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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA AMIR FARKAS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 05-1-04866-4

BRIEF OF RESPONDENT

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

1. Was Officer Carey's proper characterization of Ms. Dunning as a victim improper?
2. Did defendant receive effective assistance of counsel when defendant has failed to demonstrate deficient performance or prejudice in the record?
3. Was the evidence sufficient for a reasonable trier of fact to find defendant guilty of malicious mischief in the third degree?
4. Was the evidence sufficient for a reasonable trier of fact to find guilty of assault in the fourth degree?
5. Was the evidence sufficient for a reasonable trier of fact to find defendant guilty of violating a domestic violence court order?

B. STATEMENT OF THE CASE.

1. Procedure

On October 4, 2005, the Pierce County Prosecutor's Office filed an information in Cause No. 05-1-04866-4, charging appellant, JOSHUA FARKAS, hereinafter "defendant," with one count of domestic violence court order violation, one count of assault in the fourth degree, and one count of malicious mischief in the third degree. CP 1-3. The matter

proceeded to jury trial before the Honorable Brian Tollefson on February 27, 2006. RP 1. At trial, defendant stipulated that he had been convicted of violating a no-contact order three times before September 22, 2005. RP 56, 57; CP 8. A no-contact order was in effect on that day that prohibited defendant from contacting Ms. Dunning. RP 112, 117; CP 6, 7.

On March 3, 2006, the jury in this second proceeding found defendant guilty of all three counts as charged. RP 231; CP 10-22. The jury also found that defendant had violated no-contact orders at least twice before. CP 9.

On March 10, 2006, defendant was sentenced to seven months for Count I with credit for time served. RP 245-246; CP 12-22. He was sentenced to 12 months for Count II, with seven of those months suspended, to be served consecutively to his sentence for Count I. RP 245, 246; CP 12-22. He was sentenced to 365 days for Count III, deferred for two years, to be served consecutively to Counts I and II. RP 245, 246; CP 12-22. He was sentenced to pay monetary penalties. RP 245, 246; CP 12-22. This sentence requires defendant to spend a minimum of one year incarcerated. RP 245, 246; CP 12-22. The court ordered a 10 year no-contact order between defendant and Zuleika Dunning and a two year no-contact order between defendant and Marquita Sanders. RP 245, 246; CP 12-22.

Defendant filed a timely notice of appeal. CP 28-39.

2. Facts

a. The day of the assault.

On September 22, 2005, Zuleika Dunning was moving from her house in Spanaway, Washington, to her grandmother's home. RP 127. Ms. Dunning was pregnant at the time with defendant's child. RP 108, 119. Marquita Sanders and Ms. Sanders's friend Alexis arrived between 1:00 p.m. and 2:00 p.m. to help Ms. Dunning move her furniture into a truck so it could be put into storage. RP 85. Ms. Sanders testified that Ms. Dunning did not have any injuries to her face at that time. RP 85. Ms. Sanders also said that a dresser and mirror in Ms. Dunning's master bedroom was intact when she arrived that day. RP 94.

Ms. Sanders testified that defendant came to Ms. Dunning's home between 6:00 p.m. and 8:00 p.m. that evening. RP 85. Ms. Sanders was moving a dresser at the time, and defendant told her to put it down, angrily telling her, "nobody's taking nothing out of my house." RP 87. Defendant went into the house and began to argue loudly with Ms. Dunning in a spare bedroom on the second floor. RP 89, 91.

Ms. Sanders went into the house when she realized that Ms. Dunning and defendant were in the house together. RP 88, 89. As she entered the house, Ms. Sanders heard a slapping noise and ran up the stairs. RP 89. When she reached the spare bedroom, it seemed as if someone were on the other side of the door holding it closed. RP 89. When Ms. Sanders did open the door, she saw Ms. Dunning and defendant

on opposite sides of the room. RP 89. They were both out of breath, and Ms. Dunning was holding her mouth. RP 89, 90, 92.

