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COURT OF APPEALS
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STATE OF WASHINGTON

NO. 34556-1-II

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

STATE OF WASHINGTON, Respondent

v.

JASON VINCENT POWELL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02296-5

BRIEF OF RESPONDENT

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PM 11/14/06

TABLE OF CONTENTS

I. STATEMENT OF FACTS 1

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1 1

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2 10

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3 15

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4 17

VI. RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW 19

VII. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) 10
State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995) 14
State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1995) 8
State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2 1120 (1997) 13
State v. Brown, 48 Wn. App. 654, 658, 739 P.2d 1199 (1987) 15
State v. Dault, 19 Wn. App. 709, 719, 578 P.2d 43 (1978) 15
State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) 19
State v. Hall, 46 Wn. App. 689, 692, 732 P.2d 524 (1987) 15
State v. Halstien, 65 Wn. App. 845, 851, 829 P.2d 1145 (1992) 14
State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005) 9
State v. McDaniels, 39 Wn. App. 236, 240, 692 P.2d 894 (1984) 8
State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) 10
State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992) 15
State v. Salinas, 119 Wn.2d 192, 201, 892 P.2d 1068 (1992) 9
State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) 9
State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) 13
State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) 13
State v. Tigano, 63 Wn. App. 336, 344-345, 818 P.2d 1369 (1991) 15
State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999) 18
Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 10

Statutes

RCW 9A.52.040 8

I. STATEMENT OF FACTS

The State accepts the bulk of the factual recitation contained in defendant's brief. Supplement to the record will be provide in the response section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the State had failed to present substantial evidence of all the elements of attempted first degree burglary. Specifically, the defense maintains that there is no evidence that the defendant intended to commit a crime.

Amber Williams testified for the State that she had known the defendant for approximately three and a half years and that he was the father of her one-year old son, Zion. (RP 45). She testified that at the time of the attempted burglary, that the defendant and her were not together as a couple. (RP 46). She further testified that prior to the date of the attempted burglary (October 13, 2005) that he had threatened to kill her. She told the jury about a specific incident which occurred on or about July 5, 2005. He told her that he would kill her if she ever tried to keep the little boy away from him. (RP 47-48). She indicated that the comments that he made to her concerning killing her scared her. (RP 49-50).

She testified that on the evening of October 12, 2005, that she and the defendant had an argument on the phone. The conversation ended by her hanging up on him and turning her phone off. The argument dealt with her not wanting the defendant to be around the boy. (RP 50).

On October 13, 2005, she woke up about 7:30 in the morning and started getting ready for work and also getting ready to take her 13-year old son to school and pick up two other boys that went with them. She remembers hearing someone trying to open the front door "really quietly". (PR 52, L.13-15). She indicated that she could hear that someone was trying to open the door "it was just really quietly, like if you were really trying to be quiet,". (RP 53, L.15-16). Her 13-year old son looked out the window and saw the defendant and mentioned to the mother that it was the defendant with a really panicked look on his face. (RP 53).

After she heard the noise at the front door, her testimony continued as follows:

> QUESTION (Tonya Riddell, Deputy Prosecutor): When you heard the noise and you were saying – what did you do after you heard the noise?
>
> ANSWER (Amber Williams): I stood up out of the chair I was sitting in and I walked to the back door, 'cause my son Shay had said that he was – he didn't – he was coming down the stairs to go around back. And then I went – and there was curtains at the back sliding glass door and I shut them. And then I stood there and I kind of started to get a little scared. An then – uhm, then I just thought to myself, I think I should call the police 'cause he's trying to – trying to sneak in. And I didn't understand why he was trying to

be so sneaky, you know, like he wasn't knocking on the door or calling and I wasn't –

QUESTION: Did you – did – could you hear him on the back door when you were standing –

ANSWER: Yes, I could hear him trying to get in as I was – 'cause it's like four panels of curtains and so I was holding them closed and I was – I could hear him trying to open up the door and then, like, jiggling it and trying to do stuff to it. And then I just left. I had – I was holding my phone and I walked to my back bedroom and locked myself in my bedroom with my boys.

