

NO. 38323-3

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEROME CEASAR ALVERTO, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick

No. 06-1-02214-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it admitted a notebook found in defendant's car where the prejudicial effect did not outweigh its probative value?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Jerome Ceasar Alverto, on May 16, 2006, with one count of attempted murder in the first degree, one count of burglary in the first degree, and one count of robbery in the first degree. CP 1-3.

The case was called for trial on July 9, 2008, in front of the Honorable Kitty-Ann van Doorninck. RP 3<sup>1</sup>. The court heard pre-trial motions including a CrR 3.5 motion. RP 12-215. The State filed an amended information on August 18, 2008 which served to correct the spelling of the victim's name. RP 1125, CP 86-88. The jury found defendant guilty as charged on all three counts. 9/12/08RP 2, CP 114-119.

Sentencing was held on September 12, 2008. CP 125-139, 9/12/08RP 2. Defendant's offender score was determined to be a four.

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<sup>1</sup> The State will refer to the sequentially paginated volumes of VRPs as "RP" and the single non-sequential VRP as "9/12/08RP."

CP 125-139. Defendant's sentencing range was 210.75 - 280.50 months on the attempted murder charge, 36-48 months on the burglary charge and 51- 68 months on the robbery charge. CP 125-139. All three counts had a firearm enhancement. 9/12/08RP 2, CP 125-139. The court sentenced defendant to the high end of 280.50 months plus the firearm enhancements for a total of 460.50 months. 9/12/08RP 16, CP 125-139. Defendant filed this timely appeal. 9/12/08RP 17.

## 2. Facts

On May 13, 2006, Wanda Shackelford heard a woman screaming and several gunshots. RP 240. Ms. Shackelford called 911 and while she was on the phone, she heard several more shots. RP 241. Police cars soon descended on the Silver Creek neighborhood in Puyallup where she lived. RP 238, 242.

Stephanie Wilson also lived in Silver Creek. RP 246-7. Ms. Wilson lived in a home with her two children. RP 247. Ms. Wilson had moved to that house shortly after her divorce from defendant, Jerome Alverto. RP 249, 259. Ms. Wilson had dated defendant for two and half years prior to marrying him in the spring of 2005. RP 248, 1093. Ms. Wilson gave defendant a bracelet with a Bible verse from the Song of Solomon on it. RP 1095. Defendant kept the bracelet. RP 1096. Their relationship has always been on and off and the marriage only lasted about 40-45 days. RP 249, 1007, 1093. Ms. Wilson stated that she and

defendant would break up a lot but that she would always take him back. RP 250. Defendant would tell her that he wanted to change and she in turn wanted to help him. RP 251-2.

Defendant was very controlling during their relationship. Defendant wanted his name on every bill and even made her refinance the house she had purchased prior to their marriage to his name. RP 253. Defendant was furious when she didn't ask his permission to landscape the backyard. RP 253-4. Ms. Wilson loaded up a U-Haul with her belongings while defendant was away at work and left. RP 255. Ms. Wilson was afraid of defendant. RP 255.

While Ms. Wilson wanted to end things as smooth as possible, defendant did not want to get divorced. RP 256. Defendant went to Ms. Wilson's sister and begged her to convince Ms. Wilson to take him back. RP 1008.

On May 12, 2006, Ms. Wilson was out with her new boyfriend Eric Rogers. RP 265. Ms. Wilson decided not to stay at Mr. Rogers' house and instead drove to her house. RP 266. Ms. Wilson returned to her home around 2:00 or 3:00 in the morning. RP 266. Defendant called Ms. Wilson. RP 267. Defendant was breathing heavy and sounded like he was winded. RP 333-4. Defendant said that he knew she had gotten a concealed weapons permit. RP 267. He also told her that she shouldn't have married him. RP 267. Defendant said, "Why did you marry me?" and "You're going to be sorry." RP 268. Defendant then asked if she was

going to marry Mr. Rogers. RP 268. Ms. Wilson told defendant she didn't want to talk to him anymore and hung up the phone. RP 269.

