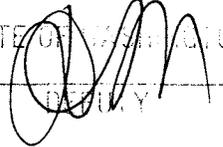


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STATE OF WASHINGTON
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NO. 37302-5-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

ADAN E. GUZMAN,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 07-1-00456-8

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	6
(1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT GUZMAN WAS GUILTY OF TWO COUNTS OF ASSAULT IN THE SECOND DEGREE—ASSAULT WITH A FIREARM (COUNTS V AND VI)	6
(2) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS THAT COUNTS III AND IV CONSTITUTED THE SAME OR SIMILAR CRIMINAL CONDUCT AND THUS GUZMAN’S OFFENDER SCORE WAS MISCALCULATED	9
(3) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE THE COURT IMPOSED A SENTENCE INCLUDING COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM.....	13
(4) GUZMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED AND THAT HIS SENTENCE EXCEEDED THE STATUTORY MAXIMUM.....	14
E. CONCLUSION	16

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>In re Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	10
<u>State v. Ammons</u> , 105 Wn.2d 175, 718 P.2d 796, <i>cert. denied</i> , 479 U.S. 930 (1986).....	9
<u>State v. Bencivinga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	6, 9
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	6
<u>State v. Deharo</u> , 136 Wn.2d 856, 966 P.2d 1269 (1998).....	12
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	6
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996).....	15
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987).....	11
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	15
<u>State v. Gentry</u> , 125 Wn.2d 570, 646, 888 P.2d 1105 (1995).....	15
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	15
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	15
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	15
<u>State v. Majors</u> , 94 Wn.2d 354, 616 P.2d 1237 (1980).....	10
<u>State v. McCraw</u> , 127 Wn. 2d 281, 898 P.2d 838 (1995).....	9
<u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	12
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6

<u>State v. Sloan</u> , 121 Wn. App. 220, 87 P.3d 1214 (2004).....	13
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	15
<u>State v. Thomas</u> , 150 Wn.2d 666, 80 P.3d 168 (2003).....	13
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	11
<u>State v. Tresenriter</u> , 101 Wn. App. 486, 4 P.3d 145 (2000)	11
<u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	11
<u>State v. Weaver</u> , 60 Wn.2d 87, 371 P.2d 1006 (1962)	7
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	15
 <u>Statutes</u>	
RCW 9.94A.310	13
RCW 9.94A.400.....	11
RCW 9.94A.505.....	13
RCW 9.94A.510.....	13
RCW 9.94A.533.....	13
RCW 9.94A.589.....	11
 <u>Court Rules</u>	
CrR 3.5.....	2
CrR 3.6.....	2

A. ASSIGNMENTS OF ERROR

1. The trial court erred in not taking Counts V and VI (assault in the second degree—assault with a firearm) from the jury for lack of sufficient evidence.
2. The trial court erred in sentencing Guzman where it appears that Counts III and IV constituted the same or similar criminal conduct.
3. The trial court erred in sentencing Guzman as the court imposed a sentence including community custody in excess of the statutory maximum.
4. The trial court erred in allowing Guzman to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated and that the sentence imposed exceeded the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to uphold Guzman's convictions in Counts V and VI (assault in the second degree—assault with a firearm)? [Assignment of Error No. 1].
2. Whether the trial court erred in sentencing Guzman where it appears that Counts III and IV constituted the same or similar criminal conduct? [Assignment of Error No. 2].
3. Whether the trial court erred in sentencing Guzman as the court imposed a sentence including community custody in excess of the statutory maximum? [Assignment of Error No. 3].
4. Whether the trial court erred in allowing Guzman to be represented by counsel who provided ineffective assistance in failing to properly argue at sentencing that his offender score was miscalculated and that the sentence imposed exceeded the statutory maximum? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Adan E. Guzman (Guzman) was charged by third amended information filed in Thurston County Superior Court with one count of drive by shooting (Count I), one count of unlawful possession of a firearm in the second degree (Count II), three counts of assault in the second degree (Counts II, V, and VI), and one count of felony harassment (Count IV). [CP 18-19]. The information also included deadly weapon sentence enhancement allegations on Counts III-VI. [CP 18-19].

