

NO. 36271-6-II

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH EUGENE WRIGHT, APPELLANT

---

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 13 PM 2:06  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

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

No. 06-1-04520-5

---

**BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
WSB # 16717

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Should this Court review defendant's challenge to the admissibility of a hearsay statement as an excited utterance where the same statement was also admitted as a present sense impression and defendant has not challenged that basis for admissibility?..... 1

2. Did the trial court abuse its discretion in admitting a hearsay statement that met the requirements of both the excited utterance and present sense impression exceptions to the hearsay rule?..... 1

3. Should defendant's convictions be reversed where, even if the hearsay statement was improperly admitted, such error is harmless because the statement was cumulative of other evidence properly admitted at trial?..... 1

4. Should defendant's convictions be reversed for insufficient evidence of identity when (1) defendant's sister saw him get into a big, old, white car and drive away from her house; (2) defendant was angry and cursing at his sister when he left; (3) immediately after he left, defendant's sister heard shots fired; (4) two other witness heard the shots fired simultaneous with seeing defendant's big, old, white car speeding away; (3) there were no other cars in the area; (4) defendant gave seriously conflicting stories when asked by police to account for his whereabouts; and (5) police found the big, old, white car in defendant's driveway with defendant nearby in the early morning hours just after the shooting? ..... 1

5. Should defendant's convictions be reversed for insufficient evidence that defendant's conduct created a substantial risk to others where defendant fired five shots in a residential area as he sped down the street?.....2

B.	<u>STATEMENT OF THE CASE</u> .....	2
	1. Procedure .....	2
	2. Facts.....	3
C.	<u>ARGUMENT</u> .....	6
	1. DEFENDANT’S CHALLENGE TO THE ADMISSIBILITY OF A HEARSAY STATEMENT AS AN EXCITED UTTERANCE IS MOOT BECAUSE THE SAME STATEMENT WAS ALSO ADMITTED AS A PRESENT IMPRESSION AND DEFENDANT DOES NOT CHALLENGE THAT BASIS FOR ADMISSIBILITY. ....	6
	2. THE STATE PRESENTED AMPLE EVIDENCE (1) IDENTIFYING DEFENDANT AS THE SHOOTER AND (2) DEMONSTRATING THAT FIRING FIVE ROUNDS IN A RESIDENTIAL NEIGHBORHOOD CREATED A SUBSTANTIAL RISK OF DEATH OR SERIOUS INJURY.....	15
D.	<u>CONCLUSION</u> . ....	19

## Table of Authorities

### Federal Cases

<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	7
--	---

### State Cases

<u>Beck v. Dye</u> , 200 Wash. 1, 9-10, 92 P.2d 1113 (1939), <u>overruled on other grounds by State v. Rangel-Reyes</u> , 119 Wn. App. 494, 81 P.3d 157 (2003).....	9, 10
<u>Habitat Watch v. Skagit County</u> , 155 Wn.2d 397, 416, 120 P.3d 56 (2005) .....	8
<u>Johnston v. Ohls</u> , 76 Wn.2d 398, 406, 457 P.2d 194 (1969).....	12
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988) .....	15
<u>State v. Chapin</u> , 118 Wn.2d 681, 686, 826 P.2d 194 (1992).....	11
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980) .....	15
<u>State v. Flett</u> , 40 Wn. App. 277, 699 P.2d 774 (1985) .....	12
<u>State v. Hieb</u> , 39 Wn. App. 273, 278, 693 P.2d 145 (1984), <u>rev'd on other grounds</u> , 107 Wn.2d 97, 727 P.2d 239 (1986).....	10
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965) .....	15
<u>State v. Johnson</u> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) .....	8
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	15
<u>State v. Martinez</u> , 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) .....	9, 10
<u>State v. Olson</u> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995).....	8
<u>State v. Owens</u> , 128 Wn.2d 908, 913, 913 P.2d 366 (1996) .....	12

