodily harm or death” when the jury heard testimony describing the severity of Ms. Wilson’s injuries, saw photographs of those injuries, and heard that as a result she suffered a permanent hearing loss?

B. STATEMENT OF THE CASE.

1. Procedure

On August 15, 2005, the Pierce County Prosecutor’s Office filed an information charging appellant, WILLIAM LOUIS MATTHEWS, hereinafter “defendant,” with, assault in the second degree against Angela Hicks (Count 1); kidnapping in the first degree against Wanda Wilson (Count 2); possession of a fire arm in the second degree (Count 3); and assault in the first degree against Ms. Wilson (Count 4). CP 1-5.

On December 13, 2005, the Pierce County Prosecutor's Office filed an amended information that increased the firearm charge to first degree. CP 23-25.

The matter came on for trial before the Honorable Bryan E. Chushcoff on December 14, 2005. RP 1. After hearing the evidence the jury convicted defendant as charged except as to Count 2. On that count the jury found defendant guilty of the lesser included offence of unlawful imprisonment. RP 665.

Additionally, the jury returned a special verdict that defendant was armed with a firearm when he committed the crimes of assault in the second degree and unlawful imprisonment. RP 665-666.

At the sentencing hearing on January 27, 2006, the parties agreed that defendant's offender score was 9 for each count. The court ordered concurrent sentences, the longest of which was for Count 4, assault in the first degree, which carried a standard range of 240 to 318 months. CP 138-139, RP 683. The court imposed a sentence of 300 months for Count 4, plus 54 months for two firearm enhancements for a total of 354 months. CP 137, RP 685. The court imposed the high end sentences for Counts 1 and 3, and the low end sentence for Count 2. The court also imposed various legal financial obligations. CP 137, RP 686.

Defendant timely appealed from this judgment and sentence. CP 152-162.

## 2. Facts

On the evening of August 4, 2005, Ms. Hicks was bartending at the Golden West Saloon on 54<sup>th</sup> Street and South Tacoma Way. RP 114, 117, 234. Defendant entered the bar at some point in the evening, approached Ms. Hicks, and asked for the location of Ms. Hicks' friend, Wanda Wilson; he wanted to know whether she had been in the Saloon that evening, and if so, with whom she had left. RP 119. Ms. Hicks had not previously seen defendant, but deduced that he was Ms. Wilson's boyfriend. RP 119-120. Ms. Hicks and Ms. Wilson kept close contact. CP 119, 120. Ms. Hicks refused to answer defendant's questions, and refused to serve defendant when he ordered a drink. She told defendant, "you need to leave. You are here for nothing but trouble. You beat my friend up." RP 120. Defendant swore at Ms. Hicks, insulted her, and left the bar. RP 120.

Ms. Wilson arrived at the bar sometime after defendant had been in looking for her. RP 121. Ms. Wilson and Erik Franshier visited with Ms. Hicks until the bar closed at approximately 1:30 a.m. RP 121. The three then left the bar and went to Ms. Hicks' house. RP 121. Ms. Wilson received several phone calls from defendant on Ms. Hicks's home phone telling Ms. Wilson to leave. RP 123, 238. At one point, Mr. Franshier got on the phone with defendant. Mr. Franshier swore and yelled at defendant. RP 241. In response to defendant's phone calls, Ms. Wilson left 15 minutes after having arrived at Ms. Hicks's home. RP 240. Ms.

Wilson returned to her apartment on Tacoma Mall Boulevard, where defendant was waiting for her. RP 240-241.

At the apartment, defendant hit Ms. Wilson, dragged her by her hair, and then forced her down three flights of stairs to Ms. Wilson's car. RP 242-244, 512. Defendant slapped Ms. Wilson and told her to get in the front passenger seat. RP 245. Defendant ordered Ms. Wilson to give directions to Ms. Hicks's home. RP 242.