QUESTION: And did you call the police when you were in the bedroom with your sons?

ANSWER: Yeah. When I – I started to talk to them when I was on the way to my bedroom.

QUESTION: And how long did you stay in the bedroom?

ANSWER: Uhm, anywhere from five to 15 minutes. I don't – it was kind of like a long time.

QUESTION: Did – what did you do when you came out of the bedroom?

ANSWER: Well, at that time, Jason was being arrested, so.

QUESTION: How did you know he was being arrested?

ANSWER: 'Cause I could see him out the window.

QUESTION: So do – could you see him from the window in the bedroom?

ANSWER: Not at the time. I didn't see him even once until he was being arrested.

- (RP 54, L.3 – 55, L.15)

She further testified that the defendant and her parents did not get along and that he was not an invited guest at her parents' home. (RP 57-58).

During cross-examination she reiterated that he was not invited at any time to come over to her parents' residence where she was living. (RP 65). She further indicated that during the phone call on the evening of October 12, 2005, that she told him that she did not want him to be around his son, Zion. (RP 66). She further testified on cross-examination that he did not knock at the door nor did he use the doorbell at any time. (RP 71). She further indicated on cross-examination that the defendant had tried to open the sliding glass door which was locked and had curtains over it. She could hear him trying to pull it open. (RP 78). Later in cross-examination she did recall that the defendant had knocked on the door, but she indicated that that was as the police were pulling up. Prior to that there had not been any calling, knocking or ringing of the doorbell. (RP 86).

On redirect examination, Amber Williams indicated that she loves the defendant but that she is fearful of him because he has been physically abusive to her in the past. (RP 87). She indicated that she has had to call the police on him before because she has been afraid for her life because of his conduct. (RP 88).

The State also called in its case-in-chief, Office James Watson from the Vancouver Police Department. He testified that he was responding to the 911 call made by Ms. Williams and as he approached the house, in his vehicle, he saw the defendant at the front door.

> QUESTION (Tonya Riddell, Deputy Prosecutor): And did – when you first pulled up and saw the defendant, what was he doing?
>
> ANSWER (Officer Watson): Well, it appeared to me that he was actually trying to get in the door. He was facing the door, slightly bent over, and his right arm was – looked like he was working the mechanism.
>
> QUESTION: Did he immediately notice you?
>
> ANSWER: He appeared not to. I drove – I drove by and was able to actually park and get out of my car and start walking towards the house before it appeared that he noticed me and started moving from the house.
>
> QUESTION: So, my next question was, what did he do when he noticed you?
>
> ANSWER: Well, his posture and movements changed. They went from focusing on the door to extremely rigid, staring one way and coming down the stairs very quickly with his arms barely moving at all, which is not how people usually move.
>
> - (RP 92, L.3-20)

As the officer approached the defendant, the defendant ignored the officer's request for him to stop. Ultimately, the officer had to wrestle him to the ground and secure him until another vehicle could arrive.

(RP 94-98). As he was being restrained, a handgun fell from the defendant's shorts. (RP 99). The officer testified that the gun that was recovered from the defendant was loaded. (RP 100).

On cross-examination, the officer talked to the jury about what Amber Williams had told him about recent events with the defendant:

> QUESTION (Brian Berkenmeier, Attorney for the Defendant): Did Amber tell you that she was living with her parents because she moved away from the Defendant?
>
> ANSWER (Officer Watson): That sounds about right, but I'd like to refer to my report to see if I quoted her.
>
> QUESTION: Okay. Did Amber say that her parents didn't like him and he's not welcome here?
>
> MS. RIDDELL: Objection: I think the witness is trying to answer the first question, so.
>
> THE COURT: Okay. Let's – let's have the answer to the first question first. Excuse me.
>
> ANSWER: She had told me that she had moved here into her parents' house away from Jason.
>
> QUESTION: Did she also tell you that he's not welcome here; that came from Amber?
>
> ANSWER: She said her parents do not like him and do not want him here.
>
> QUESTION: Okay. Did Amber say that he'd made prior threats to kill her?
>
> ANSWER: She told me that around the 4th of July of this year, 2005, Jason warned her that if she ever tried to keep his son from him, he would kill her.