<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	15
<u>State v. Strauss</u> , 119 Wn.2d 401, 417, 832 P.2d 78 (1992).....	10, 12
<u>State v. Thomas</u> , 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) .....	8, 13
<u>State v. Thomas</u> , 46 Wn. App. 280, 284, 730 P.2d 117 (1986), <u>affd</u> , 110 Wn.2d 859, 757 P.2d 512 (1988).....	12
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	15
<u>State v. Woodward</u> , 32 Wn. App. 204, 206-07, 646 P.2d 135, <u>review denied</u> , 97 Wn.2d 1034 (1982) .....	12

**Statutes**

RCW 9A.36.045(1).....	16, 17
RCW 9A.36.045(2).....	16

**Rules and Regulations**

CrR 3.5.....	2
ER 803(a)(1).....	9
ER 803(a)(2).....	11
RAP 10.3(a)(6) .....	8

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

1. Should this Court review defendant's challenge to the admissibility of a hearsay statement as an excited utterance where the same statement was also admitted as a present sense impression and defendant has not challenged that basis for admissibility?

(Pertains to Appellant's Assignment of Error #1.)

2. Did the trial court abuse its discretion in admitting a hearsay statement that met the requirements of both the excited utterance and present sense impression exceptions to the hearsay rule? (Pertains to Appellant's Assignment of Error #1.)

3. Should defendant's convictions be reversed where, even if the hearsay statement was improperly admitted, such error is harmless because the statement was cumulative of other evidence properly admitted at trial? (Pertains to Appellant's Assignment of Error #1.)

4. Should defendant's convictions be reversed for insufficient evidence of identity when (1) defendant's sister saw him get into a big, old, white car and drive away from her house; (2) defendant was angry and cursing at his sister when he left; (3) immediately after he left, defendant's sister heard shots fired; (4) two other witness heard the shots fired simultaneous with seeing defendant's

big, old, white car speeding away; (3) there were no other cars in the area; (4) defendant gave seriously conflicting stories when asked by police to account for his whereabouts; and (5) police found the big, old, white car in defendant's driveway with defendant nearby in the early morning hours just after the shooting? (Pertains to Appellant's Assignment of Error #2.)

5. Should defendant's convictions be reversed for insufficient evidence that defendant's conduct created a substantial risk to others where defendant fired five shots in a residential area as he sped down the street? (Pertains to Appellant's Assignment of Error #3.)

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Kenneth Eugene Wright, defendant, with drive-by shooting (count I) and first degree unlawful possession of a firearm (count II). CP 1-2.

On March 19th and 20th, 2007, the trial court conducted a 3.5 hearing. RP 14-58; 92-113. The trial court ruled that defendant's statements to police were admissible at trial. RP 114. Trial testimony began on March 20, 2007. RP 132. The jury found defendant guilty as charged. RP 503-04.

The trial court sentenced defendant to a prison term of 75 months. CP 49-61. This timely appeal follows.

## 2. Facts

On September 23, 2006, at around 2:40 a.m., defendant went to Jonnice Morris' house located at 1321 East 62<sup>nd</sup> Street in Tacoma. RP 133; 164. Morris and defendant are brother and sister. RP 134. Defendant pounded on the door and demanded money. RP 164. Defendant became upset when Morris said she could not loan him any money. Id. Defendant yelled and cursed at his sister. Id. Defendant then demanded that she give him his bullet-proof vest and clothing items that she had in her possession. RP 164-65. When Morris brought the items out to defendant, he ordered her to throw them on the ground, which she did. RP 165.

Morris watched as defendant picked up the items and went back to his car. RP 165. She saw him get into a big, white, older Buick-type car. Id. Morris heard defendant drive off. Id. Within seconds she heard gunshots. Id.

A neighbor, Kathy Devlin, called police immediately. RP 237. Officers were in the area and it took them less than three minutes to get to Morris' house. RP 157.