Ms. Wilson sent a text to Mr. Rogers to tell him that defendant was making threats. RP 270. The text was around 4:30 a.m. RP 611. Mr. Rogers called right away and wanted to come over. RP 270. Ms. Wilson told him not to and set her alarm system. RP 271. An audible voice indicates that the alarm is on. RP 354. Defendant had told Ms. Wilson previously that part of his Marine training was the ability to get in and out of the house without anyone knowing. RP 358. The only door not locked in the house was the one between the garage and the house. RP 335.

Ms. Wilson entered the master bathroom and tried to turn on the water. RP 272. It didn't turn on. RP 272. When she went to turn around, she was hit on the head with a bottle of wine. RP 273. It was the defendant. RP 273. Ms. Wilson fell to the ground, bleeding. RP 273. Defendant then proceeded to hit her on the head repeatedly with a handgun. RP 273-4. While he was hitting her, defendant said, "You shouldn't have married me." RP 274. Defendant was dressed in dark clothes and wearing a black cap and back gloves. RP 274, 363. Defendant was wearing a black bandana around his face. RP 329, 363. Ms. Wilson recognized defendant by his eyes, his voice, and his body. RP 275.

Defendant then picked Ms. Wilson up by her hair and brought her into the bedroom. RP 275. Defendant put the gun to her head and said,

“I’m going to kill you, and your kids are going to come home and they’re going to find you.” RP 275. Ms. Wilson begged him to take her someplace else. RP 275.

Ms. Wilson, dazed, attempted to dial 911. RP 274, 276. She didn’t dial 911 because she thought no one would help her since it wasn’t a land line. RP 276. She walked into her closet to put pants on and when they walked out of the closet, defendant grabbed her safe. RP 277. Ms. Wilson then ran down the stairs. RP 279. Defendant caught up to her and continued to beat her with the gun. RP 280. Defendant then told her to turn off the alarm. RP 281. Defendant also asked for her keys. RP 377. Defendant kicked her and she “flew through the air.” RP 282. Ms. Wilson knew she was going to die and so she wanted to get DNA evidence so that someone would know who had done this to her. RP 283. Ms. Wilson tried to scratch defendant but couldn’t. RP 284. Defendant had the gun pointed at Ms. Wilson the entire time. RP 284.

Ms. Wilson was finally able to run out of the front door of her house. RP 285. As she was trying to get to the open area at the back of her house, defendant shot her in the chest. RP 286. Ms. Wilson said she could feel the blood and fluids gushing out of her. RP 287. Ms. Wilson fell to the ground and defendant shot her in the hand. RP 287. She thought she needed to play dead and when she heard defendant run off, she ran to the neighbor’s house. RP 288. As she was banging on the door and screaming for help, defendant shot her in the back of the neck. RP

288. Ms. Wilson collapsed and defendant proceeded to drag her down the steps by her hair. RP 288-9. Ms. Wilson didn't scream anymore because she felt lifeless and tired. RP 290. Defendant stood over her and shot her in the head two more times. RP 290. One bullet hit her in the face and the other one hit the top of her head. RP 290. Ms. Wilson played dead again until she heard defendant run off and the sound of tires screeching. RP 290.

Ms. Wilson was covered in blood and bleeding profusely. RP 292. She spit out bark that had gotten in her mouth when she fell after the first shot. RP 293. While she was continually getting up and passing out, Ms. Wilson managed to make it to the back of a neighbor's house. RP 293. The neighbor called 911. RP 294. Ms. Wilson told the neighbor that defendant had done this to her and gave the neighbor defendant's name and address and described the two cars defendant drives. RP 294. The police passed by her location five times and she tried to lift her leg to show them where she was. RP 306. When the police arrived, she repeated the same information. RP 294.

