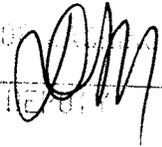


COURT OF APPEALS  
DIVISION II

NO. 38309-8-II

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

STATE OF WASHINGTON  
BY 

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STATE OF WASHINGTON

Respondent,

v.

SHERRY HAMM,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

OPENING BRIEF OF APPELLANT

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P.M. 4-23-2009

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in convicting appellant of second degree assault, as charged in Count I.

2. The trial court erred in finding the appellant did not suffer from acute stress disorder or post traumatic stress disorder at the time of the assault alleged in Count 1.

3. The trial court erred in concluding that the appellant did not suffer from diminished capacity at the time of the assault alleged in Count 1.

4. The trial Court erred in entering Finding of Fact 22 insofar as appellate disputes that she “attacked” Jim Hutchison:

23. While in the tool shed, the Defendant attacked Jim Hutchison with a claw hammer and hit him on the back of his head with enough force to produce at least one of the two most prominent wounds on the back of his head.

5. The trial court erred in entering Finding of Fact 23:

24. Contrary to the Defendant’s testimony, the Court finds that Jim Hutchison did not strike or slap the Defendant prior to the Defendant striking Mr. Hutchison with the claw hammer.

6. The trial court erred in entering Finding of Fact 25:

25. The Defendant acted of her own free will was and not under the effects of post-traumatic stress disorder or acute stress disorder at the time of the assault on March 10, 2007, nor did she act in self-defense when

she assaulted Jim Hutchison. The Court did not believe the Defendant's version as it related to the hammer assault.

7. The trial court erred in entering Finding of Fact 27:
  27. The Defendant testified that, after she struck Jim Hutchison with the hammer, and after the two had exited the storage shed, her attention shifted somewhat to concern for Jim Hutchison and for his ability to drive in his condition. The Defendant's contention that she was focused on the care and treatment of Jim Hutchison after she struck him in the back of the head is not credible. The Court rejects any argument that the Defendant's post-assaultive behavior was somehow the result of her being free from confinement in the shed.
8. The trial court erred in entering conclusion of Law 3:
  28. The Court concludes that the Defendant, Sherry Hamm, is guilty beyond a reasonable doubt of Assault in the Second Degree, as alleged in Count I.
9. The trial court erred in entering conclusion of Law 4:
  4. The Court concludes, beyond a reasonable doubt, that Sherry Hamm, assaulted the victim, Jim Hutchison, with unlawful force, by knowingly and intentionally striking him in the back of the head with a deadly weapon, to wit, a claw hammer.
10. The trial court erred in entering Conclusion of Law 5:
  5. The Court concludes, beyond a reasonable doubt, that Sherry Hamm did not act in self defense.

11. The trial court erred in entering Conclusion of Law 6:

The Court concludes, beyond a reasonable doubt, that Sherry Hamm did not suffer from diminished capacity at the time of the assault alleged in Count I.

12. The trial court erred in entering Conclusion of Law 7 insofar as the underlying assault is challenged on appeal.

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

1. Whether the trial court erred in finding that there was sufficient evidence to convict appellant of Assault in the Second Degree, where the appellant presented compelling testimony that she suffered from acute stress disorder on the date of the alleged assault—resulting in diminished capacity and negating the element of intent—stemming from a fight that occurred eleven days earlier, in which she was injured and for which she received medical attention? Assignment of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12.

**C. STATEMENT OF THE CASE**

1. **Procedural history:**

On May 4, 2007, Sherry Hamm was charged in the Pacific County Superior Court by amended information with three counts of second degree

assault. Clerk's Papers [CP] at 12-13. The State alleged that each count was committed with a deadly weapon, contrary to RCW 9.94A.602. In Count 1 the State alleged:<sup>1</sup>

The defendant, Sherry G. Hamm, in Pacific County, Washington, on or about March 10, 2007, did intentionally assault another person, to wit: James E. Hutchison, with a deadly weapon, to wit: a hammer, in violation of RCW 9A.36.021(1)(c).

CP 5-7.

Statements by Ms. Hamm were ruled admissible following a CrR 3.5 suppression motion on July 20, 2007. 1RP (July 20, 2007) at 33-34. Defense counsel did not object to admission of the statements. 1RP (July 20, 2007) at 31. CP 11-14.