Prior to trial, no motions regarding 3.5 or 3.6 were made or heard. Guzman was tried by a jury, the Honorable Gary R. Tabor presiding. Guzman stipulated to having a prior offense that precluded his possession of a firearm for purposes of Count II (unlawful possession of a firearm in the second degree). [RP 79]. Guzman had no objections and took no exceptions to the instructions. [RP 155-156]. The jury found Guzman not guilty of Count I (drive by shooting), guilty of Count II (unlawful possession of a firearm in the second degree), guilty of Count III (assault in the second degree) but did not enter a special verdict regarding the deadly weapon sentence enhancement, guilty of Count IV (felony harassment) but did not enter a special verdict regarding the deadly weapon sentence enhancement, guilty of Count V (assault in the second

degree) entering a special verdict regarding the deadly weapon sentence enhancement; and guilty of Count VI (assault in the second degree) entering a special verdict regarding the deadly weapon sentence enhancement. [CP 20-29; RP 210-215].

The court sentenced Guzman, who had no prior convictions for purposes of calculating his offender score, to a standard range sentence of 16-months on Count II; to a standard range sentence of 33-months on Count III; to a standard range sentence of 16-months on Count IV; to a standard range sentence of 33-months on Count V; and a standard range sentence of 33-months on Count VI with all sentences running concurrently. [CP 72-82; 1-29-08 RP 3-13]. The court also imposed the required two 36-months deadly weapon enhancements running consecutive to the underlying sentences and to each other for a total sentence of 105-months. [CP 72-82; 1-29-08 RP 3-13]. In addition, the court imposed 18 to 36-months of community custody on Counts III, V, and VI despite the fact that the statutory maximum sentence for these crimes (all class B felonies) was 120-months. [CP 72-82; 1-29-08 RP 3-13].

Timely notice of appeal was filed on January 29, 2008. [CP 58-69]. This appeal follows.

2. Facts

On March 11, 2007, Raymond Reyes, Sr. held a 21st birthday party for his son, Rueben, at his home located at 1313 25th Ct. NE in Thurston County. [RP 84-85, 119]. Guzman and his girlfriend, Viola “Aracelli” Olivares attended. [RP 87-89, 106, 120-121]. An altercation apparently broke out with Guzman injuring his head. [RP 88, 107, 115]. Guzman had been outside getting caught in the middle of a fight and, as he told police, fired a gun into the air then handed the gun to Olivares. [RP 20-26, 90-91, 106-107]. Hearing of the altercation, Raymond confronted Guzman to defuse the situation, but Guzman responded by hitting and kicking Raymond. [RP 91-94, 107-109]. Raymond suffered broken ribs and a punctured lung and was eventually taken to the hospital for treatment. [RP 91-94, 152-154]. During this time period, Guzman was heard threatening to kill Raymond, which threat was later relayed to Raymond—Raymond testified to being afraid that Guzman would carry out his threat as to himself or his family/friends because Guzman had attacked him and had had a gun. [RP 96-98, 107, 112]. Daniel Ramos testified that he had heard gunshots and attempted to call the police by dialing 911. [RP 110-112].

Jesus Zepeda testified that he was at the party hanging out in Raymond’s home when he saw Jacob Murphy, another guest, running

towards him from outside. [RP 122-125]. Zepeda saw Guzman standing some distance away, but did not testify that he saw Guzman with a gun nor did he testify as to seeing Olivares in the vicinity. [RP 116, 122-125]. Zepeda and Murphy ducked inside just as gunshots were fired in their direction. [RP 122-125]. Zepeda then climbed onto the roof to hide and Guzman joined him on the roof. [RP 126-127]. Jacob Murphy did not testify.

Police were dispatched to Raymond's address regarding 911 hang-up calls. [RP 7-8, 20]. As they arrived, the police heard gunshots, saw people running some of whom were yelling that a girl was shooting, and immediately set about securing the residence. [RP 11-14, 20-26, 40]. The police found Guzman and Zepeda on the roof. [RP 49]. Once the residence was secure, the police interviewed those present investigating what had occurred. [RP 20-26]. Guzman admitted to firing a gun into the air then giving the gun to Olivares. [RP 28-32]. Olivares was interviewed and showed the police where she had dropped the gun, which was taken into evidence. [RP 34-38, 52]. The Washington State Patrol Crime Lab determined that the gun recovered had fired all the shots during the incident. [RP 60-63, 65-77, 134-146].

Guzman did not testify.