Defendant and Ms. Wilson drove to Ms. Hicks's home. RP 247. As they approached the house, defendant turned off the headlights. He slowed to a stop in front of the house. RP 247. Defendant instructed Ms. Wilson to call Ms. Hicks on her cell phone, and tell her that he and Ms. Wilson were in front of the house. RP 250. Ms. Hicks responded to this call opening the front door and looking outside. RP 128. While she was at the open door, defendant pointed a semiautomatic pistol out of the driver-side window and fired two shots into the air. RP 128, 248, 250. Ms. Hicks dropped to the floor, kicked the front door shut and called the police from her cell phone while lying on the ground. RP 128-129. Defendant then drove away with Ms. Wilson. RP 129. Defendant dropped Ms. Wilson off at her apartment, then left. RP 252.

The police responded to Ms. Hicks's call. RP129. Ms. Hicks gave the police Ms. Wilson's address, but could not provide them with the last name of the defendant. RP 129-130. Forensic specialist Toni Martin recovered the two shell casings from in front of Ms. Hicks's home.

RP158-160. While the police were at Ms. Hicks's home, defendant called her on the telephone and asked, "are you scared now bitch?" RP 198.

Three police officers arrived at Ms. Wilson's apartment approximately 10 minutes after she was dropped off by defendant. RP 252-253. When questioned by the police, Ms. Wilson did not give defendant's true name. RP 253-254.

On the evening of August 10, 2005, at around 10:00 p.m., Ms. Wilson went out with her girlfriends to nightclubs in Federal Way and Tacoma. RP 261-262. She returned to her apartment on Tacoma Boulevard at 4:00 in the morning. RP 263. Defendant was inside Ms. Wilson's apartment waiting for her. RP 263. As soon as Ms. Wilson walked through the door, defendant began beating her with his fists. RP 265. Defendant stripped Ms. Wilson and ripped off her panties. RP 267. He then repetitively struck her bare body, legs, arms and head with an electrical cord, specifically a cell phone charger. RP 266-269, 271, 510. Defendant used his fists to strike Ms. Wilson's face, neck, and head. RP 266, 288. The assault lasted an hour. RP 268. The beating ended when Ms. Wilson escaped and drove to her mother's home. RP 272.

Ms. Wilson's mother called Detective Miller who called 911. An ambulance picked up Ms. Wilson and took her to St. Clare Hospital. RP 274. Ms. Wilson arrived at the emergency room at 8:25 in the morning. RP 435. Once at the hospital the emergency room staff was able to stop the bleeding from Ms. Wilson's head. RP 276. Both a nurse and

emergency room physician, Dr. Ian Cowan, examined Ms. Wilson. RP 276, 409.

Defendant ruptured Ms. Wilson's eardrum, causing permanent hearing loss. RP 272, 276-277. Defendant lacerated the back of Ms. Wilson's head and blackened her eye. RP 271-272, 293, 427, 433. The electrical cord wielded by defendant made linear pattered contusions or bruises over various areas of Ms Wilson's body, specifically her right shoulder, left arm, legs, and around her groin and lower abdomen. CP 177-190, RP 413.

The patterns of Ms. Wilson's injuries suggested the possibility of fractured facial bones or bleeding around the brain. RP 413. Dr. Cowen, therefore, ordered an CAT scan of Ms. Wilson's head and face. RP 413. After determining that Ms. Wilson did not have bleeding around the brain or any broken bones, Dr. Cowen prescribed antibiotics and pain medication, and referred Ms. Wilson to an ear, nose and throat specialist for her hearing loss. RP 414. Ms. Wilson was released from the emergency room at 2:30 that afternoon. RP 435.

On August 12, Detective Miller along with two patrol officers conducted a search of Ms. Wilson's apartment and found defendant asleep in Ms. Wilson's bed. RP 505-506. After detaining defendant, the officers searched the premises. RP 507. They found blood on the bedroom floor, blood on Ms. Wilson's bed sheets, blood spatter on the walls in the hallway and by the front door, and bloody clothing. RP 507-508.

At trial the defense presented two witnesses, Stephen Teixeira and Cariann Pennington. Defendant did not testify. Ms. Pennington testified that she and defendant had a brother-sister relationship. RP 537. She testified that she and defendant were together from August 4, 2005, through August 11, 2005. RP 546. She testified that from August 11, 2005, at 3:40 in the morning to 11:00 in the morning on August 12, 2005, that she was checked into the Econolodge on Homer Street in Tacoma and that defendant was with her. RP 530, 533, 541-545.