Ms. Dunning said that defendant hit her, which defendant denied. RP 92. Ms. Sanders noted that defendant had no injuries, and that she escorted Ms. Dunning downstairs and out the front door of the house. RP 92. From the porch, Mr. Dunning saw defendant leave the spare bedroom and was moving toward the second floor master bedroom. RP 93. Ms. Dunning seemed afraid that defendant was going to “mess up” her belongings, so she ran back up the stairs. RP 93. Ms. Sanders followed about ten feet behind her. RP 93. When Ms. Dunning was about half way up the stairs, Ms. Sanders heard a noise that sounded like a crash coming from the master bedroom. RP 93. The two women ran to the bedroom and found defendant standing over the dresser and mirror, which were lying on the floor. RP 94. The dresser was damaged and the mirror was smashed. RP 48, 94.

Defendant left the master bedroom and went downstairs to the living room. RP 95. He found a vacuum there and lifted it over his head as if to throw it through Ms. Dunning’s television. RP 95. Ms. Dunning and Ms. Sanders stopped him before he could throw the vacuum cleaner, and Ms. Sanders called 911. RP 95, 96. When Ms. Sanders called 9-1-1, defendant got into his vehicle and left the scene before police officers could arrive. RP 96. After talking for a minute or two, Ms. Sanders gave

Ms. Dunning the phone. RP 96. Ms. Dunning then reported the incident to the 911 operator. RP 96, 114.

Officer Ingeborg Carey arrived at the house at 8:07 p.m., ten to fifteen minutes after the women called 911. RP 45. Ms. Dunning identified herself as the victim and Officer Carey took a verbal statement from her. RP 46. From this statement, Officer Carey was able to determine that defendant was a suspect in the case. RP 47. Officer Carey took pictures of the damage to the mirror and the dresser. RP 47. She also noted that Ms. Dunning had a cut on her lower lip and took pictures of that injury. RP 49.

b. Ms. Dunning's testimony.

At trial, Ms. Dunning told a different version of the facts than either the one she told the 911 operator or the one to which Ms. Sanders testified at trial. RP 118-140. Ms. Dunning testified that defendant did not come to her house on September 22, 2005. RP 130-132. She admitted that she had one child and was pregnant with defendant's child. RP 119. For this reason, Ms. Dunning did not have much money. RP 126. Even though she did not have much money, had one child, and was pregnant, Ms. Dunning said that she had planned on paying a monthly rent to store her furniture after she moved to her grandmother's home. RP 127.

c. Defendant's arrest.

Deputy Jason Tate met with Ms. Dunning on September 28, 2005, to discuss the events of September 22, 2005. RP 67. He also spoke with Ms. Sanders by telephone about the incident. RP 68, 69. On September 30, 2005, Deputy Tate went to defendant's mother's house to arrest defendant. RP 70, 71. A man answered the door, and Deputy Tate asked for defendant by name. RP 71. The man pointed to a couch inside the residence behind which defendant was hiding. RP 71. Defendant's mother told defendant to come out from behind the couch, and defendant complied. RP 71. Deputy Tate then arrested defendant without incident. RP 72.

Defendant did not call any witnesses or testify on his own behalf at trial.

C. ARGUMENT.

1. AS MS. DUNNING WAS A VICTIM, IT WAS NOT IMPROPER FOR OFFICER CAREY TO REFER TO HER AS A VICTIM WHERE OFFICER CAREY DID NOT ATTRIBUTE GUILT TO DEFENDANT.

The admission of evidence lies largely within the sound discretion of the trial court. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). A decision to allow certain evidence will not be reversed on appeal absent a showing of abuse of discretion. Id. The jury is presumed

to follow instructions to disregard improper evidence. State v. Copeland, 130 Wn.2d 244, 285, 922 P.2d 1304 (1996).

To preserve a claimed error on appeal, an objection must be timely and specific. ER 103(a)(1). A defendant's failure to object precludes appellate review. State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). Any objection to inappropriate conduct is waived by failure to make an adequate timely objection and request a curative instruction. Copeland, 130 Wn.2d at 290. The failure to give a particular instruction is not error when no request was made for such an instruction. State v. Hoffman, 116 Wn.2d 51, 111-12, 804 P.2d 577 (1991).

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the jury." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." Demery, 144 Wn.2d at 760, (quoting Heatley, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should

consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and the other evidence before the trier of fact. Demery, 144 Wn.2d at 758-59. “[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.” Heatley, 70 Wn. App. at 578.