Chad Anderson heard a series of booms around 4:50 a.m. RP 411. He looked out the window and saw a man drag a woman by her hair off of the neighbor's patio. RP 413. The man was dragging the woman and carrying a bag. RP 422. He also had some kind of mask on. RP 424. When Ms. Wilson started banging on his door, begging for help, he called

911 but didn't let her in because he was concerned for his safety. RP 414-6. Ms. Wilson was wet and bloody. RP 416.

Roby Lunsford also lives in Silver Creek. RP 578. Mr. Lunsford heard a women scream and two distinct gunshots. RP 579. Mr. Lunsford saw a black man wearing a dark jacket and dark pants. RP 580.

Deputy Maier arrived at Ms. Wilson's location. RP 437. Ms. Wilson was incoherent and bleeding from gunshot wounds. RP 437. She told him defendant had broken into her house and shot her. RP 438. She then gave him defendant's address and descriptions of his cars. RP 438. She described them as a tan Mercedes and a green Volvo. RP 438. Deputy Maier thought Ms. Wilson was going to die. RP 462.

Deputy Smith also contacted Ms. Wilson. RP 468. He heard her yell, "Help me!" and observed the blood covering her. RP 469. Ms. Wilson told him defendant had shot her. RP 469. Deputy Smith then headed to Ms. Wilson's house. The garage door was open as was the front door. RP 471. Mr. Rogers had arrived at Ms. Wilson's house, saw blood, yelled for her and then come back out of the house. RP 472. There was no blood on Mr. Rogers. RP 491, 729.

Mr. Rogers got to Ms. Wilson's house at around 5:00 a.m. RP 597. When he opened the garage door and entered the house, he noticed that the alarm was going off. RP 598. He started to yell her name and saw blood on the carpet and door. RP 598.

Officer George Robinson contacted Ms. Wilson at the hospital. RP 506. Ms. Wilson said that defendant had shot her because she divorced him. RP 508. She also told him she was the woman who had been dragged. RP 508.

Deputy Fry responded to the area and observed a tan Mercedes traveling from the south. RP 512. A black male was driving the vehicle. RP 512. Deputy Fry stopped the vehicle which was driven by defendant. RP 514. Defendant had blood on his pants. RP 514, 1215. Defendant said he hadn't shot anyone and that he had weapons in his car because he was going deer hunting. RP 515. Defendant had no answer when he was informed it wasn't deer season and no answer to how the blood got on his pants. RP 516. Defendant was wearing a black shirt, blue pants, and black shoes. RP 520, 531.

In the backseat of the vehicle defendant was driving, deputies could see a rifle, some gun cases and a scope. RP 565. A search warrant was obtained for defendant's house and car. RP 567. In defendant's house, deputies found an empty nylon holster for a handgun and a loaded magazine with .40 caliber ammunition. RP 569, 737. In defendant's car, deputies found a .22 rifle, an empty case for a Smith and Wesson gun, .40 caliber ammunition and other accessories. RP 570, 749, 776. There was also a pair of boots and black gloves. RP 750, 776. In addition, a small spiral notebook was on the front passenger seat. RP 750, 776, 802.

Defendant was alone in the vehicle when the notebook was found. RP 836.

Defendant had arrived at Cheryl Knapp's house to spend the night on May 12, 2006 around 11:30 p.m. or midnight. RP 1141-2. Ms. Knapp lives close to the Puget Sound Naval Shipyard. RP 1141. Defendant said he didn't want to go all the way home to Puyallup so he wanted to spend the night at her house. RP 1141.

Blood spatter was found in and around Ms. Wilson's house as well as a trail of blood to the neighbor's house. RP 680, 740-6. More blood was found at the neighbor's. RP 680, 742. A .40 caliber round was found on the carpet inside Ms. Wilson's house. RP 681. Two more spent .40 caliber shell casing were found at the neighbor's house. RP 856. In the master bedroom, a steak knife was found hidden between the mattresses. RP 682. The knife did not belong to Ms. Wilson. RP 829. A wine bottle was found wrapped in a bathmat from the master bathroom. RP 683. Keys were found on a chair. RP 724-5. There was no sign of forced entry. RP 686.