Mr. Teixeira, defendant's other witness, was the manager of the Econolodge. RP 530. He testified that Ms. Pennington was checked into the hotel from early morning of the 11<sup>th</sup> to the 12<sup>th</sup>. RP 533. The defense then admitted exhibit number 213, an Econolodge registration card filled out and signed by Ms. Pennington which showed her check-in and check-out dates and times. RP 531-532. Nowhere on the registration card or in any other hotel records was there any indication that defendant had accompanied Ms. Pennington at the hotel. RP 535, 542.

The case presented by defense was that defendant could not have committed the offenses charged because he never left the presence of Ms. Pennington during the time frame in which the crimes were committed. RP 537-544.

C. ARGUMENT.

1. THE COURT PROPERLY EXERCISED ITS DISCRETION BY ALLOWING MS. HICKS TO TESTIFY TO EVIDENCE THAT SHOWED ANIMOSITY BETWEEN HER AND DEFENDANT AND WHICH WAS RELEVANT TO HIS MOTIVE FOR HIS CRIMES.

Admission of evidence is within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). Abuse “occurs when the ruling of the trial court is manifestly unreasonable or discretion was exercised on untenable grounds[.]” State v. Gatalski, 40 Wn. App. 601, 606, 699 P.2d 804 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)), review denied, 104 Wn.2d 1019 (1985). The appellant bears the burden of proving abuse of discretion. Gatalski, 40 Wn. App. at 606; State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Although relevant, evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ER

403. Evidence of other crimes, wrongs, or acts is inadmissible to prove a person's character; but such evidence is admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

In evaluating ER 404(b) evidence, a trial court must engage in a three-step analysis. It must determine: (1) The purpose for offering the evidence; (2) its relevance; and (3) whether it outweighs the probative value of the evidence against its prejudicial effect. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). A trial court has “wide discretion in balancing the probative value of evidence against its potentially prejudicial impact.” State v. Rivers, 129 Wn.2d 697, 710, 921 P.2d 495 (1996) (citing State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)). Although this balancing test should be done on the record, its absence is not fatal to the claim if the record establishes reasons for admission. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996) (where record shows the trial court adopted the argument of one of the parties regarding probative value of the evidence and its prejudicial effect, there is no error).

In this case, defense counsel, concerned that testimony that Ms. Hicks threw defendant out of the bar would be prejudicial, requested the court to conduct an offer of proof examination of two of the State’s witnesses, Mr. Franshier and Ms. Hicks. RP 84. The court heard an offer

of proof, during which Ms. Hicks testified that she told defendant to leave the Golden West Saloon because he was trouble because he “beat my friend up,” referring to Ms. Wilson. RP 93-94. After the testimony was given, the court conducted a hearing to determine the admissibility of the evidence. RP 95. Defense counsel moved to exclude any evidence that Ms. Hicks asked defendant to leave the bar or that she had accused defendant of assaulting Ms. Wilson. RP 95-96. Counsel stated such evidence of “prior bad acts” would be prejudicial, and therefore, inadmissible under ER 404(b). RP 105. The court determined that the evidence fell under an exception to ER 404(b), was relevant to all counts charged, and admissible. RP 195, 107.

The court found the testimony was admissible for purposes of establishing why animosity existed between defendant and Ms. Hicks. RP 104. From Ms. Hicks testimony that she threw defendant out of the bar and accused him of beating up Ms. Wilson, a jury could infer that defendant was angry at Ms. Hicks, and thereby probative of defendant’s motive for assaulting her. RP 104-105. Additionally, defendant’s animosity towards Hicks, was connected to his motive for unlawfully imprisoning Ms. Wilson. He needed to find out where Ms. Hicks lived from Ms. Wilson so he could commit his assault. RP 105. Finally, the testimony is probative in establishing defendant’s motive for assaulting

Ms. Wilson. RP 105. The evidence showed defendant was angry at Ms. Wilson for socializing with Ms. Hicks and her other friends. RP 105. Defendant's actions on the 4<sup>th</sup> and the 10<sup>th</sup> show that when Ms. Wilson went out without him, he became possessive and violent. From this evidence the jury could infer that defendant found it unacceptable for his girlfriend to associate with a woman who had confronted him for being abusive towards Ms. Wilson. Defendant's assault on Ms. Wilson was his way of punishing her for associating with Ms. Hicks and other women who encouraged Ms. Wilson to be independent.