RAP 10.3(a)(5) requires parties to provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). An appellate court need not consider claims that are insufficiently argued. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

Defendant argues that Officer Carey offered improper opinion testimony as to defendant’s guilt. Defendant did not preserve this issue for appeal because he failed to object to Officer Carey’s use of the word victim. Moreover, Officer Carey’s testimony was proper because Officer Carey did not offer improper opinion testimony and defendant fails to support his claim with arguments and citations to the record.

First, defendant did not preserve error regarding the testimony by making an objection on the record. The Supreme Court has requires compliance with ER 103 before considering claims of improper admission of opinion testimony. State v. Black, 109 Wn.2d at 348. Officer Carey

used the word “victim” during her testimony, yet defendant never objected to the use of this word. RP 44-57. Defendant should not be heard to claim that it was error to call Ms. Dunning a victim when he did not object to that characterization at trial.

Second, Officer Carey’s testimony did not constitute improper opinion testimony. Officer Carey’s testimony never referred to defendant’s guilt. See Heatley, 70 Wn. App. at 578. Moreover, the testimony was “otherwise helpful to the jury, and based on inferences from the evidence.” Id. Officer Carey knew that Ms. Dunning reported to a 911 that she was a victim; Ms. Dunning identified herself to Officer Carey as the victim; Ms. Dunning was injured when Officer Carey arrived; and Ms. Dunning’s dresser and mirror were broken when Officer Carey arrived. RP 45-50. Officer Carey’s observations described the conditions of the scene to which she responded; they did not impermissibly comment on defendant’s guilt.

Third, defendant does not support his argument that Officer Carey offered improper opinion testimony about defendant’s guilt. While defendant states that the testimony was improper and cites authority, he does not apply that authority to the present case, nor does he point this Court to any specific place in the record where Officer Carey offered an improper opinion about defendant’s guilt. Br. of Appellant at 6-11. With no argument and no citations to the record, defendant’s argument must fail.

Officer Carey's testimony is not improper because defendant did not preserve this issue for appeal, defendant did not properly argue this issue in his brief, and Officer Carey's testimony did not comment on defendant's guilt.

2. DEFENDANT HAS FAILED TO ESTABLISH HIS COUNSEL'S INEFFECTIVE ASSISTANCE BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State

v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the

motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir.1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir.1990). The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. Id. An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Defendant claims that his attorney Edward Nelson was provided ineffective representation at trial. Mr. Nelson's representation was adequate, however, because his representation was not deficient and because his performance did not prejudice defendant.

Mr. Nelson's decision to allow Officer Carey to call Ms. Dunning a victim did not fall below the standards of effective representation. First, this decision did not fall below the normal standard of representation because it was a trial tactic. See Garrett, 124 Wn.2d at 520. Mr. Nelson likely knew that it was appropriate for Officer Carey to call Ms. Dunning a victim. See previous section. Even if he felt that calling Ms. Dunning a victim was improper, he may have chosen to avoid drawing attention to

this fact as it may have prejudiced the jury against defendant. Mr. Nelson could reasonably have thought that he would lose credibility by trying to argue that Ms. Dunning was not a victim when she had clearly been injured somehow. RP 48-50. Mr. Nelson offered effective assistance by allowing testimony that he could not keep out and by choosing not to undermine his credibility with the jury.

Mr. Nelson's decision to allow Officer Carey's testimony also did not prejudice defendant's case. If Mr. Nelson had objected to the testimony, moved to suppress it, or moved for a mistrial based on it, the court likely would have denied Mr. Nelson's requests because Officer Carey's testimony was acceptable. See previous section.

There was also ample evidence from which the jury would have been able to conclude that Ms. Dunning was a victim of some sort of violence. The jury members heard a tape of Ms. Dunning's 911 call shortly after she was attacked. RP 114. They saw photographs of her injuries and of her broken dresser. RP 48-50. Officer Carey and Ms. Sanders reported that they saw the injuries and the broken furniture, and Ms. Sanders said that the furniture belonged to Ms. Dunning. RP 48-50, 86, 89-94.

Moreover, the word "victim" is so commonplace that a jury is not likely to place much significance on it. "Victim" simply indicated that Officer Carey felt that someone had injured Ms. Dunning. The word "victim" by itself does not attribute guilt or causation to the defendant or

to anyone in particular. Officer Carey didn't even use the word "victim" in the context of speaking about the defendant. If Officer Carey did not connect the innocuous word "victim" to defendant, then her use of that word did not prejudice defendant in any way.