On the way to Morris' house, an unidentified older white male in a pick-up truck flagged down police about half a block away from Morris'

house. RP 152-54; 373-75. The man told officers he saw a white, Lincoln-type car drive away from the blue house located at 1321 East 62<sup>nd</sup> (Morris' house). RP 156-57. He heard five shots coming from the vehicle. Id. There had been no other traffic in the area. RP 152.

When officers arrived on the scene, Morris' neighbors were outside in the street. RP 376. Morris was in the doorway of her house. RP 160. She was upset, crying, and visibly shaken. RP 160-62. She was on the phone. Id. Morris believed that defendant was the shooter because he had just been there prior to the officers' arrival. RP 163. Morris, who saw defendant drive off, gave a similar description of the vehicle as the unidentified man gave. RP 156; 165-67. Morris told police how to locate defendant. RP 163-64.

Morris' neighbor, John Smith, heard eight shots that were very loud, like they were close-by. 241; 243. He looked out the window and saw a big, white car go by very fast. RP 242-43. He heard the last shot just as he saw the vehicle. RP 244. Smith went into the street and found spent 9 mm shell casings, which he gave to police when they contacted him about four minutes after the shooting. RP 246-47. Smith gave five shell casings to Sgt. Branham. RP 168; 205; 249-50; 378.

Another neighbor, James Cook, heard four to five gun shots at 2:40 a.m. He said the shots were so close by, they sounded like they were in his front yard. RP 261. He saw Smith pick up four to five shell casings off the street. RP 264.

Kathy Devlin, the neighbor who called 9-1-1, reported that she heard three to five rapidly fired gun shots. RP 237-38.

Officers proceeded to defendant's residence in Parkland. RP 171; 385. They saw a 1977 white Chevrolet Impala in the driveway. RP 172. Officers approached the house in their patrol cars with emergency lights on. RP 177. Defendant was outside at that point in time. RP 175. With guns drawn, police ordered defendant to put his hands in the air. RP 177; 181. Defendant did not comply and went back into the house. Id. Eventually he came back outside, this time carrying a baby. RP 182. Defendant was belligerent and uncooperative and kept saying, "I have a baby." RP 392. Defendant was repeatedly told to give the crying baby to the baby's mother, Jestina, who was present as well. RP 183. Defendant had to be told everything several times: "It was a long process." RP 184. Eventually defendant was taken into custody. RP 184.

After being advised of his rights, defendant told officers differing stories. RP 188; 190. He denied knowing why police were there and said he and Jestina had been at the movies. RP 191. Defendant maintained that they went straight home from the movie and did not leave again. Id. When asked why Jestina had said they were at a bowling alley, defendant changed his story to say that although they had purchased tickets to the movie "Jackass II," they changed their minds, decided not to go to the movie, and went to the bowling alley for drinks instead. RP 192-93. He denied seeing or talking to his sister that evening. RP 193.

On the ride to jail, defendant said that he “would never shoot into the air because that’s kids’ stuff.” RP 194. He said that if he were going to shoot, it would be at someone. Id.

The Impala was impounded and searched with the authority of a search warrant. RP 309-310. The gun was never recovered. RP 311.

At trial, Morris recanted her earlier statements to police. When she testified, she denied seeing defendant get into the car and denied hearing the gunshots as she had told police. RP 142-44; 163-66. She did admit defendant was at her house to collect some money and other items during the time in question. 137-39. Morris claimed she was upset at the time because she was arguing with her boyfriend on the phone. RP 140.

The jury found defendant guilty as charged. RP 503-504.

C. ARGUMENT.

1. DEFENDANT’S CHALLENGE TO THE ADMISSIBILITY OF A HEARSAY STATEMENT AS AN EXCITED UTTERANCE IS MOOT BECAUSE THE SAME STATEMENT WAS ALSO ADMITTED AS A PRESENT IMPRESSION AND DEFENDANT DOES NOT CHALLENGE THAT BASIS FOR ADMISSIBILITY.

