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**A. ASSIGNMENTS OF ERROR**

1. THE TRIAL COURT ERRED IN FINDING K.T.<sup>1</sup> GUILTY OF ASSAULT IN THE SECOND DEGREE. ABSENT FROM ITS FINDINGS IS THE REQUIRED ELEMENT THAT K.T. INTENDED TO CREATE REASONABLE FEAR AND APPREHENSION OF BODILY INJURY IN HIS VICTIM.
2. TRIAL COUNSEL DEPRIVED K.T. OF CONSTITUTIONALLY GUARANTEED COUNSEL BY OPTING FOR AN ALL OR NOTHING APPROACH ON THE SECOND DEGREE ASSAULT CHARGE. TRIAL COUNSEL'S FAILURE TO ASK THE COURT TO FIND GUILT ON THE LESSER CHARGE OF UNLAWFUL DISPLAY OF A WEAPON ENTITLES K.T. TO A RETRIAL.
3. BECAUSE K.T. WAS DENIED EFFECTIVE COUNSEL, THE TRIAL COURT ERRED IN FINDING K.T. GUILTY.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. THE EVIDENCE AT K.T.'S SECOND DEGREE ASSAULT TRIAL ESTABLISHED THAT HE DID NOT HIT OR ATTEMPT TO HIT ANOTHER TEENAGER WITH A METAL PIPE. YET, THE COURT STILL FOUND HIM GUILTY OF SECOND DEGREE ASSAULT EVEN THOUGH IT DID NOT FIND THE REQUIRED ELEMENT THAT K.T. INTENDED TO CREATE REASONABLE FEAR AND APPREHENSION OF BODILY INJURY IN THE VICTIM. IS K.T. GUILTY OF SECOND DEGREE ASSAULT EVEN THOUGH A REQUIRED ELEMENT OF ASSAULT WASN'T FOUND BY THE TRIAL COURT? (ASSIGNMENT OF ERROR 1)

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<sup>1</sup> K.T. is a juvenile and was tried in Clark County juvenile court. In the interest of privacy, K.T.'s initials are used instead of his name. Where applicable, other juveniles are also identified by their initials.

2. **AN ALL OR NOTHING APPROACH TO THE CHARGES AT TRIAL IS NOT ONLY A BAD IDEA BUT IS ALSO INEFFECTIVE REPRESENTATION WHEN (1) THE LESSER CHARGE'S PENALTY IS SIGNIFICANTLY LESS THAN THE CHARGED OFFENSE, (2) THE DEFENDANT ACKNOWLEDGED COMMITTING THE LESSER OFFENSE, AND (3) THE EVIDENCE OF THE GREATER CHARGE WAS WEAK. IN K.T.'S CASE, WHERE THERE ARE ALL THREE OF THESE FACTORS, DID DEFENSE COUNSEL'S FAILURE TO ASK FOR A FINDING OF GUILT ON THE LESSER CHARGE DEPRIVE K.T. EFFECTIVE ASSISTANCE OF COUNSEL? (ASSIGNMENTS OF ERROR 2 AND 3)**

**C. STATEMENT OF THE CASE**

**1. Procedural History.**

The Clark County prosecutor charged K.T. with a single count of second degree assault alleging that he assaulted B.A. with a metal pipe, a deadly weapon.<sup>2</sup> CP 1. At K.T.'s juvenile, non-jury trial, Judge Wulle found K.T. guilty as charged. RP<sup>3</sup> 70. K.T. did not testify and he presented no witnesses. K.T.'s attorney did not ask the court to find guilt on the lesser included offense of unlawful

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<sup>2</sup> 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.36.020(1)(c).

<sup>3</sup> The report of proceedings (RP) consists of a single bound volume of consecutively numbered pages.

display of a weapon.<sup>4</sup> RP 65-68. K.T. had no criminal history. RP 78. The court handed down a 15-36 week standard range JRA<sup>5</sup> sentence. RP 87. The court entered written findings of fact and conclusions of law. RP 92-102; CP 9-11. See attached as Appendix A.<sup>6</sup> K.T. filed a timely appeal. CP 5-8.

## **2. Trial Facts.**

During a weightlifting class at Evergreen High School, students K.T. and J.P. exchanged insults. RP 8-9. K.T. approached J.P. and told him that he would beat him up. RP 9-10. Because J.P. had his arm in a sling, J.P.'s friend, B.A., stepped between K.T and J.P. RP 11-13. K.T. and B.A. exchanged words. RP 13. K.T. threatened to hit B.A. RP 13. B.A. encouraged K.T. to hit him. RP 13. B.A. accepted K.T.'s invitation to go outside where he intended to fight K.T. RP 15-16, 28.