The State moved to admit, pursuant to ER 404(b), evidence of an incident on February 27, 2007, in which Ms. Hamm was in a fight with Karen Bailey that resulted in injuries to both of the women. CP 23-34. The motion was heard on January 17, 2008. During closing argument on the motion, defense counsel joined the State's motion and stipulated to admission of the acts under ER 404(b). 2RP at 228. The court granted the motion and permitted testimony concerning the February 27 incident. 2RP at 233.

Ms. Hamm waived jury trial on January 17, 2008. CP 45. The court

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<sup>1</sup>Ms. Hamm was acquitted of Counts 2 and 3. Conclusion of Law 8. CP 140.

found that Hamm's waiver was made knowingly, intelligently and voluntarily. CP 45.

The case was tried to The Honorable Michael Sullivan, starting February 4, 2008.

**2. Trial testimony:**

On the morning February 27, 2007, appellant Sherry Hamm went to Karen Bailey's house in Raymond, Washington. 8RP at 271.<sup>2</sup> After she arrived at the house, there was a fight between Ms. Hamm and Ms. Bailey. Ms. Hamm testified that Ms. Bailey hit her with a rock. 8RP at 275. Ms. Bailey said that Ms. Hamm assaulted her. 7RP at 64, 84, 85, 91. Both were injured in the fight and both were treated at the Willapa Harbor Hospital. 2RP at 13-19, 20-21, 22-24; 8RP at 277.

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<sup>2</sup>The Verbatim Report of Proceedings consists of 9 volumes of transcripts [RP], which are referred to in this Brief as follows:

1RP July 20, 2007, hearing; August 10, 2007, hearing; October 5, 2007, hearing; December 21, 2007, hearing; January 17, 2008, ER 404(b) hearing.

2RP January 17, 2008, ER 404(b) hearing; January 25, 2008, hearing; February 4, 2008 trial.

3RP February 4, 2008, trial.

4RP February 5, 2008, trial.

5RP February 5; February 6, 2008, trial.

6RP February 6; February 7, 2008, trial.

7RP February 7, 2008, trial.

8RP February 7; February 8, 2008, trial.

9RP May 16, 2008, hearing; May 23, hearing; June 27, hearing; August 22, hearing, August 29, 2008, sentencing.

Following the incident, Officer Arley Boggs of the Raymond Police Department interviewed both of the women. During the interview, Ms. Hamm said that Ms. Bailey initiated the attack without any provocation. 5RP at 104, 116, 117; 6RP at 136. Ms. Bailey stated that Ms. Hamm attacked her without provocation while she was working on the computer. 6RP at 249, 250. Ms. Bailey said that Ms. Hamm hit her with a “fish roller.” 6RP at 256.

Eleven days later, on the morning of March 10, 2007, Jim Hutchison went to Ms. Hamm’s home in Raymond. 3RP at 163, 164; 8RP at 293. Jim Hutchison is the brother of Ms. Hamm’s long-term boyfriend, Ken Hutchison. 3RP at 157; 8RP at 266. Ken lived at the house with Ms. Hamm, and he was sleeping at the house at the time the incident took place. 8RP at 297.

Ken and Jim Hutchison’s mother had died in 2003, and her estate was being distributed to the beneficiaries at the time of the incident on March 10, 2007. 3RP at 159. Ken was the executor of the estate. 3RP at 159, 160. The relationship between Jim Hutchison and his brother Ken had been strained over the years preceding the March 10, 2007, incident. 3RP at 158; 8RP at 305.

After Jim arrived at the house, he and Ms. Hamm went to a motor home located on the property. 3RP at 169. Inside the motor home, Ms.

Hamm showed Jim papers and two checks pertaining to the distribution of the estate. 3RP at 169. After reviewing the checks and paperwork in the motor home, there was a problem with the checks and Ms. Hamm said that they would have to be redone. 3RP at 171. Ms. Hamm told him that there were items in a tool shed for Jim's wife, and that they could go get them while waiting for Ken. 3RP at 172. They both went into the shed and Jim testified that as he turned his head, Ms. Hamm hit him in the back of the head with a hammer. 3RP at 176, 179. He stated that he started to pick himself up and that that she hit him again on the head. 3RP at 177. He denied that she bumped into him prior to being hit and he denied slapping her or hitting her. 3RP at 178.