D. ARGUMENT

- (1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT GUZMAN WAS GUILTY OF TWO COUNTS OF ASSAULT IN THE SECOND DEGREE—ASSAULT WITH A FIREARM (COUNTS V AND VI).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703,

711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, Guzman was charged and convicted of two counts of assault in the second degree—assault with a firearm with the victims being Jesus Zepeda and Jacob Murphy (Counts V and VI). [CP 18-19, 24-25, 43-44]. The State failed to elicit sufficient evidence of these crimes beyond a reasonable doubt. In order to sustain these charges and convictions, the State bore the burden of proving beyond a reasonable doubt that Guzman in fact fired the gun at the two victims.

The sum of the State's evidence on these crimes consists of the fact that gunshots were fired near Zepeda and Murphy, that only one gun—the gun recovered by the police at the scene—fired all the shots during the party/incident, and that Guzman admitted to police that he had fired the gun into the air (as confirmed by testimony of other witnesses) but he then gave it to his girlfriend, Olivares.

However, and most importantly with regard to Count VI, Murphy (the victim of that count) never testified. There is no evidence as to this count from Murphy that Guzman aimed let alone fired a gun at him. In addition, Zepeda's testimony (the basis for both Count V, his own, and Count VI, Murphy's) does not support either conviction. Zepeda testified he was in Raymond's home and saw Murphy running towards him trying

to get inside—there was no explanation as to why Murphy (as he didn't testify) was trying to get inside and could have simply been doing so because Murphy was trying to avoid the altercation that had admittedly occurred. Zepeda looked out and saw Guzman standing down the drive way, but did not testify that he saw Guzman with a gun nor did he testify that he saw Olivares anywhere nearby let alone that she had a gun before the gunshots were fired where he and Murphy were. Zepeda's testimony does not establish that Guzman assaulted him and Murphy with a firearm as Guzman was charged and convicted in Counts V and VI. Nor does Zepeda's testimony establish that Guzman was Olivares's accomplice to the assault as argued by the State in closing. [RP 201-205]. The evidence merely establishes that Guzman admittedly had a firearm, fired it into the air, and gave it to Olivares. After that, what she did with the gun let alone to whom she gave the gun was outside Guzman's knowledge—he could not have been an accomplice to any of her actions as demonstrated by the fact that he told the police that after he gave the gun to Olivarez she put it in her purse (where he thought the police would find it) but in fact the police after an independent interview with Olivarez, found the gun in a location where she had thrown it.

Absent any evidence that Guzman, actually fired the shots near Zepeda and Murphy, particularly given the fact that Murphy did not

testify, the State did not sustain its burden of proof on these charges (Counts V and VI)—the State cannot prove beyond a reasonable doubt that it was Guzman, let alone someone to whom he was acting as an accomplice, who fired the firearm constituting the crime of assault in the second degree based solely on the alternative of assault with a firearm. The State’s evidence on these counts constitute nothing more than the improper pyramiding of inferences condemned by Bencivinga, *supra*.

This court should reverse and dismiss Guzman’s convictions for assault in the second degree (Counts V-VI).

(2) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE IT APPEARS THAT COUNTS III AND IV CONSTITUTED THE SAME OR SIMILAR CRIMINAL CONDUCT AND THUS GUZMAN’S OFFENDER SCORE WAS MISCALCULATED.

A sentencing court’s calculation of a defendant’s offender score is a question of law and is reviewed de novo. State v. McCraw, 127 Wn. 2d 281, 289, 898 P.2d 838 (1995). A challenge to the calculation of an offender score may be raised for the first time on appeal. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack, that a sentence is excessive if based on a miscalculated upward offender score, “that a defendant cannot agree to punishment in excess of that which the Legislature has established,” and that “in general a defendant cannot waive a challenge to a miscalculated offender score.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, *citing* State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Here, Guzman was convicted in Count II of assault in the second degree based on his attack and injury of Raymond Reyes, Sr.. [CP 26]. He was also convicted in Count IV of felony harassment based on his threat to kill Raymond Reyes, Sr.. [CP 27]. These crimes should have been considered the same or similar criminal conduct and counted as one for purposes of calculating Guzman’s offender score.