Once outside, K.T. found his back against a fence. RP 16, 29. K.T. picked up some softball-sized chunks of concrete or rocks and threw them in B.A.'s direction. RP 16-17. Rather than going

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<sup>4</sup> RCW 9.41.270(1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

<sup>5</sup> Juvenile Rehabilitation Administration

<sup>6</sup> Unfortunately, the Appendix refers to the juveniles by their full names rather than by their initials.

back inside the school, B.A. stood his ground. RP 31. B.A. had no problem moving out of the way and avoided being hit. RP 17. B.A. was not scared that he would be hit by a rock. RP 30. K.T. said that he would kill B.A. RP 18. B.A. said nothing to K.T. RP 19.

K.T. picked up a metal pipe and held it like a bat while approaching B.A. RP 19, 21. K.T. continued to make threatening statements to B.A. At first, B.A. was scared. RP 22. Although K.T. got within an arm's length of B.A., K.T. made no effort to swing the pipe or hit B.A. with it. RP 22. B.A. told K.T. to calm down. RP 22. After a couple of minutes of standing within an arm's length of each other, B.A. just turned his back on K.T. and walked into the school. RP 23. K.T. followed B.A. telling him to turn or he would hit him. RP 23. K.T. dropped the pipe and followed BA back into the school. RP 38.

#### **D. ARGUMENT**

##### **1. THE EVIDENCE AGAINST K.T. DOES NOT SUPPORT A FINDING THAT K.T. IS GUILTY OF SECOND DEGREE ASSAULT.**

There was insufficient evidence to find K.T. guilty of second degree assault. The State failed to prove the required element that K.T. intended to create reasonable fear and apprehension of injury in B.A. The court did not find the necessary element in its oral

ruling. RP 68-70. The court did not find the element in its written findings of fact and conclusions of law. See Appendix A. As the required element is missing from the State's proof and, consequently, the trial court's findings, K.T.'s conviction must be reversed and dismissed.

**(a) The State must prove all the required elements of the charged offense against the defendant.**

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const. Art. 1, § 3. "The reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).<sup>7</sup>

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to

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<sup>7</sup> The United States Supreme Court noted, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty." In re Winship, 397 U.S. at 364.

the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) review denied, 119 Wn. 1003, 832 P.2d 487 (1992), abrogated on other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994).

**(b) Even on a deferential standard of review, the State failed to meet its burden of proof.**

The trial court complied with its requirement to enter written findings of fact and conclusions of law following the non-jury trial.

JuCR 7.11(d)<sup>8</sup>. On appeal, this court reviews the juvenile court's findings "to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). K.T. does not object to the findings as entered. See Appendix A. The written findings support K.T.'s argument that the missing intent element requires dismissal of his charges

As charged, a person is guilty of second degree assault if he intentionally assaults another with a deadly weapon. CP 1; RCW 9A.36.021(1)(c). Where, as here, the assault is neither an actual or attempted battery, but rather a true assault, the State must prove that the defendant acted with a specific intent to create reasonable fear and apprehension of bodily injury in the victim. State v. Austin, 59 Wn. App. 186, 194-95 n. 4, 796 P.2d 746 (1990). The State failed to prove this required element.

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<sup>8</sup> JuCR 7.11(d) d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

B.A. accepted K.T.'s offer to leave the weightlifting class and go outside to fight. Once outside, K.T. found his back against a fence. K.T. picked up softball-sized rocks and pieces of concrete and threw them toward B.A. The rocks and concrete easily missed hitting B.A. B.A. showed no fear and wasn't, in fact, fearful. K.T. yelled threats toward B.A. B.A. wasn't afraid. B.A. stood his ground. K.T. picked up a pipe and held it like a bat. He walked toward B.A. Once again, B.A. stood his ground and showed no fear. K.T. stood within striking distance of B.A. for about two minutes and did nothing but hold the pipe. B.A. turned his back on K.T. and walked back into the school. By his actions, K.T. did nothing more than display a weapon. K.T. made no effort to strike B.A. with the pipe even though he could have. In the context of the case, nothing K.T. did established that he intended to create fear of apprehension of bodily injury in B.A. Although K.T.'s actions show a certain level of aggressiveness, that alone does not satisfy the required element that K.T. acted with a specific intent to create reasonable fear and apprehension of bodily injury in B.A.