Jim Hutchison stated that he took the hammer away from her. 3RP at 180. He took out his cell phone and she asked him not to call the police. 3RP at 181. He testified that he then went to the house in order to ask people in the house to call 911, but no one answered when he asked if anyone was there. 3RP at 186. He said that Ms. Hamm was trying to break his cell phone and twist it out of his hand. 3RP at 192. He stated that she also tried to stab him with a knife and hit him with a wrench, as alleged by the State in Counts

2 and 3. 3RP at 183-85, 189-90. Judge Sullivan acquitted Hamm of Counts 2 and 3. Conclusion of Law 8. CP 140.

Jim Hutchison said that he was able to get into his car but that Ms. Hamm stood in the way and prevented him from closing the car door. 3RP at 193. He said she also ran around the car, trying to open the doors and trying to get into the vehicle. 3RP at 194. After he closed the door he turned the car around and was driving 15 to 20 miles per hour, and as the car went by Ms. Hamm, she jumped onto the hood of the car. 3RP at 195. He stated that he swerved left and then right and that she fell off the hood. 3RP at 195. He stated that the car's windshield wiper was damaged as result. 3RP at 195. He had put the knife, wrench, and hammer into the car. 3RP at 196. He stated that he did so because he did not want her to have the objects. 3RP at 196. He drove to a nearby convenience store and had the person working there call 911. 3RP at 197.

Ms. Hamm stated that while in the tool shed, she started to fall and put her hand on his back, and that he fell forward. 8RP at 278, 280. She said that Jim then hit her on the left temple with his right hand. 8RP at 279. She stated that he was yelling at her and then he came up with his right hand raised in fist "as though he were going to strike [her] again."

8RP at 281, 283. She reached into a box she was leaning on and got a hammer, and then she then hit him with twice on the back of his head. 8RP at 28-82. She said that he turned his head and was facing out of the door of the tool shed when she hit him. 8RP at 282. She testified that she believed that he was going to hit her again before she had the hammer in her hand and that she thought "I'm not going to be beaten again." 8RP at 282. She stated that she was defending herself when she hit him. 8RP at 282.

Charles Gailey of the Raymond Police Department said that Ms. Hamm told him that while in the shed she slipped and fell against Jim Hutchison, and that he then slapped her and swore at her. 5RP at 222. He testified that she said that she "did not want to be a victim again" and that she hit him on the back of the head with a hammer. 5RP at 222. Ms. Hamm stated that, after she struck Jim Hutchison with the hammer and they had left the tool shed, she was concerned about his ability to drive in his condition and that she told him not to drive away. 8RP at 298. She said that as he left, he "swerved over" and ran over her foot. 8RP at 299. After he left in his car, she called 911 from her house. 8RP at 286.

Ms. Hamm was treated by Dr. David Lush at Willapa Harbor Hospital following the March 10 incident. 4RP at 18. Her left foot was bruised and

she had a non-displaced fracture of her left distal toe. 4RP at 89-90. He did not notice any new injuries to her head or face, but she did have injuries from the previous fight involving Ms. Bailey. 4RP at 88. Dr. Lush had also seen Ms. Hamm on March 2, 2007, as a follow up to the February 27 incident. 4RP at 106. Ms. Hamm had multiple facial cuts and a bruise on her head from the February 27 fight. 4RP at 106. Dr. Lush reported that Ms. Hamm “was very frightened and upset” and “anxious” when he saw her on March 2. 4RP at 106. He asked her to return in a few days and prescribed her Zanax as result of trauma. 4RP at 111.

Dr. Lush also treated Jim Hutchison the same day. 4RP at 38. He was bleeding from a laceration on his head. 4RP at 38, 46.

Dr. Stanulis, a neuropsychologist, testified that he evaluated documents including the court file, the police reports, the report of Dr. Lush and Dr. Frank Hing, the transcript of the January 7, 2008 hearing, and a CD containing photos of Ms. Hamm following the February 27 fight. 7RP at 172, 196.

