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B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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C. STATEMENT OF THE CASE

Mr. Knight was convicted of two counts of assault in the second degree and two counts of felony harassment. CP 4. He was sentenced to life in prison as a persistent offender. CP 4. He made a motion, pursuant to CrR 7.8 (b) (1), (4), and (5) to have his convictions for assault in the second degree vacated on the grounds that they violated double jeopardy, that there was insufficient evidence to support the convictions, that the amended information on which the State proceeded omitted an essential

element of the crime¹, and that the “to convict” instruction for assault in the second degree omitted essential elements by omitting the elements of felony harassment. CP 11-14. He also moved to vacate his conviction on the ground that the trial court failed to give the jury a unanimity instruction for the two counts of assault in the second degree, but withdrew that part of his motion during the hearing. CP 15, RP 41.

As to the double jeopardy part of the motion, the State conceded that the convictions for assault in the second degree and felony harassment were barred by double jeopardy. RP 6. The State argued that the remedy for the violation was dismissal of the felony harassment counts, not the assault second degree counts. RP 6. Mr. Knight conceded that the remedy was dismissal of the felony harassment counts. RP 6. The court subsequently entered an order amending the judgment and sentence vacating the convictions for felony harassment (counts III and VI). CP 24.

As to the portion of the motion challenging the sufficiency of the evidence for assault in the second degree, the trial court agreed with the State that because sufficiency of the evidence had already been raised by Mr. Knight in his direct appeal and the Court of Appeals had found the

¹ Specifically, the Amended Information alleged that Mr. Knight committed Assault in the Second Degree by assaulting another with the intent to commit the felony of Unlawful Imprisonment or Felony Harassment. CP 9. Mr. Knight argued that in order to be sufficient, the Amended Information had to go beyond simply stating “felony harassment” and actually list the method of committing felony harassment that the State believed Mr. Knight committed. CP 9.

evidence to be sufficient, the law of the case doctrine required the trial court to deny the motion on that basis. CP 22. The trial court further found that even if not barred by the law of the case doctrine, the evidence was sufficient for a rational trier of fact to find that Mr. Knight had committed two counts of assault in the second degree. CP 22. Appellate counsel for Mr. Knight does not challenge this finding on appeal, and leaves that to Mr. Knight to address in his Statement of Additional Grounds for Review should he so choose.

On the remaining parts of the CrR 7.8 motion, namely the contentions of instructional error and an insufficient charging document, the trial court ruled those motions were time barred and denied them. CP 22 (conclusions 7 and 9). The court went on to state that even if these claims were not time-barred, it would have nevertheless denied them on their merits. CP 22 (conclusions 8 and 10). Mr. Knight filed a timely notice of appeal. CP 25.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. KNIGHT'S CrR 7.8 MOTION TO VACATE HIS CONVICTION ON THE BASES THAT THE AMENDED INFORMATION FAILED TO INCLUDE ALL ESSENTIAL ELEMENTS AND THE "TO CONVICT" INSTRUCTION FOR ASSAULT IN THE SECOND DEGREE OMITTED AN ESSENTIAL ELEMENT ON THE GROUND THAT IT WAS TIME-BARRED, WHERE, UNDER THE CURRENT

**VERSION OF CrR 7.8 SUCH MOTIONS MUST BE
TRANSFERRED TO THE COURT OF APPEALS AS A PRP.**

Prior to September 1, 2007, CrR 7.8 allowed a trial court to deny a motion for relief from judgment without a hearing if the facts alleged in the affidavits do not establish grounds for relief. Former CrR 7.8. The trial court was also free to deny a motion under CrR 7.8 if it deemed the motion to be untimely. However, the rule was amended and now a superior court does not have the authority to deny an untimely motion, but rather it must transfer the motion to the Court of Appeals as a personal restraint petition. CrR 7.8 (2); *State v. Smith*, 144 Wn.App. 860, 863. Further, a superior court does not have the authority to deny a timely motion under CrR 7.8 on its merits unless it finds that either (1) the defendant has made a substantial showing that he is entitled to relief, or (2) resolution of the motion will require a factual hearing. CrR 7.8 (c) (2); *Smith* at 863 (2008). If either of these prerequisites is not met, the motion must be transferred to the Court of Appeals as a personal restraint petition. CrR 7.8 (c) (2); *Smith* at 863. Under CrR 7.8 (c) (3), if the superior court determines either that an initial substantial showing of entitlement to relief was made or that resolution of the motion will require a factual hearing, it must enter an order fixing a time and place for a hearing and directing the

adverse party to appear and show cause why the relief sought should not be granted. *Smith* at 863.

In other words, subsection (2) of CrR 7.8 (c) requires the superior court to make an initial determination of whether the motion is timely and if it isn't, the motion must be transferred to the Court of Appeals as a personal restraint petition. Here, the superior court erred when it denied Mr. Knight's motion, as to the aforementioned two issues of the insufficient charging document and the erroneous "to convict" instruction, on the basis that it was not timely. The trial court was required, if it believed the motion to be untimely, to transfer the motion to the Court of Appeals as a personal restraint petition. The superior court's action here exceeded its authority. *Smith* at 863-64.

That the trial court *also* made conclusions on the merits of the motion does not excuse the court's failure to transfer the motion to the Court of Appeals as a personal restraint petition. This Court should remand Mr. Knight's case to the superior court with instructions to apply the proper procedure under CrR 7.8. Should the State argue that this Court should simply convert the motion to a personal restraint petition and consider it on its merits, *State v. Smith* holds that this is not the proper remedy. Division II in *Smith* held that a defendant is entitled to both notice and an opportunity to object before a superior court transfers his

motion to the Court of Appeals as a personal restraint petition. *Smith* at 864. This is so because conversion of the motion to a personal restraint petition “could infringe on his right to choose whether he wanted to pursue a personal restraint petition because he would then be subject to the successive petition rule in RCW 10.73.140 as a result of the conversion of the motion.” *Smith* at 864. This Court should remand this matter to the Thurston County Superior Court so that Mr. Knight has an opportunity to elect whether to withdraw his motion or to have it transferred back to this Court as a personal restraint petition.

E. CONCLUSION

Mr. Knight’s motion should be remanded to the Superior Court for consideration.

RESPECTFULLY SUBMITTED this 29th day of October, 2008.



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Attorney for Mr. Knight

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DIVISION II
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BY CM
DEPUTY

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

STATE OF WASHINGTON,)
) Court of Appeals No. 37443-9-II
) Thurston County No. 99-1-00929-4
 Respondent,)
)
 vs.) AFFIDAVIT OF MAILING
)
 MARVIS KNIGHT,)
)
 Appellant.)
)
)

ANNE M. CRUSER, being sworn on oath, states that on the 29th day of October
2008, affiant placed a properly stamped envelope addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Mr. Marvis J. Knight
DOC# 734648

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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. KNIGHT)
- (3) AFFIDAVIT OF MAILING

Dated this 29th day of October, 2008


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: October 29, 2008, Kalama, Washington

Signature: Anne M. Cruser