The prosecutor offered the unidentified man’s statements during the testimony of Officer Metzger. RP 153-57. Defense counsel objected when the prosecutor asked the officer, “And what did [the unidentified man] say?” RP 154. Defense counsel objected as to hearsay. RP 154.

The prosecutor advised the court that he was offering the statement as a present sense impression *and* an excited utterance. RP 155. Defense counsel again objected as to hearsay. RP 155. The trial court stated, “Overruled.” Id.

The day after the unidentified man’s statement was admitted into evidence in front of the jury, defense counsel moved the court to reconsider the admissibility of the statement. RP 197. Defense counsel argued that the statement did not qualify as a present sense impression or as an excited utterance. RP 199-200. Additionally, defense counsel argued that the holding in Crawford v. Washington<sup>1</sup> would further prohibit admission of the statement. RP 198-99. The trial court allowed the prosecutor additional time to review the holding in Crawford. RP 200-01. Later that day, the prosecutor refuted defendant’s Crawford claim as it pertained to both present sense impression and excited utterance. RP 290-92. The prosecutor then reasserted that the statement was properly admitted under both present sense impression and excited utterance. RP 292-93

The trial court denied defendant’s motion to reconsider its earlier ruling. RP 296. In so doing, it specifically adopted the prosecutor’s

---

<sup>1</sup> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The holding in Crawford is not an issue in this appeal.

theories of admissibility, stating: “I think that all the reasons that [the prosecutor] stated apply...” RP 296. The court also stated, “But I think [the prosecutor] has hit the proper analysis on the head correctly, and I just adopted his argument.” RP 296.

On appeal, defendant does not challenge the admissibility of the statement as a present sense impression and merely attacks the excited utterance exception to the hearsay rule. Brief of Appellant (BOA) at 8-10. “[T]his court will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” Habitat Watch v. Skagit County, 155 Wn.2d 397, 416, 120 P.3d 56 (2005)<sup>2</sup> (quoting State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)); RAP 10.3(a)(6). Further, the Rules of Appellate procedure require the argument section of an appellant’s brief to contain the “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6).

Here, defendant assigned error to the admissibility of the man’s statement, but makes no effort to present any argument or citations to legal

---

<sup>2</sup> The Washington Supreme Court has not treated criminal cases and civil cases any differently in this regard. State v. Olson, 126 Wn.2d at 323, n. 3.

authority challenging the admissibility of the statement under the present sense impression exception to the hearsay rule. BOA at 8-10. Therefore, this Court should not consider any challenge to the trial court's ruling regarding the unidentified man's statement because even if this Court agrees with defendant that the statement was inadmissible as an excited utterance, the trial court's ruling that the statement also qualifies as a present sense impression stands.

However, should this Court decide to analyze the admissibility of the statement under the present sense exception to the hearsay rule, it will find that the trial court did not abuse its discretion in admitting this evidence.

A present sense impression is a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). Present sense impressions must grow out of the event reported and in some way characterize that event. State v. Martinez, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) (citing Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939), overruled on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003)). The statement must be a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself, unembellished by premeditation, reflection, or design; it is not a statement

of memory or belief. Martinez, 105 Wn. App. at 783 (quoting Beck, 200 Wash. at 9-10). Although a present sense impression need not be contemporaneous, a statement made several hours after an event may be inadmissible. See State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). An answer to a question is not a present sense impression. Martinez, 105 Wn. App. at 783 (citing Hieb, 39 Wn. App. at 278). The trial court's determination of whether a statement falls within an exception to the hearsay rule will not be disturbed absent an abuse of discretion. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