That same morning, around 7:30 a.m., a bag was found at a subdivision that was under construction. RP 547, 663, 666. The bag was stuffed into a lumber pile and had a jacket and a gun in it. RP 547. A cell phone was in the jacket pocket. RP 548. There was blood on the phone and the end of the gun. RP 549, 756. The construction workers who found it called 911. RP 548. Deputy Richardson indicated that an initial

inspection revealed a leather jacket and a smaller black backpack in the bag. RP 648, 755. There were also some gas masks and filter cartridges, as well as a blue bandana. RP 649, 756. Two sets of handcuffs were found in the jacket. RP 663. A yellow Motorola Nextel cell phone was also in the jacket. RP 663. The phone belonged to Ms. Wilson. RP 756, 1099. In the small backpack, there were three white trash bags, a blue stocking cap, another stocking cap with the eyes cut out, a hairbrush, nail file, nail cream, an extra pair of pants, a brown t-shirt, green boxers, white socks, and a black tank top. RP 756. There was also a garage door opener that opened Ms. Wilson's garage. RP 721, 756, 897, 898. In addition, there was a photo of Ms. Wilson and Mr. Rogers, and two bracelets, one with an inscription of a Bible verse and the words, "Love, Stephanie." RP 756, 900. A grocery list was also in the backpack that had defendant's name on the top. RP 807, 890. The gun was a Smith & Wesson .40 caliber handgun. RP 757. There was a lot of blood on the receiver, upper slide and pistol grip. RP 757. The construction site was only two miles from the shooting location. RP 665.

That evening, the safe was located in a garbage can at a neighbor's house about 30 seconds from the crime scene. RP 671, 673, 675. The safe had dried blood on it. RP 676. The safe was small, able to be carried by hand and unopened. RP 766, 767, 770.

The three shell casings found were fired from the gun found in the backpack. RP 1051.

The stains on defendant's pants were blood. RP 1063. The blood matched Ms. Wilson. RP 1064.

The photo of Ms. Wilson and Mr. Rogers had been on her nightstand. RP 1097.

Ms. Wilson had multiple surgeries and was at the hospital for weeks. RP 297. She had several gunshot wounds including through her chest, a gunshot wound to her right hand and a gunshot wound to her neck. RP 391. She also has had to go through follow up care and surgeries. RP 297. Ms. Wilson has had problems with her memory and problems breathing. RP 602. She also does not like to be left alone. RP 602. Her personality has changed. RP 1022. She cries a lot and has nightmares. RP 1022.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE NOTEBOOK FOUND IN DEFENDANT'S CAR WHERE THE PREJUDICIAL EFFECT DID NOT OUTWEIGH THE PROBATIVE VALUE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object

precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence is assumed relevant and admissible under ER 403. *Carson v. Fine*, 123 Wn.2d 206, 222, 867 P.2d 610 (1994), *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). The burden is on the party seeking to exclude the evidence. *Hayes v. Wieber Enterprises, Inc.*, 105 Wn.App. 611, 618, 20 P.3d 496 (2001). The party seeking to exclude the evidence must show the probative value is substantially outweighed by the prejudicial affect. *Carson*, 123 Wn.2d at 224-5. The probative value has to be substantially outweighed by the danger of unfair prejudice in order for the court to exclude the challenged evidence. *Lockwood v. AC*

*& S, Inc.*, 44 Wn. App. 330, 350, 722 P.2d 826 (1986), *aff'd*, 109 Wn.2d 235, 744 P.2d 605 (1987). If it is not outweighed, the evidence must be admitted. *Id.*

The balancing test is required but because the scales have to be tipped by substantial prejudice in order to exclude the challenged evidence, if the balance is even, the evidence should be admitted. In the instant case, the court heard argument about the admissibility of the notebook several times. The court initially reserved ruling on the admissibility of the notebook and in fact, advised counsel that they could not talk about the notebook in opening. RP 68-75, 212. The court reasoned that she needed to be able to put the notebook in context in order to make a ruling. RP 212. After hearing testimony from the victim, the court engaged in the balancing test as to the admissibility of the notebook.