The State argued the probative value of the evidence outweighed its prejudicial effect:

It is extremely probative for the jury as to whether or not there was any animosity between Angela Hicks and the defendant... That probative value outweighs any prejudice to the defendant... [T]he fact that they didn't like each other... she threw him out of the bar... is very relevant and should be admitted if the jury is going to have the opportunity to decide for themselves whether this defendant had a motive and a reason to be angry..."

RP 97-98.

After hearing Ms. Hicks's testimony and the State's argument, the court ruled the evidence admissible. RP 104. This ruling shows that the trial court considered the purpose the statement was offered (to show animosity between Ms. Hicks and defendant); its relevance (to establish

defendant's motive for the offenses charged); and that the court incorporated the State's argument as to the probative value of the testimony balanced against its prejudicial effect. The trial court, therefore, did not abuse its discretion in allowing this testimony.

Defendant contends that Ms. Hicks spontaneously revealed that she had thrown defendant out of the bar, and at the same time accused him of previously beating up her friend Ms. Wilson during direct examination. Such a "spontaneous" revelation, defendant argues, is a "serious irregularity." (See Appellant's Brief at p. 11). However, Ms. Hicks did not "spontaneously" reveal this information in the presence of the jury. Rather, she revealed it during the offer of proof examination, where the court determined the testimony to be admissible. RP 93. When Ms. Hicks testified during direct examination, she presented the same information in the same fashion as she had during the offer of proof examination.<sup>1</sup> Defendant, nevertheless, objected to the testimony. The court, however, having previously determined the evidence admissible, overruled defendant's objection. RP 120.

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<sup>1</sup> Ms. Hicks testimony at the offer of proof examination:

I asked him to leave, and I wasn't going to serve him... Because I told him, you beat my friend up. You have to leave if you are going to cause trouble. RP 93.

Ms Hicks Testimony on direct examination:

I refused to serve him [defendant]. I said you need to leave. You are here for nothing but trouble. You beat my friend up. RP 120.

The trial court did not abuse its discretion in admitting the evidence below.

2. A RATIONAL TRIER OF FACT COULD FIND THAT AN HOUR LONG BEATING OF A NAKED VICTIM WITH FISTS AND AN ELECTRICAL CORD THAT LEFT THE VICTIM WITH PERMANENT HEARING LOSS CONSTITUTED “FORCE OR MEANS LIKELY TO PRODUCE GREAT BODILY HARM OR DEATH” IN VIOLATION OF THE FIRST DEGREE ASSAULT STATUTE.

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); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Also, a challenge to 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 defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. 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. The differences in the testimony of witnesses create the need for such credibility determinations; these 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:

Great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It,

alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). 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 assault in the first degree when, (1) with intent to inflict great bodily harm, (2) he or she assaults another (3) by any force or means likely to produce great bodily harm or death. (CP 90-128, Jury Instruction No. 25)

Great bodily harms means bodily injury that creates a probability of death, or which causes significant permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. (CP 90-128, Jury Instruction No. 26)

Whether the force used by the defendant is likely to cause great bodily injury is a question for the jury. State v. Pierre, 108 Wn. App. 378, 384-385, 31 P.3d 120 (2001); quoting People v. McCaffrey, 118 Cal. App. 2d 611, 616-17, 258 P.2d 557 (1953) (“[W]hether the blow of a fist or the kick of a shod foot was of such force as was likely to produce great bodily injury [is] a question for the jury.”)

In this case, there are three elements of the crime, however, defendant only challenges evidence as to one of the elements. Defendant's sole contention is that the State provided insufficient evidence to prove that the “force or means used by defendant were likely

to produce great bodily harm or death” when he assaulted Ms. Wilson. (Appellant’s brief at p. 8). This contention is without merit.