**(c) The assault conviction must be dismissed.**

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1081 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). Because the evidence against K.T. was insufficient, his conviction must be dismissed.

**2. DEFENSE COUNSEL'S ALL OR NOTHING APPROACH ON THE SECOND DEGREE ASSAULT DEPRIVED K.T EFFECTIVE COUNSEL.**

An all or nothing approach on the charges at trial can lay the foundation for a successful claim of ineffective assistance of counsel. State v. Pittman, 134 Wn. App 376, 387-88, 166 P.3d 720 (2006) (noting that an all or nothing trial strategy was untenable in part because the defendant was plainly guilty of some offense). While this claim is typically raised in the context of counsel failing to propose a lesser included offense instruction at a jury trial, there is no reason to limit the analysis only to those defendants entitled to jury trials. Juvenile K.T. was equally deprived of effective counsel when his counsel took an all or nothing approach to the charges at his non-jury trial.

**(a) Effective counsel is a constitutional requirement.**

Both the United States Constitution and the Washington Constitution guarantee an accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). A defendant demonstrates deficient performance by showing that defense counsel's representation fell below an objective standard of reasonableness. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). Counsel is presumed effective and counsel's conduct that can be characterized as legitimate trial strategy or tactics will not support a claim of deficient performance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)). A defendant demonstrates prejudice by showing only that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been

different. Davis, 152 Wn.2d at 672-73. Reasonable probability is "a probability sufficient to undermine confidence in the outcome." Davis, 152 Wn.2d at 673 (quoting Strickland, 466 U.S. at 694).

**(b) Effective counsel would urge the court to find guilt on a lesser included offense.**

A criminal defendant may be held to answer only to those offenses contained in the information or indictment. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). Consistent with that notion, Wash. Const., Art. I, § 22 preserves a defendant's right to be informed of the charges against him and to be tried only for offenses charged. Id. In keeping with the constitutional requirement of notice, the lesser included offense doctrine entitles the prosecution or the defendant to a jury instruction on a crime other than the one charged only if the commission of the lesser offense is necessarily included within the offense for which the defendant is charged in the information. RCW 10.61.006; State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978).

(i) Unlawful display of a weapon is legally a lesser included offense of assault in the second degree with a deadly weapon.

Our courts apply the two-pronged Workman test to determine whether a lesser offense is included within the charged offense. State v. Workman, 90 Wn. 2d at 447-48. First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. Id. Specifically, the elements of the lesser offense must be necessarily and invariably included among the elements of the greater charged offense. State v. Harris, 121 Wn.2d 317, 321-23, 849 P.2d 1216 (1993). Here, the requirements of the legal prong are met. Unlawful display of a weapon is a lesser included offense of second degree assault with a deadly weapon. State v. Ward, 125 Wn. App. 243, 248, 104 P.3d. 670 (2004); see also State v. Baggett, 103 Wn. App. 564, 569, 13 P.3d 659 (2000), review denied, 143 Wn. 2d 1011 (2001) (all of the elements of the unlawful display statute are elements of second degree assault with a deadly weapon).

(ii) Unlawful display of a weapon is factually a lesser included offense of assault in the second degree with a deadly weapon

Second, under the factual prong, the evidence of the case must support an inference that only the lesser included offense was

committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. In other words, the evidence must affirmatively establish the defendant's theory of the case as it is not enough that the trier of fact might disbelieve the evidence pointing to guilt. Id. at 456. Instead, some evidence must be presented which affirmatively established the defendant's theory on the lesser included offense before an instruction should be given. State v. Berlin, 133 Wn. 2d 541, 546, 947 P.2d 700 (1997). Although there must be affirmative evidence from which a jury could find the defendant committed the lesser offense, the evidence can come from the State or the defendant because there is no requirement that the defendant offer the evidence or that the defendant's testimony cannot contradict the evidence. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998).

In determining if the evidence at trial was sufficient to support the giving of a lesser included instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. As noted under Argument 1, an essential element of second degree assault is the specific intent to create reasonable fear and

apprehension of bodily injury in B.<sup>9</sup> The State failed to prove that element and the court failed to find it in either its oral or written findings or conclusions. The crime of unlawful display of a weapon requires proof that the defendant (1) carried, exhibited, displayed, or drew (2) a weapon apparently capable of producing bodily harm (3) in a manner that manifested an intent to intimidate another or that warranted alarm for the safety of others. RCW 9.41.270(1). K.T. conceded that he committed the elements of this lesser crime.