In the present case, all of the requirements of present sense impression are satisfied. First, the unidentified man told officers "that he saw a white Lincoln type car drive from a blue house, and then he heard five shots coming from [that same] vehicle." RP 156. He made this statement within a minute or two of the incident. RP 154. He was only one block away from the scene when he made the statement. RP 373-75. The man made the statement describing the incident immediately after he perceived it. Secondly, the statement grew out of the incident reported and characterized what happened. Thirdly, the statement was spontaneous and evoked by the incident. He hears gunshots close by and flags down police to report this alarming event. There is nothing to suggest the

statement, which was very succinct, was embellished by premeditation, reflection or design. Fourth, the statement was not of memory or belief. Lastly, the statement was not in response to any question asked by the officers. The man initiated the police contact by flagging the officers down. RP 154; 373. The officers did not ask the unidentified man any questions.

Because the requirements for present sense impression are all met, the trial court did not abuse its discretion in admitting the statement.

Nor did the trial court abuse its discretion by finding that the statement also qualifies as an excited utterance. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2).

Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The key determination is “whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” State v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The passage of time between the startling event and the declarant’s statement is a factor to be considered in determining whether the statement is an excited utterance. State v. Woodward, 32 Wn. App. 204, 206-07, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982). The passage of time alone, however, is not dispositive. State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (trial court did not err in determining that statements made after a 6 to 7 hour time span qualified as excited utterances), aff’d, 110 Wn.2d 859, 757 P.2d 512 (1988); State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (a statement made 7 hours after a rape was properly admitted as an excited utterance because of the declarant’s “continuing stress” during that time period).

Moreover, an excited utterance may also be given in response to a general question, such as asking what happened. State v. Owens, 128 Wn.2d 908, 913, 913 P.2d 366 (1996). For instance, in State v. Strauss, 119 Wn.2d 401, 405-406, 832 P.2d 78 (1992), the defendant picked up a

17 year-old girl, took her back to his apartment where he repeatedly raped her at knifepoint. When the officer took the victim's statement, she was very distraught, very red in the face, crying, and appeared to be in a state of shock three and half-hours after the incident. Id. at 416. The court found that the victim was still under the influence of the incident when she made her statement to the police. Id.

A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

Although there was no direct evidence of emotion or excitement on the part of the unidentified man, there was sufficient circumstantial evidence for the trier of fact to infer that he was laboring under the excitement of the incident. The action of flagging down police and immediately reporting the incident suggests that he was anxious and stressed out by the incident. The very nature of the incident is one that few people could witness without stress, anxiety, and excitement. Not only that, the incident had just happened. Although this statement may best be described as a present sense impression, it also meets the requirements for an excited utterance. Admission of the statement was a proper exercise of discretion on the part of the trial court.

Even if the trial court had abused its discretion by admitting the evidence, the error was harmless. Contrary to defendant's assertion, the unidentified man's statement was not the only evidence that directly tied the white car to the gunshots. BOA at 8-10. Morris saw defendant get into a "white, older, big Buick type car." RP 165. She saw him drive off and immediately heard gunshots fired. RP 165. This is almost exactly what the unidentified man said. See RP 156. Morris believed that defendant fired the shots because he had just been at her house pounding on the door, cursing, and demanding money. RP 164. The testimony of Morris' neighbor, John Smith, also ties defendant to the white car. He heard the gunshots close by. RP 243. He looked out the window as the shots were ringing out and saw a big, white car go speeding by just as the last shot was fired. RP 242-44. There were no other vehicles in the area besides the white car. RP 242-43. After about a minute he went outside and located shell casings in the street, two houses down from him. RP 246-47. The Morris residence was three houses down. RP 376.

This testimony not only corroborates the unidentified man's statement, but is also cumulative of other properly admitted evidence in the trial. Any error was therefore harmless.

2. THE STATE PRESENTED AMPLE EVIDENCE  
(1) IDENTIFYING DEFENDANT AS THE  
SHOOTER AND (2) DEMONSTRATING THAT  
FIRING FIVE ROUNDS IN A RESIDENTIAL  
NEIGHBORHOOD CREATED A SUBSTANTIAL  
RISK OF DEATH OR SERIOUS INJURY.