**COURT:** The defense argument had been regarding *State v. Whalon*, which is at 1 Wn. App. 785, a 1970 case. And I read that very carefully, and I think it's very distinguishable. That was a situation where there was a charge of Rape, and there was some writings by the defendant having to do with, it appeared to be, sort of planning out a rape.

But in that case, not the victim, but a different woman's name was there, a different woman's address was there, and other contact information. So there was nothing particularly about the victim in that alleged case related to the notebook. And the Court of Appeals then said that was too prejudicial.

This is a little bit different. Perhaps, vaguer, but I think that under 403, it is very prejudicial. It is also very probative.

And it is my understanding from -- I guess what I'm saying is, even if it's equal in terms of prejudice and probative, everything the State wants to admit is usually prejudicial to the defendant; that on balance that it would be admissible to -- in terms of being relevant to the issues in this case. It's not a 404(b) kind of prior bad act. It is in and of the same time frame, just that it was found in the defendant's car at the time of his arrest. Shortly after the alleged assault occurred, but again, on balance. I think that it's probative, given the issues that have been raised by the defense, in terms of identification, and -- anyway, that's my ruling.

RP 429-430. The court concluded that even if the balance was even, the notebook had to be admitted. However, the court also went through an analysis of how the notebook was probative and how it related to the issues in the case. RP 429-430. This is consistent with the evidence rule and with case law. The court properly applied the balancing test. There is no abuse of discretion.

ER 404(b) provides that evidence of "other crimes, wrongs, or acts" is inadmissible to prove "action in conformity therewith" on a particular occasion. However, that rule also provides a non-exhaustive list of purposes for which such evidence can be admissible: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

In addition to the non-exhaustive list of exceptions identified in ER 404(b), Washington courts recognize a *res gestae* or "same transaction" exception to the rule. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Same transaction evidence of prior misconduct is admissible to

complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App.422, 93 P.3d 969, 974 (2004) (citing *State v. Tharp*, 27 Wn. App. 198, 205, 93 P.3d 969 (1981)). “A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant’s bad character, thus forcing the State to present a fragmented version of the events.” *Lillard*, 122 Wn. App. at 431. However, if the story is complete without the proffered testimony, the exception is not applicable. *State v. Mutchler*, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989).

In the instant case, the notebook was clearly relayed to the events on the date of the incident. The notebook was found on the front seat of the car defendant was driving when he was stopped by police. RP 750, 776, 802. Defendant was stopped by police minutes after the attack had occurred and only blocks away from the scene of the attack. RP 511-2. In addition, the notebook had many similarities to the attack that has occurred. The notebook said to “remove cell.” RP 786. Ms. Wilson testified that she tried to get to her cell phone right in front of defendant and set it down in front of him. RP 276. Ms. Wilson’s cell phone was later found with the backpack that was determined to be defendant’s. RP 548, 663, 756, 1099. The time listed in the notebook was 5:30-6 a.m. with 5 a.m. listed in parenthesis. RP 786. That is approximately the time the

attack occurred. RP 411, 597, 611. The notebook goes one step further to say “Enter garage at 5a.m.” RP 787. A garage door opener was found in the backpack belonging to defendant and that garage door opener opened the garage door of Ms. Wilson’s house. RP 721, 756, 897, 898. Further, it was likely defendant had entered through the garage since Ms. Wilson kept the door between the house and the garage unlocked. RP 335.

In addition, the notebook states, “Has to look natural. Cuts. Ransack truck and purse.” RP 786. A knife was found planted between the mattresses of Ms. Wilson’s bed. RP 682. Also, her keys were out of her purse and in the living room. RP 724-5. Also, her safe was stolen from her closet and stashed in a neighbor’s garbage can, unopened. RP 671, 673, 675. The planning and the reality are linked.