The critical difference between assault and unlawful display is whether K.T simply showed the pipe. Construing this evidence in K.T.'s favor, the court could have found that K.T. displayed the pipe in a manner that manifested an intent to intimidate or that warranted alarm for B.A.'s safety. And merely because B.A. was frightened does not mean that K.T. necessarily committed assault. Unlawful display is defined by the way K.T. used the weapon, not by the victim's response. Thus, if K.T. displayed the weapon only in a manner to intimidate, he committed unlawful display even if B.A. was actually frightened by his conduct. Because the court should have been urged to consider the lesser included offense of unlawful display, this court should reverse and remand for a new trial.

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<sup>9</sup> State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995)

(iii) It is error not to urge the court to impose a guilty finding on a legally and factually supported lesser included offense.

Error in failing to give a legally and factually supported lesser included instruction is always reversible error. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984). See Ward, 125 Wn. App. at 249 (finding an all or nothing trial tactic not legitimate in part where the defendant faced considerably longer punishment on the greater offense than the lesser); see also Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (if the evidence would permit a finder of fact to rationally find a defendant guilty of the lesser offense and acquit him of the greater offense, a lesser included offense instruction should be given).

**(c) Counsel's failure to urge the court to find guilt on the lesser unlawful display denied K.T. effective counsel.**

A judge, sitting as the trier of fact, is not required sua sponte to consider lesser included crimes in reaching its verdict. State v. Hoffman, 116 Wn. 2d 51, 71, 804 P.2d 577 (1991). As established above, under the facts of K.T.'s case, unlawful display was a lesser offense of second degree assault. The court had no obligation to reach into the case and pull out a finding of guilt only on the lesser

crime. But defense counsel had an obligation to ask the court to do so. There were three reasons why an "all or nothing" approach was not a reasonable trial tactic. First, K.T. conceded that he committed the lesser offense. Second, the second degree assault charge against K.T. was weak. (See Argument 1.) And third, there was a great disparity between the penalties on the two crimes. Second degree assault is a felony. RCW 9A.36.021(2)(a). Unlawful display of a weapon is a gross misdemeanor. RCW 9A.41.270(2). With no criminal history, K.T.'s standard range on second degree assault was 15–36 weeks. His standard range on unlawful display of a weapon was 0–30 days. K.T. was entitled to have the court consider whether he committed only the less serious offense.

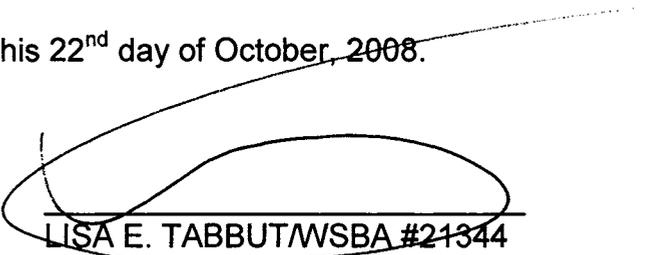
A defendant need only demonstrate a reasonable probability that the outcome would have differed to sufficiently undermine confidence in the outcome. Strickland, 466 U.S. at 694. Based on the facts of this case, it cannot be said to a reasonable degree of certainty that the outcome at trial would not have differed had the trial court considered the lesser charge of unlawful display of a weapon. T.K. has satisfied both prongs of Strickland and his conviction should be reversed for ineffective assistance of counsel and remanded for a new trial.

**(E) CONCLUSION**

Under the first argument, K.T.'s conviction for second degree assault should be dismissed as the evidence was insufficient. An alternative remedy would be to remand and order imposition of a conviction for unlawful display of a weapon. When the evidence is insufficient to convict of the crime charged, but sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree. State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996); see also RCW 10.61.006, .010.

Alternatively, under K.T.'s second argument, his second degree assault conviction should be reversed because K.T. was denied effective counsel. The remedy under the second argument is remand for retrial.

Respectfully submitted this 22<sup>nd</sup> day of October, 2008.



LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

# APPENDIX A

**FILED**

MAY - 1 2008

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

KETSON B. TOMMY,

Respondent

DOB: 9/23/92

No. 08-8-00141-1

Juvis No. 760689 08-R-006749

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

THIS MATTER having come before the above-entitled Court for trial on March 12, 2008, the Respondent being personally present and represented by his trial attorney of record, Karen Peterson, and the Plaintiff being represented by Julie C. Carmena, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony, pleadings and argument of counsel in this case, now enters the following:

**I. FINDINGS OF FACT**

1. On February 7, 2008, during weightlifting class at Evergreen High School, in Clark County, Washington, Brandyn Austin heard Ketson Tommy challenge one of Austin's friends to a fight.

