

original

NO. 36745-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL DUANE EASTMAN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's failure to give the jury a unanimity instruction denied the defendant his right to a unanimous verdict under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment. CP 7-15.

2. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to allow him to call witnesses to present relevant, exculpatory evidence. RP 96-101.

Issues Pertaining to Assignment of Error

1. Does a trial court's failure to give a jury a unanimity instruction in a case in which the jury could have found the not defendant guilty based upon one of two separate actions deny a defendant the right to a unanimous verdict under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment?

2. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it refuses to allow the defendant to call witnesses to present relevant, exculpatory evidence?

STATEMENT OF THE CASE

Factual History

Charles Joseph (Joe) Eastman lives at 252 Woodard Road in Centralia, Washington. RP 35, 55-56. On March 24, 2007, he was out in his shop working on a vehicle with his step-son Daryl Doll and his friend Donald Clevenger. RP 12, 36, 48. While working on the vehicle, the defendant Daniel Eastman walked in and started talking to Daryl. RP 12-13, 37, 48, 72-73. The defendant and Daryl are cousins and grew up living next to each other. RP 25-28, 40-41, 72-73. While they were growing up, Daryl was always bigger and more of a bully than the defendant. RP 42. They occasionally got into fights, and there was one occasion where Daryl held the defendant so he could not breathe. RP 25-28, 42-43, 88.

When the defendant entered the shop, he asked Daryl if he would help the defendant move a “skidder” that he owned.¹ RP 12-23, 37, 49-50, 74. When Daryl asked him how they were going to move it, the defendant stated that they could move it with Daryl’s chainsaw winch. *Id.* At this point Daryl became very angry, telling the defendant that the winch belonged to him, that he didn’t have permission to use it, and that he had been “ripping everyone off.” *Id.* The defendant did not respond, and after a few seconds Daryl said

¹A “skidder” is a large, four-wheeled vehicle used in logging operations.

something along the line of “I already feel like knocking your teeth out of your head, quit glaring at me,” (Daryl’s version) or “Don’t stand there glaring at me, if you want to hit me, hit me,” (Joe Eastman and Donald Clevenger’s version), or “stop glaring at me or I will knock the last tooth out of your head and beat the piss out of you.” (the defendant’s version). RP 13, 37, 49, 76.

According to all of the witnesses, the defendant then turned around and left the shop. RP 13, 37, 49-5076-77. As the defendant walked out, he said “come on outside fat boy, let’s see what you got.” RP 77-78. In fact, Daryl had always been bigger than the defendant and capable of beating up the defendant, but could rarely catch the defendant, who was much faster on his feet. RP 78-83. When Daryl heard this, he ran out of the shop after the defendant. RP 49-50, 77-79. According to the defendant and Don Clevenger, Daryl chased the defendant around to the back of the building saying he was going to “beat the piss” out of him. *Id.* In response, the defendant then picked up a piece of steel reinforcing bar (rebar) with which to defend himself. RP 79-83. However, Daryl was unable to catch the defendant and he returned to the shop. *Id.*

After getting away from Daryl, the defendant got into his Bronco II and backed up to maneuver so he could leave. RP 16-18. As he did so, Daryl walked or ran out of the shop and over to the Bronco, and when the defendant put the Bronco in gear and stepped on the gas, the right front corner of the

Bronco hit Daryl and knocked him to the ground, causing him a number of significant scrapes and bruises to his arm, torso, and legs. RP 16-23, 80-83. The defendant then stopped the Bronco and got out, the rebar still in his hand. RP 18, 37, 79-83. According to the defendant, he did not intentionally hit Daryl, and he got out of his Bronco to see if Daryl was injured. RP 86. According to Daryl, the defendant hit him intentionally, and when he got out of the Bronco with the rebar in hand, he said "I'm going to kill you, you son of a bitch." RP 18. At this point, Joe Eastman came out of the shop and told the defendant to drop the rebar and leave, so the defendant complied. RP 19, 37. In Joe Eastman's opinion, the defendant did not look angry at this point, but Daryl looked "very angry." RP 38-45. Daryl called the sheriff's office. RP 23.

After the defendant drove down the road a couple of miles, he stopped and called his sister, who lived close to Joe Eastman. RP 84-86. She told him that the deputies were already at the shop. *Id.* The defendant told his sister to tell them to wait as he was coming back. *Id.* The defendant then drove back to the property, parked his vehicle, and walked up to the shop where the deputies placed him under arrest. *Id.* According to one of the deputies, at this point the defendant said "I should have killed him." RP 59. According to Joe Eastman, during this whole incident Daryl was "very angry." RP 45. In fact, when the deputies arrived they asked Daryl if he

wanted a protection order. RP 34. Daryl responded that he did not need one, that it was the defendant who was going to need one. *id.*

Procedural History

By information filed March 26, 2007, the Lewis County Prosecutor charged the defendant Daniel Eastman with one count of second degree assault under RCW 9A.36.021(1)(c), alleging that he assaulted Daryl Doll with a deadly weapon. CP 1-2. The case later came on for trial before a jury, with the state calling Daryl Doll, Charles Eastman, Donald Clevenger, and two sheriff's deputies as witnesses. RP 11, 35, 48, 54, 62. They testified to the facts in the preceding *Factual History*. *Id.* After the state rested, the defendant took the stand on his own behalf. RP 71. He testified that when he got into his Bronco, he was trying to get away from Daryl, who was attempting to catch him and beat him up, and that he did not intentionally run into Daryl. RP 71-80.