Dr. Stanulis testified that Ms. Hamm was suffering from acute stress disorder as a result of the fight with Bailey. 7RP at 200, 202. He stated that acute stress disorder occurs within a minimum of two days to four weeks

following a traumatic event, and that it is the same as post-traumatic stress disorder [PTSD], which is generally more long term in duration. 7RP at 173,188. He stated that acute stress disorder and PTSD have been widely accepted in the medical community as a legitimate medical diagnosis. 7RP at 175, 176.

Dr. Stanulis noted that Ms. Hamm had been injured in the incident with Ms. Bailey on February 27, and testified that because she had been physically attacked it would be reasonable for her to fear for her life. He stated that her statement to police on March 10 that “I don’t want to be a victim again” suggested that her acute stress disorder was “quite active” and the she was re-experiencing her symptoms, suggesting a flashback. 7RP at 200. He described a flashback as “re-experiencing the symptoms and the time period in which you were originally traumatized.” 7RP at 201. He stated that if Jim Hutchison slapped or struck her head while in the tool shed, it would activate intense fear that reliving the trauma of the February 27 incident, and she went into “what is called a fight or flight” response. 7RP at 203. He testified that she had a reason to believe that she was acting in self-defense when she hit him with a hammer because “she believed that she was in another life-threatening event because of the acute stress disorder.” 7RP at

208. He testified that the ability to judge the situation may also have been compromised by a concussion she sustained on February 27. 7RP at 208.

Dr. Stanulis testified that people with acute stress disorder have difficulty responding to stress and that they often go into a kind of a panic or a fight or a flight type of behavior, which can be automatic, and therefore the person is not choosing to act. 7RP at 220. He stated that acute stress disorder results in bypassing the frontal lobe where a person makes a plan or assesses stimuli, and goes directly to the subcortical region of the brain where the person acts in a reactive and instinctual way. 7RP at 220-21.

After hearing closing arguments, Judge Sullivan issued his written verdict on February 12, 2008. CP 57-59. Judge Sullivan convicted Ms. Hamm of second degree assault in Count 1, found that she did not act in self defense and that she was not suffering from diminished capacity at the time of the assault, and that she was armed with a deadly weapon—a hammer—at the time of the offense. CP 57-59. Judge Sullivan did not find that Jim Hutchison struck or slapped Ms. Hamm prior to the time she hit him with the claw hammer. Finding of Fact 23. CP 136. The defense had previously stipulated to admission of the February 27 incident under ER 404(b). Judge Sullivan did not consider the evidence of the February 27 incident for ER

404(b) purposes, but only considered the February 27 acts in order to evaluate Ms. Hamm's diminished capacity defense, because her defense was predicated upon the February 27 incident. Conclusion of Law 2. CP 138.

The following Findings of Fact and Conclusions of Law RE: ER 404(b) Evidentiary Hearing and Non- Jury Trial was filed on December 19, 2008:

#### FINDINGS OF FACT

This matter came to be heard for an evidentiary hearing on January 17, 2008, to determine the admissibility of ER 404(b) evidence of a prior incident between the Defendant and Karen Bailey which had occurred on or about February 17, 2007. During closing arguments to the court, the Defendant joined the State's motion to admit evidence of the prior incident. The Court granted the State's motion based on the Defendant's joining in the motion. A non-jury trial took place February 4-8, 2008. The court hereby makes these Findings of Fact and Conclusions of Law.

#### FACTS

28. On the morning February 27, 2007, there was an incident in Raymond, Washington, involving the Defendant and a woman named Karen Bailey.
29. On that occasion, Sherry Hamm had gone to Karen Bailey's home for the purpose of assisting Ms. Bailey on the computer.

30. At some point after Ms. Hamm's arrival at the Bailey residence, an altercation ensued during the course of which the two women exchange blows.
31. During the above-mentioned altercation, both women received injuries.
32. At some point, Karen Bailey telephoned the police.
33. Officer Arley Boggs of the Raymond Police Department responded to the call.
34. Officer Boggs interviewed both of the women, and each of them stated that the other had initiated the attack without any sort of provocation.
35. Each of the women stated that the other has struck them about the head with a fish roller and one or more large rocks.
36. Each of the women had injuries consistent with having been struck about the head with a blunt instrument.
37. Each of the women received medical attention for their injuries at the Willapa Harbor Hospital.
38. The Court is unable to make any findings, from the evidence presented, as to who the primary aggressor was. The Court finds that Ms. Hamm believed that Ms. Hamm was the victim in the February 27, 2007, incident.
39. On March 10, 2007, another incident took place involving Sherry Hamm, this time occurring at Ms. Hamm's residence in Raymond, Washington.