Defendant was not prejudiced by references to Ms. Dunning as a victim because those references were entirely admissible, because ample evidence supported the conclusion that she was a victim, and because the word "victim" does not carry any special significance in relation to defendant. Because Mr. Nelson's representation did not fall below the normal standard of representation and did not prejudice defendant's case, defendant had effective assistance of counsel at trial.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ASSAULT IN THE FOURTH DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the

evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

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

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

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

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

“A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1). The term “assault” is not statutorily defined, so Washington courts apply the common law definition to the crime. State v. Aumick, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995).

The word “assault” is not defined in Washington Criminal Code. See RCW 9A.04.110; State v. Brown, 140 Wn.2d 465, 5++, 998 P.2d 321 (2000). Washington recognizes three forms of assault: (1) unlawful touching with criminal intent – actual battery, (2) an attempt, with unlawful force, to inflict injury upon another – attempted battery; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm – common law assault. State v. Daniels, 87 Wn. App. 149, 152, 940 P.2d 690 (1997). This case involves assault committed by the first means.

The State provided enough evidence to indicate that defendant actually harmed Ms. Dunning by using unlawful force. A reasonable jury could infer that defendant hit Ms. Dunning and caused the cut on her face because she did not have the injury before defendant arrived, she and defendant were alone when Ms. Sanders heard the slapping sound, and

Ms. Dunning had a cut on her lip immediately after Ms. Sanders heard the slapping sound. RP 49, 88-92. The jury could infer that defendant intentionally inflicted this harm because he became angry with Ms. Dunning, yelled at her in a loud voice, attempted to throw her vacuum through the television, and left when he the police were called. RP 89, 95, 96. Intentionally slapping someone constitutes physical harm, so the jury had sufficient evidence to infer that defendant inflicted physical harm on Ms. Dunning. Thus, the jury had sufficient evidence to find defendant guilty of assault in the fourth degree.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF VIOLATING A DOMESTIC VIOLENCE COURT ORDER.

Defendant also claims that there was insufficient evidence to prove that he violated a domestic violence court order.

Whenever an order is granted under [RCW 26.50.110]..., chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime.

RCW 26.50.110(1). Thus, to convict defendant of the crime of violating a no-contact order, the State had to prove (1) that a no-contact order existed,

(2) that defendant knew of the order, and (3) that defendant violated the restrictions of the order.

There was sufficient evidence to fulfill these three requirements. First, defendant stipulated orally and in writing that on September 22, 2005, a court order prohibited him from having any contact with Ms. Dunning. RP 112, 117; CP 6, 7. Second, defendant stipulated orally and in writing that he signed the protection order prior to September 22, 2005, so he knew that he was prevented from having any contact with Ms. Dunning. RP 112, 117; CP 6, 7. Third, defendant arrived at Ms. Dunning's residence on September 22, 2005, and hit Ms. Dunning on the face, which certainly constitutes contact. RP 88-92.

5. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF MALICIOUS MISCHIEF IN THE THIRD DEGREE.

“A person commits the crime of malicious mischief in the third degree when he or she knowingly and maliciously causes physical damage to the property of another.” RCW 9A.48.090(1)(a). “Malicious mischief in the third degree under subsection (1)(a) of this section is a gross misdemeanor if the damage to the property is in an amount exceeding fifty dollars.” RCW 9A.48.090(2)(a). “For the purposes of RCW 9A.48.090, ‘Physical damage’, in addition to its ordinary meaning, . . . includes any diminution in the value of any property as the consequence of an act.”

RCW 9A.48.100(1). “‘Malice’ and ‘maliciously’ shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another.” RCW 9A.04.110(12). This type of inference is valid when there is a “rational connection” between the proven fact and the inferred fact, and the inferred fact flows “more likely than not” from the proven fact. County Court of Ulster Cy. v. Allen, 442 U.S. 140, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979); Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969); State v. Johnson, 100 Wn.2d 607, 616, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

Thus, the State proved that defendant committed malicious mischief in the third degree if it proved that (1) defendant knowingly and maliciously caused damage to Ms. Dunning’ dresser and mirror and (2) that the damage was worth more than \$50.