After the defendant finished his testimony, the state moved to exclude the defendant's remaining four witnesses. RP 96. They were the defendant's mother, his sister, and two friends. *Id.* They were all prepared to testify to Daryl's prior history of violence toward the defendant, as well as the defendant's fear of him. RP 96-100. The state argued that since the defendant had not claimed self-defense, this evidence was irrelevant. *Id.* The defense argued that this evidence was relevant to show the defendant's

panicked state of mind at the time he drove his Bronco forward, thus supporting his claim that he accidentally hit Daryl. *Id.* The court granted the state's motion and precluded the defense from calling any of its witnesses. RP 96-101. The defense then rested. RP 101.

After very short rebuttal evidence, the court instructed the jury on the law without objection by the defense. CP 16-29. These instructions included the following statement defining the term "assault."

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

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

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

CP 23.

The court did not give a *Petrich* unanimity instruction, but it did give the following instruction on what constituted a deadly weapon:

Deadly weapon also means any weapon, device, instrument, or substance, or article including a vehicle, which under the circumstances in which it is used, is readily capable of causing death

or substantial bodily harm.

CP 26.

Finally, the court's "to convict" instruction did not designate the vehicle as the weapon with which the state alleged the defendant assaulted Mr. Doll. CP 22. Rather, it stated as follows:

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

(1) That on or about the 24th day of March, 2007, the defendant assaulted Daryl Doll with a deadly weapon; and

(2) That this act occurred in the State of Washington.

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

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

CP 22.

After argument by counsel, the jury retired for deliberation and later returned a verdict of guilty. CP 30. The court then sentenced the defendant within the standard range, and the defendant filed timely notice of appeal. CP 31-40, 41.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO GIVE THE JURY A UNANIMITY INSTRUCTION DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS VERDICT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNDER UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, the Defendant in a criminal action may only be convicted when an unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)).

Failure to follow one of these options is constitutional error and may be raised for a first time on appeal, even though the defense fails to request either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988). Furthermore, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime

beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411 (quoting *State v Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)). Once again quoting the court in *Kitchen*, “[t]his approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *Kitchen*, 110 Wn.2d at 411, (citing *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

For example, in *State v. Petrich, supra*, the defendant was charged with one count of indecent liberties and one count of second degree statutory rape. At trial, numerous incidents of sexual contact were described in varying detail. The jury convicted him on both counts, and he appealed, arguing that the court’s failure to ensure a unanimous verdict required the reversal of the convictions and a retrial. The Washington Supreme Court agreed and reversed, stating as follows:

In petitioner’s case, the evidence indicated multiple instances of conduct which could have been the basis for each charge. The victim described some incidents with detail and specificity. Others were simply acknowledged, with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place. The State was not required to elect, nor was jury unanimity ensured with a clarifying instruction. The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. We cannot so hold on this record. Petitioner is entitled to a new trial.

State v. Petrich, 101 Wn.2d at 573 (citation omitted).

In the case at bar, the state charged the defendant with one count of second degree assault with a deadly weapon under RCW 9A.36.021(1)(c), which states:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(c) Assaults another with a deadly weapon;

RCW 9A.36.021(1)(c).

Although the information in this case alleged that the “deadly weapon” the defendant used was a motor vehicle, the “to convict” instruction did not limit the jury or require it to find that deadly weapon the defendant employed was the motor vehicle. Rather, it allowed the jury to find any deadly weapon supported by the facts before it. The “to convict” instruction stated:

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

(1) That on or about the 24th day of March, 2007, the defendant assaulted Daryl Doll with a deadly weapon; and

(2) That this act occurred in the State of Washington.

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

On the other hand, if, after weighing all of the evidence, you

have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

CP 22.

In addition, while the state's initial theory of the case appears to be that the defendant committed an actual battery, the definitional instruction for the term "assault" did not require the jury to find an actual battery. This instruction stated:

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

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

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

CP 23.

Finally, the definitional instruction for the term "deadly weapon" also did not limit the jury to a determination that the motor vehicle was the only potential deadly weapon that the defendant might have used. This instruction stated:

Deadly weapon also means any weapon, device, instrument, or substance, or article including a vehicle, which under the circumstances in which it is used, is readily capable of causing death or substantial bodily harm.

CP 26.