40. At the time of the March 10, 2007, incident, Sherry Hamm shared a residence with her long-time boyfriend and partner, Ken Hutchison.
41. Ken Hutchison was present and sleeping at the residence at the time the incident took place, i.e. on the morning of March 10, 2007.
42. Ken Hutchison has a brother, named Jim Hutchison.
43. The mother of Ken and Jim Hutchison recently passed away, and her estate was in the process of being distributed amongst the beneficiaries when the incident occurred on March 10, 2007.
44. The relationship between Jim Hutchison and his brother was very strained in the years preceding the March 10, 2007, incident. There had been very little contact between the brothers during this time.
45. Jim Hutchison was invited by the defendant to come to the Defendant's home in Raymond on March 10, 2007.
46. At some time after Jim Hutchison's arrival at the residence on March 10, 2007, papers and checks pertaining to the distribution of the estate were reviewed by Sherry Hamm and Jim Hutchison in a motor home located on the property.
47. After reviewing the checks and paperwork in the motor home, Jim Hutchison took two checks with him. At some point, there was a disagreement over whether Jim Hutchison would sign the receipt for one of the checks.

48. At Ms. Hamm's suggestion, Jim Hutchison went with the Defendant to the garden shed/tool shed located on the property.
49. While in the tool shed, the Defendant attacked Jim Hutchison with a claw hammer and hit him on the back of his head with enough force to produce at least one of the two most prominent wounds on the back of his head.
50. Contrary to the Defendant's testimony, the Court finds that Jim Hutchison did not strike or slap the Defendant prior to the Defendant striking Mr. Hutchison with the claw hammer.
51. The blow to the back of Mr. Hutchison's head was not just a light "tink tink" type blow as the Defendant testified. The wounds to the victim's head were from severe blows. The Court observed the Defendant during her testimony and observed her hand/arm motion when describing the motion of the hammer, which she identified as "tink, tink." The Court does not find the Defendant's characterization of the blows to be credible.
52. The Defendant acted of her own free will was and not under the effects of post-traumatic stress disorder or acute stress disorder at the time of the assault on March 10, 2007, nor did she act in self-defense when she assaulted Jim Hutchison. The Court did not believe the Defendant's version as it related to the hammer assault.
53. The claw hammer which the Defendant used to strike Mr. Hutchison is made of steel with a rubber-covered grip and is of sufficient size and weight to be able to produce serious injury,

including death, and from the manner in which it is used, is likely to produce, or may easily and readily produce, death. The Court finds that the Defendant was armed with a deadly weapon at the time of the commission of the crime.

54. The Defendant testified that, after she struck Jim Hutchison with the hammer, and after the two had exited the storage shed, her attention shifted somewhat to concern for Jim Hutchison and for his ability to drive in his condition. The Defendant's contention that she was focused on the care and treatment of Jim Hutchison after she struck him in the back of the head is not credible. The Court rejects any argument that the Defendant's post-assaultive behavior was somehow the result of her being free from confinement in the shed.
55. At some point following the assault, the windshield wiper on the victim's vehicle was bent and twisted out of shape. The damaged windshield wiper on the Jim Hutchison's vehicle occurred due to the Defendant's attempts to either prevent the victim from leaving or to convince the victim not to leave and presumably, contact the police for help. The Court finds that the Defendant's version of this incident is not credible.
56. The evidence of the February 27, 2007, incident between Sherry Hamm and Karen Bailey was admitted at trial pursuant to the joint motion and stipulation of the parties.