> QUESTION: And it also came from Amber that she is experiencing fear, that she's in fear of the Defendant for her or her child or whatever, did that also come from Amber?
>
> ANSWER: Yes.
>
> - (RP 112, L.9 – 113, L.8)

The State also called in its case-in-chief a friend of the defendant's, Gregory Kincaid. Mr. Kincaid testified that he had been with the defendant on the morning of October 13, 2005, that he saw the defendant using some methamphetamine and that he indicated that the defendant was acting strangely and not being himself that morning. He also testified that the defendant was upset with Amber Williams and that he was dressing in camouflage clothing which was unusual. (RP 121).

The Amended Information filed in the case charged the defendant with one count of Attempted Burglary in the First Degree (Domestic Violence) and further maintained that the offense was committed while he was armed with a firearm. (CP 4).

The Court's Instructions to the Jury (CP 45) included as No. 7 the elements that had to be proven beyond a reasonable doubt. The elements as set forth in Instruction No. 7 were as follows:

1. That on or about October 13, 2005, the defendant did an act which was a substantial step towards the commission of Burglary in the First Degree;

2. That the act was done with intent to commit Burglary in the First Degree;
3. That Amber Williams was a family or household member; and
4. That the acts occurred in the State of Washington.

- (Court's Instructions, CP 45, Instruction No. 7 (partial))

The jury was also instructed by way of Instruction No. 9 that "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 the immediate flight therefrom, he or she is armed with a deadly weapon."

Any of the elements of burglary may be proved by circumstantial evidence. State v. McDaniels, 39 Wn. App. 236, 240, 692 P.2d 894 (1984). For a burglary charge, the State has to prove beyond a reasonable doubt that the defendant intended to commit a crime against a person or property inside the burglarized premises. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1995). Intent may be inferred when a person enters or remains unlawfully. RCW 9A.52.040. Intent can be inferred from all the facts and circumstances surrounding the commission of the act and from the conduct that plainly indicates such intent as a matter of logically probability. Bergeron, 105 Wn.2d at 20. Evidence is sufficient if, viewed in a light most favorable to the State, any rational trier of fact could have

found the defendant's guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 892 P.2d 1068 (1992). A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d at 201. The Appellate Court will defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005).

The State submits that there was adequate information supplied to the jury to allow them to determine the defendant's intent on the morning of October 13, 2005. There was recent bad blood between the defendant and Amber Williams as demonstrated by the telephone call and the hang up. Further, a witness who was with him that morning testified that the defendant was upset with Amber Williams and was acting unusual. Amber Williams had testified that the substance of the argument dealt with his being around the child. He had previously threatened to kill her if she ever tried to prevent him from seeing the child. Finally, his unusual and strange conduct both with his friend and when being apprehended by the police, coupled with the fact that he was carrying a loaded firearm, is

circumstantial evidence of an intent to commit a crime had he been able to gain access to the residence.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of ineffective assistance of counsel. Specifically, the claim is that the ineffective assistance is based upon the trial counsel's failure to object when the State elicited testimony from Officer Watson that a witness who did not appear for trial, Andrew Pearson, told the officer that he had given the defendant a ride so that the defendant could get his child.

Ineffective assistance of counsel is a mixed question of law and fact and is reviewed by the appellate court de novo. Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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, 466 U.S. at 687. There is a strong presumption that counsel's representation at the time of trial was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The reasonableness of the defense attorney's performance is to be evaluated from the counsel's perspective at the time of the alleged error and in light of all the circumstances. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In our situation, the defense anticipated the testimony of Andrew Pearson. They wanted his testimony in front of the jury. This became obvious before the State started its case-in-chief when the defense attorney let the court know that they had attempted a number of times to find Andrew Pearson. Attempts had been made to contact a phone number which had been disconnected but that it was clear that he was still around and that they were looking for him. (RP 7-8).