Under these three instructions, as presented by the court, the jury was free to find that (1) the defendant accidentally ran into his cousin with his car and was not guilty of second degree assault for this action, but (2) the defendant was still guilty of second degree assault because he intentionally threatened his cousin with a deadly weapon, which was the piece of rebar. In other words, under the third paragraph of the "assault" definition, the jury could have found the defendant guilty of second degree assault because when he threatened to kill his cousin while holding the rebar in his hand, he did "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact create[d] in another a reasonable apprehension and imminent fear of bodily injury."

The problem with the instructions the court gave, in light of the facts before the jury, is that the court did not give a *Petrich* unanimity instruction. Thus, some of the jury members could well have concluded that the defendant did not intentionally run into his cousin. However, these jurors could have still convicted him of second degree assault under the theory that he threatened to kill his cousin while holding a rebar, which was a deadly

weapon. Some of the other jurors could well have come to the opposite conclusion. Under these facts, the court's instructions, absent a *Petrich* instruction, denied the defendant his right to a unanimous jury verdict as is required under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ALLOW HIM TO CALL WITNESSES TO PRESENT RELEVANT, EXCULPATORY EVIDENCE.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude

his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments to present relevant evidence supporting his defense.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.” Under ER 402, “all relevant evidence is admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony or exhibit can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951).

In the case at bar, the state charged the defendant with second degree assault under RCW 9A.36.021(1)(b). The state’s theory of the case was that the defendant intentionally drove his vehicle into his cousin. The defendant’s response was that (1) he was afraid of his cousin because of their long history of fights during which the cousin repeatedly prevailed, and (2) he panicked because of this history and accidentally drove his car into the defendant. Under this defense theory of the case, the facts at issue included (1) the claim that there had been a history of physical confrontations between the defendant and his cousin, (2) the claim that the defendant’s cousin repeatedly prevailed in these physical confrontations, and (3) the claim that the defendant had a great deal of fear because of this history. Thus, in this case, any evidence that made any one of these three facts slightly more or less likely was relevant and admissible under ER 401 and ER 402.

In this case, the defendant did have evidence that made these facts more likely. The evidence was available through four defense witnesses who

had personal knowledge about the history of violence between the defendant and his cousin, had personal knowledge about the defendant's cousin prevailing in these physical confrontations, and had personal knowledge about the defendant's fear of his cousin. Since this evidence was "relevant" under ER 401, it was also "admissible" under ER 402. Thus, the trial court erred when it excluded this evidence as irrelevant.

In this case, the trial court's decision to improperly exclude this evidence violated the defendant's due process right to present a valid defense under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. As an error of constitutional magnitude, the defendant is entitled to a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004).

In this case, the evidence presented at trial was far from overwhelming. In fact, it showed that the defendant's cousin was the primary aggressor in the confrontation, and that the defendant obviously feared him, particularly given Mr. Clevenger's testimony concerning Daryl Doll chasing the defendant. Under these facts, it is equally as likely that the defendant

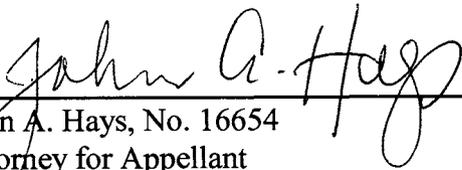
acted accidentally as it is that he acted intentionally. Thus, the state cannot meet its burden of proving the existence of overwhelming evidence of guilt. In fact, even if the burden were on the defendant to show that the error caused prejudice, meaning that but for the error the jury would have arrived at the opposite verdict, this burden would be met under the equivocal evidence that was presented at trial. Thus, the defendant is entitled to a new trial.

CONCLUSION

The defendant is entitled to a new trial because (1) the trial court failed to give the jury a *Petrich* unanimity instruction, and (2) the court violated the defendant's due process right to present a defense when it excluded his relevant witnesses.

DATED this 21st day of February, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.36.021

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

EVIDENCE RULE 401
DEFINITION OF “RELEVANT EVIDENCE”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY *C. M. M.*
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,
Respondent,

LEWIS CO. NO. 07-1-00212-4
APPEAL NO: 36745-9-II

vs.
EASTMAN, Daniel D.,
Appellant,

AFFIDAVIT OF MAILING

12 STATE OF WASHINGTON)
13 COUNTY OF LEWIS) vs.
14)

15 CATHY RUSSELL, being duly sworn on oath, states that on the 21st day of FEBRUARY
16 2008, affiant deposited into the mails of the United States of America, a properly stamped
17 envelope directed to:

18 MICHAEL GOLDEN
19 LEWIS COUNTY PROSECUTING ATTY
20 345 W. MAIN STREET
21 CHEHALIS, WA 98532

DANIEL D. EASTMAN #744843
WASH STATE PENITENTIARY
1313 n. 13TH aVE.
WALLA WALLA, WA 99362-1065

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 21ST day of FEBRUARY, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 21st day of FEBRUARY, 2008.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: KELSO/LONGVIEW
Commission expires: 11-04-2009