## CONCLUSIONS OF LAW

- 1) The Court has both territorial and subject-matter jurisdiction in this matter.
- 2) The evidence of the February 27, 2007, incident between Sherry Hamm and Karen Bailey was admitted at trial pursuant to the joint motion and stipulation of both parties. However, the Court concludes, pursuant to ER 104, ER 403, and ER 404(b) that the State failed show by a preponderance of the evidence that this prior incident is probative for purposes of establishing motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or common scheme or plan; nor did the State demonstrate that such evidence is more probative than prejudicial. Therefore, the Court did not consider the evidence of the February 27, 2007, incident for any of these purposes. The February 27, 2007, incident was considered by the Court only for purposes of evaluating the Defendant's diminished capacity defense insofar as that defense was predicated upon the February 27, 2007, incident.
- 3) The Court concludes that the Defendant, Sherry Hamm, is guilty beyond a reasonable doubt of Assault in the Second Degree, as alleged in Count I.
- 4) The Court concludes, beyond a reasonable doubt, that Sherry Hamm assaulted the victim, Jim Hutchison, with unlawful force, by knowingly and intentionally striking him in the back of the head with a deadly weapon, to wit a claw hammer.
- 5) The Court concludes, beyond a reasonable doubt, that Sherry Hamm did not act in self defense.
- 6) The Court concludes, beyond a reasonable doubt, that Sherry Hamm did not suffer from diminished capacity at the time of the assault alleged in Count I.

- 7) The Court concludes, beyond a reasonable doubt, that the hammer used in the assault alleged in Count I is capable of producing death, and from the manner in which it is used, is likely to produce, or may easily and readily produce death. The hammer is therefore a “deadly weapon” for purposes of the deadly weapon sentencing enhancement under RCW 9.94A.533. The Court concludes, pursuant to RCW 9.94A.602, that the accused was armed with a deadly weapon at the time of the commission of the offense.
- 8) The Court concludes that the state failed to prove beyond a reasonable doubt that the Defendant committed the acts alleged in Count II and Count III.
- 9) The Court concludes that the Defendant is not guilty of Assault in the Second Degree as alleged in Count III, nor is the Defendant guilty of any lesser included offense.

CP 133-140.

The matter came on for sentencing on August 29, 2008. Judge Sullivan imposed a sentence of 17.5 months, including the twelve month deadly weapon enhancement. 9RP (August 29, 2008) at 18. CP 114.

Timely notice of appeal was filed on August 29, 2008. CP 124-25. The State filed a cross–appeal on September 24, 2008, seeking review of the court’s decision to disregard evidence of Ms. Hamm’s actions during the February 27, 2007, incident involving Ms. Bailey in arriving at its verdicts. CP 128-32.

This appeal follows.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO CONVICT MS. HAMM OF ASSAULT IN THE SECOND DEGREE.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). The State must prove every element of the charged crime beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983). When reviewing a claim of insufficient evidence, the court applies a standard of review that is deferential to the jury verdict, drawing all reasonable inferences

from the evidence in favor of the State and interpreting the evidence most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989).

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, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). On review, the court defers to the fact-finder on the credibility of witnesses and the persuasiveness of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

Due process requires the State to prove each element of an offense beyond a reasonable doubt. The constitutional guarantees of the due process of law require the State to prove every element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. 5 provides, in pertinent part, "No personal shall be . . . deprived of life, liberty, or property without due process

of law . . .”; Wash. Const. Art § 3 provides, “No person shall be deprived of life, liberty or property, without due process of law.” *In re Winship*, 387 U.S. 358, 364, 25 L. Ed. 2d 358, 90 S. Ct. 1068 (1970); *State v. Baeza*, 100 Wn. 2d 387, 490, 670 P. 2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

RCW 9A.36.021 Assault in the Second Degree provides, in pertinent part, as follows:

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....

c) Assaults another with a deadly weapon[.]

Admissibility of expert testimony is governed by ER 702. ER 702 requires that 1) the witness is qualified as an expert and, 2) the testimony would be helpful to the trier of fact. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P. 2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the average lay person and does not mislead the trier of fact. *Id.*

To be admissible on the issue of diminished capacity, expert

testimony must establish how the alleged mental condition impaired the defendant's ability to form the requisite level of intent. *State v. Guilliot*, 106 Wn. App. 355, 363, 22 P. 3d 1266 (2001).

It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 16 P. 3d 626 (2001).

Diminished capacity is a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state. *State v. Warden*, 133 Wn.2d 559, 564, 947 P. 2d 708 (1997); *State v. Greene*, 92 Wn. App. 80, 106-107, 960 P. 2d 980 (1998). For the charges leveled against Ms. Hamm, the State had to prove that she possessed the mental capacity to commit second degree assault against Jim Hutchison as alleged in Count 1.