At the time that the defense was handling its case-in-chief, the defense attorney made it quite clear that they were definitely anticipating Mr. Pearson's testimony because they had just spoken with him.

(JURY ABSENT.)

> THE COURT: All right. We're back on the record in the case of State versus Jason Powell, 05-1-02296-5. Second day of trial.
>
> Defense has the floor. It's my understanding you're still waiting for a witness; is that correct?
>
> MR. BERKENMEIER: That's correct, Your Honor. This witness, Andrew Pearson, is listed in the police report. He's the guy that drove my client to the victim's residence and he's been asked to be here - - he's been in contact with me throughout the course of this representation by telephone and what not. He doesn't have a home. He doesn't have an address and he doesn't have a phone. But he calls me and each time I've asked him to show up at pretrials to speak with the Prosecutor, and he's never showed.
>
> So the - - last night, my client's father went and found him at - - found his parents' house near Tigard High School. And the - - his dad called the witness and

confirmed that he would be here. We gave him - - did you see him in person? Okay. Well, we left money for gas, 'cause he's a young kid with no home, and we gave him parking money. And I expected him to be here at a quarter to eight.

THE COURT: And where does he reside?

MR. BERKENMEIER: Somewhere near Tigard High School, Portland, I believe. I - - we don't know where he resides. That's where his dad resides.

THE COURT: Has he been subpoenaed as a witness?

MR. UNKOWN: (Inaduible).

MR. BERKENMEIER: Oh.

THE COURT: Was he subpoenaed as a witness?

MR. BERKENMEIER: I don't believe - - our subpoena got returned. So I guess he's never got it.

THE COURT: So what are you asking me to do?

MR. BERKENMEIER: Another 15, 20 minutes.

THE COURT: That's fine. We can wait till around 9:30, 9:35. If he hasn't appeared then, unless you have some reasonable likelihood that he's going to appear later in the day, then I - - I can't see continuing to hold the jury and wait for him. Do you have other witnesses?

MR. BERKENMEIER: No. The - - he was our last one and - - and he was the guy that drove my client there, the last one to speak to my client.

- (RP 165, L.3 – 166, L.22)

It is obvious from the colloquy with the court that the defense anticipated and wanted this individual's testimony for the jury. The fact

that some of that testimony came through by way of one of the officers does not in any way diminish the fact that they wanted that testimony in front of the jury.

The State submits that this becomes a trial irregularity. All parties are anticipating a witness to show up and when he doesn't, the testimony is, in part, presented to the jury in other ways. A reviewing court will not reverse due to an error in admitting evidence where the error does not prejudice the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2 1120 (1997). The error is not prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The improper admission of evidence is harmless if the evidence is of minor significance in reference to the overall evidence as a whole. State v. Thomas, 150 Wn.2d at 871.

It is interesting to note, that elsewhere in the appellant's brief, he argues that there were no restraining orders preventing the defendant from seeing his son or from taking his son to go somewhere. Yet, now he makes claim that the information that he had gone to get his son somehow prejudice's his ability to present a defense. There is nothing in this record to support the proposition that the defendant did not want this evidence

and information to be heard by the jury. Everyone was anticipating that this witness would be there and testify for the defense. There was no objection made to the statements given to the officer by Mr. Pearson because it was anticipated that Mr. Pearson would be there to testify. A party cannot appeal a ruling admitting evidence unless the party makes a timely and specific objection to the admission of the evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995). Even assuming arguendo that the statement was inadmissible, the defendant has failed to show that the result would have been different had the court excluded the statement. An evidentiary error not of constitutional magnitude requires reversal only if the error, within reasonable probabilities, materially affected the outcome of the trial. State v. Halstien, 65 Wn. App. 845, 851, 829 P.2d 1145 (1992).