- a. The State adduced sufficient evidence to convict defendant of the gross misdemeanor of malicious mischief in the third degree.

Defendant claims that the State failed to prove that defendant acted knowingly and maliciously when he damaged Ms. Dunning’s dresser and mirror. Defendant does not offer any argument, citation to authority, or citations to the record to support this proposition, however. Thus, this Court should not consider defendant’s claim that the State did not prove

the mens rea of malicious mischief. See RAP 10.3(a)(5); Dennison 115 Wn.2d at 629; Elliott, 114 Wn.2d at 15.

Moreover, the trial court had sufficient evidence to find that defendant destroyed Ms. Dunning's dresser and mirror knowingly and maliciously. A reasonable juror could conclude that defendant destroyed the dresser and mirror when he went into the bedroom where those items were located, a loud crash was heard from that bedroom, and the dresser and mirror were broken after that crash. RP 45-48, 93-95. A reasonable juror could also infer that he was acting knowingly and maliciously when he fought with and hit Ms. Dunning before the crash was heard and tried to destroy Ms. Dunning's television after he left the master bedroom. RP 88-92, 95.

A reasonable juror could infer that the mirror and dresser were worth more than \$50. Ms. Dunning testified that the dresser and mirror were valuable enough that she was going to place those items and the rest of her furniture into storage while she lived with her grandmother. RP 126, 127. She said she did not have much money and that she would have to pay monthly rent in order to place her furniture in storage. RP 126, 127. A reasonable juror would be able to infer that a dresser and mirror would be worth at least \$50 based on the fact that Ms. Dunning was willing to pay regular rent in order to keep and store those items while she was living with her grandmother. There is a rational connection between the fact that Ms. Dunning would pay to store the dresser and mirror and

the inference that they are worth more than \$50. See County Court of Ulster Cy., 442 U.S. at 167. This inference also flows more likely than not from the act that Ms. Dunning was willing to pay to store the dresser and mirror. Id.

Moreover, jurors may rely on personal life experience in order to evaluate evidence that is presented at trial, so long as those personal life experiences do not provide the kind of specialized information imparted by experts at trial. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 199, 75 P.3d 944 (2003). The value of furniture is within a reasonable person's life experience because a reasonable juror would be able to infer that a dresser and mirror would be worth at least \$50 based on that juror's own experience buying furniture.

The jury thus had sufficient evidence to convict defendant of the gross misdemeanor third degree malicious mischief because a reasonable juror could infer from the evidence that defendant knowingly and maliciously caused at least \$50 worth of damage to Ms. Dunning's dresser and mirror.

- b. The proper remedy is to remand for entry of judgment on the misdemeanor charge of malicious mischief in the third degree.

Defendant argues that this Court should reverse his conviction for malicious mischief in the third degree and dismiss the charge. Br. of Appellant at 24.

It is well-settled that when evidence is insufficient to convict a defendant of the crime charged, but sufficient to support conviction of a lesser included degree, the appellate court may remand for entry of judgment and sentence on the lesser degree. State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996); State v. Plakke, 31 Wn. App. 262, 267-68, 639 P.2d 796 (1982), overruled on other grounds in State v. Davis, 35 Wn. App. 506, 667 P.2d 1117 (1983), aff'd, 101 Wn.2d 654, 682 P.2d 883 (1984).

In order to convict a person of third degree malicious mischief, the State must prove that the person knowingly and maliciously caused physical damage to the property of another and that the damage caused was less than \$50 but less than \$250 in value. RCW 9A.48.090(1)(a), (2)(b).

Here, the evidence amply establishes damage to the dresser and mirror. If the court finds that there was insufficient evidence to convict defendant of the gross misdemeanor based on the value of the property, it is appropriate to remand for entry of judgment on the misdemeanor charge.

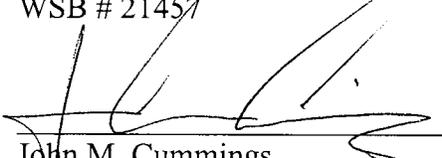
D. CONCLUSION.

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

DATED: SEPTEMBER 28, 2006

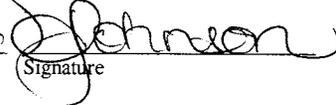
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Certificate of Service:

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.

10/30/06 
Date Signature

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