First, the State presented evidence that Ms. Wilson did in fact suffer great bodily injury. Defendant ruptured Ms. Wilson’s left eardrum causing permanent hearing loss. RP 272, 276-277, 414, 684. Again, RCW 9A.04.110(4)(c), in part, defines great bodily harm as an injury that “causes a...significant permanent loss or impairment of the function or any body part or organ.”

Additionally, the jury heard testimony from the emergency room triage nurse, Karen Barry, and the emergency room physician, Dr. Ian Cowen, who treated Ms. Wilson, describing the injuries sustained by Ms. Wilson. RP 429-435, 408-419. Ms. Wilson’s face was swollen, her right eye and lip were bruised. RP 412, 433. She had tenderness over most of her head and a laceration on the back of her head. RP 412, 427, 433. There were “linear contusions” or bruises covering various parts of Ms. Wilson’s body from being struck with an electrical cord. RP 413, 423, 433. The appearance of Ms. Wilson’s head injuries suggested the possibility of internal bleeding around the brain, and fractured facial bones, which therefore prompted Dr. Cowen to order a CAT scan to see if Ms. Wilson indeed suffered from such internal bleeding and fractures. RP 413. It is reasonable to conclude that the amount of force required to

cause the types of injuries described by RN Barry and Dr. Cowen was force likely to cause great bodily injury or death.

The jury also saw photographs of the injuries described by RN Barry and Dr. Cowen. CP 177-190, RP 285-286. The jury could reasonably determine that the amount of force necessary to make the type of bruises and contusions seen in the photos, was force likely to cause great bodily injury or death. See State v. Pierre, 108 Wn. App. 378, 384-385, 31 P.3d 120 (2001), quoting McCaffrey, 118 Cal. App. 2d 611, 616-17, 258 P.2d 557 (1953) (“By observing [the victim] who had been assaulted, the jury--as intelligent men and women--could fairly estimate the likelihood of the batteries to produce great bodily injury.”).

In addition to the photographs and descriptions of Ms. Wilson’s injuries, the jury heard testimony from Ms. Wilson, explaining how defendant inflicted these injuries. RP 263-272. Defendant beat Ms. Wilson with his fists and a electrical cord continuously for one hour. RP 268. Before striking Ms. Wilson with and electrical cord, he stripped her and ripped off her panties so that the weapon he wielded would hit her bare skin. RP 267. In light of Ms. Wilson’s injuries and the manner in which defendant inflicted them, it is reasonable to conclude that the forced used by defendant was likely to cause great bodily injury or death.

Defendant contends that the only evidence produced by the State on this issue was Dr. Cowen’s testimony that being punched in the head

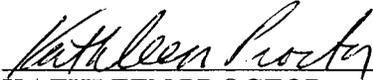
“can cause life threatening injuries.” RP 415. (See Appellant’s Brief at p. 9). Defendant then argues that this evidence alone is insufficient because “[t]he fact that a blow to the head *can* produce great bodily harm... does not mean... that a blow to the head is *likely* to produce great bodily harm,” and therefore the jury could not reasonably infer from Dr. Cowen’s single comment that a blow to the head would likely cause great bodily harm or death. (See Appellant’s Brief at p. 10). By focusing on this small portion of evidence and disregarding the other evidence provided by the State, defendant ignores the appropriate standard of review. In addition to Dr. Cowen statement, the jury heard testimony defendant repeatedly punched Ms. Wilson in the head with so much force as to rupture her eardrum, and that she was stripped naked and whipped with an electrical cord. The jury also heard testimony describing the severity of Ms. Wilson’s injuries, saw photographs of those injuries, and heard that as a result she suffered a permanent hearing loss. This evidence was sufficient to enable a reasonable jury to conclude that defendant used “force or means likely to produce great bodily harm or death.” RCW 9A.36.011.

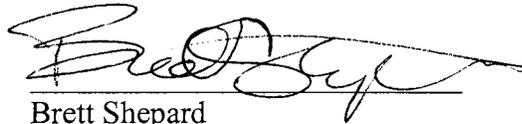
D. CONCLUSION.

For the above reasons, the State respectfully requests this Court to uphold defendant's conviction on all counts.

DATED: SEPTEMBER 13, 2006

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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.

9/14/06 Johnsen  
Date Signature

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