The State submits it is hard for the defendant on appeal to argue ineffective assistance of counsel when it is a witness that they are calling and anticipating to be present. Part of the evidence and information that they wanted the jury to hear was received by the jury. Thus, the defense gains the use of the evidence as part of its tactics or overall strategy without the necessity of worrying about cross-examination of a particular witness.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is that the trial court erred in allowing evidence of drug use by the defendant before he went to the residence. As described elsewhere in this brief, these two witnesses described the unusual behavior of the defendant that morning. Gregory Kincaid, the witness who was with him talked about the defendant's mental state and his unusual manner that morning and the officer who arrested him, Officer Watson, testified about the unusual behavior of the defendant and the necessity of being forced to wrestle him to the ground.

The admissibility of evidence rests within the trial court's sound discretion and will not be disturbed on appeal unless no reasonable person would adopt the trial court's view. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). Drugs may affect the perception, recollection, or truthfulness of a witness. State v. Dault, 19 Wn. App. 709, 719, 578 P.2d 43 (1978). For evidence of drug use to be admissible, there must be a reasonable inference that the witness was under the influence of drugs at the time of the events in question. State v. Tigano, 63 Wn. App. 336, 344-345, 818 P.2d 1369 (1991); State v. Brown, 48 Wn. App. 654, 658, 739 P.2d 1199 (1987); State v. Hall, 46 Wn. App. 689, 692, 732 P.2d 524 (1987).

The issue of the defendant's drug use that morning came up before the start of the trial. The defense had moved to keep the drugs out of the case. (RP 12). The Court having heard some preliminary discussion concerning the drugs, indicated that it needed offers of proof before ruling on the admissibility and so prevented the parties from mentioning drugs in their opening statements. (RP 19).

The trial court, as the case began, decided that it wanted to get the drug issue resolved. (RP 21). The State made an offer of proof through Amber Williams (RP 23-27) and the Court ruled that she had no personal knowledge about his drug use that morning and would not allow it to come in front of the jury. (RP 28).

A further offer of proof then was made concerning the testimony of Gregory Kincaid, who saw the defendant taking the drugs that morning. (RP 30-38). The Court noted that the witness had described the defendant's mental state before going over to Amber Williams' residence as somewhat incoherent and that he was acting in an unusual manner. (RP 40). The Court felt that the probative value outweighed the prejudice and allowed the question of drugs to be given to the jury. (RP 41).

The State submitted that it wanted this information to show the defendant's mental state at the time that he went to the residence. The

State argued it was relevant to explain how the defendant was acting and why he was upset. (RP 38, L.11-16).

The Court in making its ruling, made the following observations:

> THE COURT: - - - this witness is willing to testify, as I understand it, that shortly before the defendant went over to the residence of Ms. Williams, his mental state was somewhat incoherent, he apparently was acting in an unusual manner, and that he consumed a controlled substance just before he left.
>
> The probative value of that is pretty strong, in my opinion, because apparently, that's the issue that we have here, is whether he intended to just go over and talk to her or whether he intended to commit some other crime. I don't – haven't heard any argument that it's prejudicial effect is outweighed by its probative value and I wouldn't find that it was in this point. So I'm going to admit the testimony, as indicated by the witness.
>
> - (RP 40, L.20 – 41, L.9)

The State submits that the court balanced the pros and cons of using this very limited information in front of the jury. It ruled that the probative value outweighed its prejudice. The admissibility of this evidence rests within the trial court's sound discretion and should not be disturbed on appeal.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is that the trial court erred when it imposed community custody conditions.

Specifically, the claim is the court lacked authority to require the defendant to undergo an evaluation and treatment for substance abuse.

A court's decision imposing conditions dealing with drug and alcohol evaluations and treatment as part of community custody is reviewed for abuse of discretion. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999). The testimony produced at the time of trial indicated that the defendant had used some methamphetamine before going over to the residence and that he was acting bizarrely and out of character. Given that testimony, the State submits that the court acted within its discretion in ordering the evaluation and treatment for drug use.