To present a diminished capacity defense, expert testimony must establish that a mental disorder not amounting to insanity impaired a defendant's ability to form the culpable mental state to commit the crime charged. *State v. Atsbeha, supra* at 914; *State v. Ferrick*, 81 Wn. 2d 942, 944-945, 506 P. 2d 860 (1973). The expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required mental state to commit the crime charged. *Ferrick*, at 945; *State v. Griffin*, 100 Wn. 2d 417, 418-419, 670 P. 2d 265 (1983).

The lack of evidence to support the court's finding of the requisite intent fails to support Ms. Hamm's second degree assault conviction. In order to be convicted of the second degree assault charge, Hamm would have had to intend to assault Jim Hutchison with a deadly weapon. Here, the trial court erred in this case when it rejected the testimony and opinion of Dr. Stanulis regarding Ms. Hamm's inability to form the requisite intent. Dr. Stanulis testified that the injuries she received after the fight with Ms. Bailey on February 27 caused active acute stress disorder, and that during the altercation with Jim Hutchison, she re-experienced her symptoms, suggesting a "flashback." 7RP at 200-01. The court found that Jim Hutchison did not

slap or strike Ms. Hamm. Finding of Fact 23. Even leaving aside that testimony, however, does not negate the conclusion that she was suffering from acute stress disorder. She testified that when Jim came up, he had his fist raised and she was afraid he would hit her “again.” 8RP at 281.

There was no basis for the court’s finding that she acted of her own free will and that she was not suffering from acute stress disorder or PTSD on March 10. Even if he did not strike or hit her, the court made no finding that he did not come up with a closed fist, as Ms. Hamm testified. 8RP at 281. Moreover, even given the court’s finding that Jim did not hit or strike her, or threaten her with a closed fist, the testimony is clear that Ms. Hamm was severely traumatized after February 27. It is uncontested that she had sustained numerous lacerations from Ms. Bailey; she had suffered a concussion; she believed that she was the victim of that offense, she was suffering from panic and anxiety, and was having a balance disorder on March 6, and she was experiencing problems with concentration and memory loss on March 9. Finding of Fact 11; CP 135; 7RP at 191. She was seen by Dr. Lush, who found her to be so traumatized that he prescribed her Zanax.

The diagnosis of acute stress disorder was well founded and established the requisite connection, directly related to her mental capacity at

the time of the offense. 7RP at 200, 203, 204.

In Dr. Stanulis' opinion, on the day of the event Ms. Hamm was suffering from acute stress disorder and therefore did not have the capacity to form the intent to commit assault, Ms. Hamm's brain went into its fight or flight automatic response which bypassed reason and judgment and consideration of consequences. These events would kick in an automatic primitive response and it would bypass reason and judgment. This scenario was on which Dr. Stanulis based his opinion. 7RP at 200. The trial court totally disregarded Dr. Stanulis' testimony regarding the diagnosis of acute stress disorder. Disregard and failure to acknowledge the testimony before the trial court is demonstrative of findings that are not supported by substantial evidence.

The trial court erred in finding the requisite intent simply based upon the testimony of Jim Hutchison. This is insufficient evidence. All other testimony presented at trial was that Ms. Hamm consistently said that she was hit on the side of the head by Jim Hutchison, that she reacted without thinking, and that she consistently said that she did not want to be hit again after being injured by Ms. Bailey, and that she was traumatized, anxious, nervous, and suffering from a concussion when seen was seen by Dr. Lush

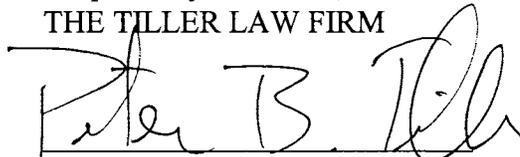
following the February 27 fight. There simply was no evidence presented to the trier of fact that Ms. Hamm intended to assault Jim Hutchison and that she acted out of anything other than fear from acute stress disorder.

**F. CONCLUSION**

Based on the above, Sherry Hamm respectfully requests this court to reverse and dismiss the conviction and deadly weapon enhancement.