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), *reviewed denied*, 143 Wn.2d 1010 (2001) (*quoting State v. Tili*, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

For purposes of RCW 9.94A.589(1)(a), intent is not defined as the specific intent required as an element of the crime charged. Rather, the inquiry focuses on the extent to which criminal intent, as objectively viewed, changed from one crime to the next. Whether one crime furthered the other may be relevant but generally does not apply when the crimes occurred simultaneously. State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). Moreover, our courts have held that separate incidents may

satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. *See e.g.*, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997); State v. Deharo, 136 Wn.2d 856, 858, 966 P.2d 1269 (1998).

Here, it cannot be disputed that Counts III and IV, involved the same victim—Raymond Reyes, Sr. [CP 18-19]. Nor can it be disputed that Counts II and IV occurred at the same time and place—the home of Raymond Reyes, Sr. on March 11, 2007 during a 21st birthday party for Raymond’s son, Rueben; and that Guzman’s “intent” remained the same, i.e. his intention to harm Raymond either actually or through his threat to kill Raymond—it should be noted in support of this last contention that while Raymond was in fact physically harmed during the assault that an assault also encompasses the creation of an apprehension of harm to the victim, [CP 41-42], much like a threat to kill. Thus, the trial court should have determined that Guzman’s convictions in Counts III and IV constituted same or similar conduct for purposes of calculating his offender score. This court should remand for resentencing.

- (3) THIS MATTER SHOULD BE REMANDED FOR RESENTENCING WHERE THE COURT IMPOSED A SENTENCE INCLUDING COMMUNITY CUSTODY THAT EXCEEDED THE STATUTORY MAXIMUM.

Where a defendant's presumptive sentence exceeds the statutory maximum, the statutory maximum will be the presumptive sentence. *See* former RCW 9.94A.310 and current RCW 9.94A.510 and 9.94A.533. To hold otherwise would be a violation of RCW 9.94A.505. Under these principles, a defendant's sentence including the time period required by community custody/placement as well as any sentence enhancement imposed on any count subject to a single sentencing cannot exceed the statutory maximum for the greatest offense for which guilt was found. *See State v. Thomas*, 150 Wn.2d 666, 671 and 674, 80 P.3d 168 (2003); *State v. Sloan*, 121 Wn. App. 220, 223-224, 87 P.3d 1214 (2004).

Here, Guzman was given a sentence of 105-months (33-months for the underlying convictions on class C and class B felonies plus two consecutive 36-months deadly weapons enhancements). [CP 72-82]. Guzman was also sentence to 18 to 36-months of community custody. [CP 72-82]. Thus, Guzman's sentence was actually 123 to 141-months. However, the greatest crime for which Guzman was convicted was a class B felony with a statutory maximum of 120-months. Under the principles set forth above, the court could only lawfully order community custody of

15-months. As the court failed to do so and the sentence actually imposed by the court exceeds the statutory maximum of 120-months, this court must remand for resentencing with directions that 120-months is the maximum sentence the trial court can impose to include the underlying sentences, sentence enhancements, and community custody

- (4) GUZMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE THAT HIS OFFENDER SCORE WAS MISCALCULATED AND THAT HIS SENTENCE EXCEEDED THE STATUTORY MAXIMUM.

Should this court find that trial counsel waived or invited the errors claimed and argued in the preceding sections of this brief (sections 2 and 3) by failing to properly object to the calculation of Guzman's offender score or by agreeing to the miscalculation of his offender score as well as failing to object to a sentence that exceeds the statutory maximum, then both elements of ineffective assistance of counsel have been established.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings

would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (*citing State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Here, both prongs of ineffective assistance are met. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to the calculation of Guzman's offender score for the reasons set forth in the preceding section of this brief (section 2) let alone allow his client to be sentenced beyond the statutory maximum (section 3), and had counsel done so, the trial court

would not have miscalculated Guzman's offender score and would have imposed a sentence with or at the statutory maximum.

Second, the prejudice is self evident. Again, for the reasons set forth in the preceding sections, had counsel properly objected to the calculation of Guzman's offender score and objected to a sentence exceeding the statutory maximum, the trial court would not have found an improper offender score and would have imposed a lawful sentence.

E. CONCLUSION

Based on the above, Guzman respectfully requests this court to reverse and dismiss his convictions for two counts of assault in the second degree (Counts V and VI) and/or remand for resentencing.

DATED this 1st day of August 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 1st day of August 2008, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 1st day of August 2008.

Patricia A. Pethick
Patricia A. Pethick