The Felony Judgment and Sentence (CP 80) sets forth the conditions complained of by the defendant in the appellant's brief. It is interesting to note that as part of this judgment and sentence is the declaration of criminal history which shows a pending controlled substance offense of delivery in Multnomah County, Oregon, which occurred on or about April 21, 2005. The State submits that this also gives support to the court's determination that a substance abuse evaluation and treatment would be advantageous under the circumstances.

VI. RESPONSE TO STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

The defendant has filed his own Statement of Additional Grounds for Review. These deal with jury instructions given in this case. A copy of the Court's Instructions to the Jury (CP 45) is attached hereto and by this reference incorporated herein.

The State submits that there is very little discussion that needs to be made concerning these matters. The defendant objects to Instruction No. 5 which was merely an instruction limiting how the jury could use information provided by Amber Williams concerning the prior threats against her by the defendant. The jury is presumed to follow the Court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). The defendant maintains that this is impermissibly directing the jury to infer intent in the attempted burglary case. The State submits that the defendant has misread the instruction.

The defendant also maintains that it was improper of the court to give Instruction No. 17. Instruction No. 17 was the firearm enhancement instruction. This is necessary when the State has alleged the firearm enhancement as additional penalty. The jury was provided special interrogatory concerning the use of this information and instruction and

responded to it. The State submits that there was no error in giving of this instruction.

The final issue that he raises deals with a right to bear arms provided by the constitution. The State has no comment concerning this allegation. Clearly it is without merit in the context of this case.

VII. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 14 day of November, 2006.

Respectfully submitted:

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By:
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APPENDIX "A"

COURT'S INSTRUCTIONS TO THE JURY

22

FEB 07 06

JoAnne McBride, Clerk, Clark Co.

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

STATE OF WASHINGTON, Plaintiff, v. JASON VINCENT POWELL, Defendant.	No. 05-1-02296-5

COURT'S INSTRUCTIONS TO THE JURY

SUPERIOR COURT JUDGE

2/7/06
DATE

received @ 10:45 AM
by Sandra Marsden deputy clerk

30
SM

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any

remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

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

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper 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 re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching 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. The defendant has no burden of proving that a reasonable doubt exists.

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. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

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

Evidence has been introduced in this case on the subject of threats against Amber Williams, on dates other than October 13, 2005, on the limited issue of the defendant's intent on October 13, 2005. You must not consider this evidence for any other purpose.

INSTRUCTION NO. 6

A person commits the crime of Attempted Burglary in the First Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 7

To convict the defendant of the crime of Attempted Burglary in the First Degree (Domestic Violence), each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 13, 2005, the defendant did an act which was a substantial step toward the commission of Burglary in the First Degree;

(2) That the act was done with the intent to commit Burglary in the First Degree;

(3) That Amber Williams was a family or household member; 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 substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 9

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 the immediate flight therefrom, he or she is armed with a deadly weapon.

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 enter includes the entrance of the person, or the insertion of any part of the person's body, or any instrument or weapon held in the person's hand and used or intended to threaten or intimidate another person, or to detach or remove property

INSTRUCTION NO. 12

A firearm, whether loaded or unloaded, is a deadly weapon.

INSTRUCTION NO. 13

For purposes of this case, "family or household members" means persons who have a child in common, regardless of whether they have been married or have lived together at any time.

INSTRUCTION NO. 14

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

INSTRUCTION NO. 15

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because 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 verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 16

You will also be given a special verdict form for the crime of Attempted Burglary in the First Degree (Domestic Violence). If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 17

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count 1.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

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

STATE OF WASHINGTON, Respondent, v. JASON VINCENT POWELL, Appellant.	No. 34556-1-II Clark Co. No. 05-1-02296-5 DECLARATION OF TRANSMISSION BY MAILING

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STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On November 14, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court Of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	John A. Hays Attorney at Law 1402 Broadway, Suite 103 Longview, WA 98632
	Jason Powell, DOC #892413 Larch Corrections Center 15314 NE Dole Valley Road Yacolt, WA 98675-9531	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland

Date: November 14, 2006.
Place: Vancouver, Washington.