DATED: April 22, 2009.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Sherry Hamm

APPENDIX

STATUTES

***RCW 9A.36.021***

Assault in the second degree.

(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.

[2007 c 79 § 2; 2003 c 53 § 64; 2001 2nd sp.s. c 12 § 355; 1997 c 196 § 2.  
Prior: 1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2;  
1986 c 257 § 5.]

***RCW 9.94A.602***

Deadly weapon special verdict — Definition.

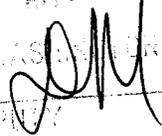
In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

[1983 c 163 § 3. Formerly RCW 9.94A.125.]

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHERRY HAMM,

Appellant.

COURT OF APPEALS NO.  
38309-8-II

PACIFIC COUNTY NO.  
07-1-00061-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Sherry Hamm, Appellant, and David J. Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 22, 2009, at the Centralia, Washington post office addressed as follows:

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Ms. Sherry Hamm  
DOC #316760  
Grays Harbor County  
Correctional Facility  
P.O. Box 630  
Montesano, WA 98563

Dated: April 22, 2009.

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PETER B. TILLER - WSBA #20835  
Of Attorneys for Appellant

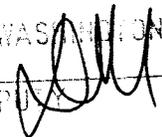
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STATE OF WASHINGTON  
BY   
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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHERRY HAMM,

Appellant.

COURT OF APPEALS NO.  
38309-8-II

PACIFIC COUNTY NO.  
07-1-00061-3

AFFIDAVIT CONCERNING  
LATE RECEIPT OF OPENING  
BRIEF OF APPELLANT FOR  
SHERRY HAMM

TO: DAVID PONZOHA, Court Clerk, Court of Appeals, Div. 2  
AND TO: DAVID J. BURKE, Deputy Prosecuting Attorney

STATE OF WASHINGTON)

:ss

COUNTY OF LEWIS )

I, Laurel L. Tiller, being first duly sworn on oath, now deposes and  
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the Court of Appeals of 950 Broadway, Ste. 300, Tacoma, Washington 98402-4454.

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6. The purpose of the Affidavit is to explain the late receipt of the Sherry Hamm's Opening Brief of Appellant, Court of Appeals no. 38309-8-II. I attach a copy of the mailed package and it has not been properly cancelled.

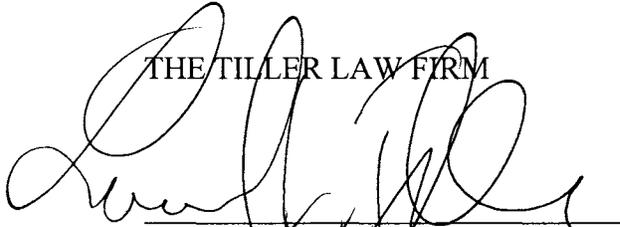
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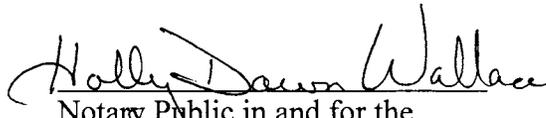
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7. We ask that the Opening Brief of Appellant be accepted and no sanction be imposed.

DATED: April 23, 2009.

  
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LAUREL L. TILLER, WSBA #3443

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DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHERRY HAMM,

Appellant.

COURT OF APPEALS NO.  
38309-8-II

PACIFIC COUNTY NO.  
07-1-00061-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original Affidavit Concerning Late Receipt of Opening Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Sherry Hamm, Appellant, and David J. Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 23, 2009, at the Centralia, Washington post office addressed as follows:

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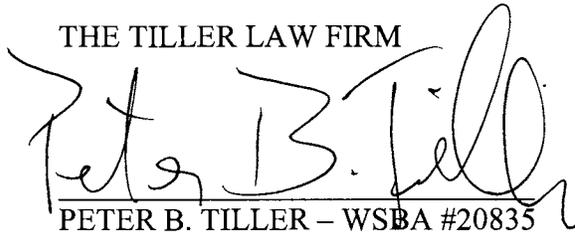
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Ms. Sherry Hamm  
DOC #316760  
Grays Harbor County  
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P.O. Box 630  
Montesano, WA 98563

Dated: April 23, 2009.

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A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER – WSBA #20835

Of Attorneys for Appellant

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