2. Because his friend had his arm in a sling, Mr. Austin moved between the two boys, and asked Mr. Tommy to, 'Back off'.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - I

CLARK COUNTY PROSECUTING ATTORNEY  
JUVENILE DIVISION  
1013 FRANKLIN STREET • PO BOX 5000  
VANCOUVER, WASHINGTON 98666-5000  
(360) 397-2261 (OFFICE)  
(360) 397-2230 (FAX)

*Handwritten initials: JCA MS*

1           3.       Ketson Tommy then began to challenge Austin. Words were exchanged  
2 between the two boys, and the two agreed to go outside to fight.

3           4.       Once outside, Tommy repeatedly threatened Austin, telling him that he was  
4 going to "kick his ass". Austin remained silent. Tommy then began to pick up softball-sized  
5 pieces of rock and concrete, and threw them toward Austin. While Mr. Tommy threw these  
6 items, Tommy continued to threaten Austin.

7           5.       When Austin moved to get away from the rocks and concrete that were being  
8 thrown, Tommy picked up a metal pipe, approached Austin, and threatened him with it.

9           6.       Austin, fearful, urged Tommy to calm down, but Tommy continued threatening  
10 Austin with the pipe, and continued to tell Austin that he was going to kill him.

11           7.       Austin ~~attempted to walk~~<sup>ed</sup> away from Tommy. Tommy followed after Austin  
12 continuing to threaten him with the pipe he was still holding.

13           8.       Carolyn Harton, an employee of Evergreen High School, saw a portion of the  
14 conflict between Tommy and Austin, and saw Tommy, who appeared to her to be very  
15 agitated, holding the metal pipe in his hand. She also observed him tapping the pipe in his  
16 hands and following after Austin.

17           9.       Mr. Austin was in fact afraid that he would be hit with the pipe Mr. Tommy held  
18 in his hand.

19           10.      Self-defense was not found with regards to Ketson Tommy, beyond a  
20 reasonable doubt.

21           11.      The metal pipe Mr. Tommy used to threaten Mr. Austin is a deadly weapon, and  
22 was capable of causing serious injury and/or death.

23           12.      The threatened use of the metal pipe by Ketson Tommy was not a reasonable  
24 response of force, and Mr. Austin's fear was reasonable under the circumstances.

25           13.      All of the foregoing events occurred in Clark County, Washington.

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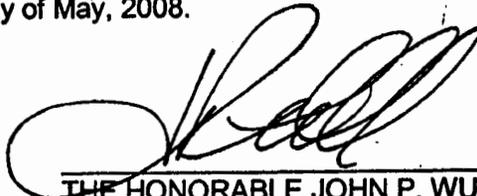
**II. CONCLUSIONS OF LAW:**

1. The court has jurisdiction over the parties hereto and the subject matter of the action.

2. All of the above facts have been proven by the State beyond a reasonable doubt.

3. On February 7, 2008, in Clark County, Washington, Ketson Tommy, did intentionally assault Brandyn Micheal Austin with a deadly weapon, to-wit a metal pipe, and is guilty of the crime of Assault in the Second Degree, as charged in Count 1. When Austin retreated in fear, Ketson Tommy was the aggressor. When Mr. Austin retreated, Mr. Tommy continued to follow and threatened Mr. Austin with the metal pipe. The use of the metal pipe was excessive, and the respondent did not act in self-defense.

Done in open court this 1 day of May, 2008.

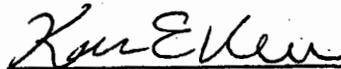


THE HONORABLE JOHN P. WULLE  
JUDGE OF THE SUPERIOR COURT

Presented by:



JULIE C. CARMENA  
WSBA #25796  
Deputy Prosecuting Attorney



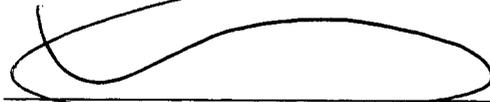
KAREN PETERSON  
WSBA # 21266  
Attorney for Respondent



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I certify under penalty of perjury pursuant to the laws of the State of Washington  
that the foregoing is true and correct.

Dated this 22nd day of October 2008 in Longview, Washington.



LISA E. TABBUT, WSBA #21344  
Attorney for Appellant