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, 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 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. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove the charge of drive-by shooting, the State must prove that:

- (1) Defendant recklessly discharged a firearm;
- (2) In a manner which created substantial risk of death or serious physical injury to another person; and
- (3) The discharge was from a motor vehicle.

RCW 9A.36.045(1).

The statute further provides that the perpetrator may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness. RCW 9A.36.045(2).

There is very compelling evidence that defendant was the individual who fired the shots on the night in question. Defendant was at his sister's house at 2:40 a.m. RP 137, 164. He was angry, yelling, and cursing when she did not give him any money. RP 164. This is defendant's motive for striking out at Morris. Morris believed defendant was the shooter. RP 163-64. Defendant left in the big, white car that was the only car anyone saw in the neighborhood, with the exception of the pick-up truck driven by the unidentified man. RP 152, 243. Three witnesses saw the big, white car fleeing. RP 156, 165, 242. Smith found five empty shell casings in the street outside Morris' house. RP 246, 378. The spent casings were all fired from a 9mm gun and they were all fired from the same gun. RP 286. Morris was visibly shaken, upset, and crying

when police arrived. RP 160-62. This is consistent with having been the target of her brother's violence.

Defendant's words and actions when confronted by police were very incriminating. The big, white, old car turned out to be a 1977 Impala and it was parked in defendant's driveway. RP 171-75. Not only that, defendant himself was awake and outside by the car when police arrived. RP 175. After being advised of his rights, defendant gave several conflicting stories about what he had been doing that evening. RP 188-94. Defendant denied being at Morris' house at all that evening, but Morris clearly told police and testified that defendant was there. Viewed in the light most favorable to the State, the inference is that defendant's untruthfulness revealed his guilty knowledge.

The compelling evidence clearly demonstrates that defendant fired five shots in a residential area while he angrily drove away from his sister's house in his 1977 white Impala. Defendant's claim fails.

There is also more than sufficient proof that defendant's conduct satisfied the element requiring that the firearm was discharged "in a manner which create[d] a **substantial risk** of death or serious physical injury to another person[.]" RCW 9A.36.045(1) [emphasis added].

A common sense evaluation of the evidence, in the light most favorable to the State, reveals ample evidence that there was a substantial

risk to others. Defendant fired the gun in a residential neighborhood where families were asleep in their homes. He fired multiple shots from a 9 mm handgun. These bullets definitely put the occupants of the neighborhood at risk, including the unidentified man in the pick-up truck, who was in the area. There is no evidence suggesting defendant fired into the air. Even if he had, what goes up, must come down, which creates danger to the population of a residential neighborhood located in an urban city. But in fact, the evidence seems more to suggest that defendant was in fact aiming at someone, and merely missed his target. In the police car on the way to jail, defendant told officers he would not shoot into the air as that was “child’s play.” RP 194. Either way, defendant was angry, driving the car at a high rate of speed, and firing rapidly out the window of the car. Because he was driving, the gun would have been held by only one hand, unsupported by the other hand that was steering the car. The jury could reasonably infer that the recoil of the gun together with the movement of the speeding car amounted to a lack of control of the muzzle of the gun which was firing rapidly. These bullets were likely to go anywhere, including into occupied residences. The jury was further entitled to find that these facts and inferences amounted to a substantial risk to others.

Defendant's claim of insufficient evidence of identity and substantial risk are without merit.

D. CONCLUSION.

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

DATED: February 11, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
P. GRACE KINGMAN *29105*  
Deputy Prosecuting Attorney  
WSB # 16717

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.

*2/13/08*  
Date Signature *Johanson*

FILED  
COURT OF APPEALS  
DIVISION II  
08 FEB 13 PM 2:06  
STATE OF WASHINGTON  
BY DEPUTY