Further, the notebook contained a list of tools including a gun, knife, handcuffs, gloves, trash bags and a scarf or face mask. RP 787. Ms. Wilson testified that defendant was wearing a bandana around his mouth on that day. RP 329, 363. A gun was used in the attack and found later the backpack determined to belong to defendant. RP 757, 1051. In the backpack were also handcuffs, masks and trash bags. RP 649, 663, 756. Gloves were also found and Ms. Wilson testified that defendant wore gloves. RP 750, 776. A knife was found at the victim’s house. RP 682. While a taser and shoe covers were not recovered, that does diminish the similarities between the plan in the notebook and the reality of what occurred in May 13, 2006.

The notebook also contains notes about “dress code.” RP 787. Dark pants, dark shirt, gloves, stocking cap and face mask are all listed. RP 778. Defendant was wearing dark clothes that morning and also gloves and a bandana. RP 274, 329, 363. Stocking caps and face masks were found in the backpack. RP 649, 756. There is a clear link.

The fact that not everything in the notebook matches exactly with what happened during the attack does not make it irrelevant. It’s true that there is no evidence defendant taped his pants to shoe covers or taped his eyebrows. No condom was found and none of the items listed as “option” were performed. The fact that defendant was not able to complete his entire plan or didn’t follow through on all of his various options does not sever the connection of the notebook to the crime. The similarities outweigh the differences. Further, the victim engaged in behaviors obviously not contemplated by the plan. Ms. Wilson set the alarm which she didn’t normally do. RP 271. Defendant repeatedly yelled at her to shut it off. RP 281. Ms. Wilson also ran away from defendant despite defendant’s efforts to subdue her. RP 285. At that point, defendant would have had to deviate from parts of the plan. However, he still had the gun and still went after Ms. Wilson. The fact that not all of defendant’s plan could be executed does not mean the notebook is not relevant. It is intricately related to the events of that day and its link to the complete version of events is necessary to complete the story. The trial court did not abuse its discretion in admitting the notebook.

Further, as noted above, this was not the only piece of evidence admitted at trial. This was a link in the chain of events of that day. Also, the prosecutor referring to the notebook as a plan of attack to kill Ms. Wilson was a proper inference from the evidence adduced. While making these arguments in passing, defendant has not assigned error to these issues or fully developed them.<sup>2</sup> Where no assignment of error has been made, the court will generally not consider a claimed error. *See Painting and Decorating Contractors of America v. Ellensburg School District*, 96 Wn.2d 806, 814-815, 638 P.2d 1220 (1992) (applying RAP 10.3(g)). As defendant has only raised these issues in passing and not developed these issues in detail, the State will not address them.

Defendant relies on *State v. Whalon*, 1 Wn. App. 785, 464 P.2d 730 (1970) for the exclusion of the notebook. However, *Whalon* is distinguishable. First, in *Whalon*, the piece of paper containing the plan of rape was found on the defendant three months after the rape had occurred. *Whalon*, 1 Wn. App. at 787. Nothing in the plan found on the defendant matched the actual attack that had occurred three months prior. *Id.* at 786-787. The court noted that the plan only showed that defendant had a lustful disposition and thought about rape and that this evidence was found some time after the attack actually occurred. *Id.* at 793. Based on

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<sup>2</sup> Defendant had not asserted a claim of insufficient evidence or prosecutorial misconduct and cannot raise new issues in its reply brief.

this, the court found that the evidence was prejudicial beyond its probative values. *Id.* at 793-4. The instant case differs from *Whalon* in that the notebook was found during the arrest of defendant on the morning of the attack. The notebook contained many similarities to the attack that had been committed. It did not just show that defendant was planning to attack someone. It contained details that matched what had just occurred. The court did not abuse its discretion.

Defendant also relies on *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) but again, the cases are distinguishable. In *Coe*, the court admitted evidence of another crime that the defendant had not been charged with. *Coe*, 101 Wn.2d at 778-9. The appeal court reversed because the actions in the uncharged incident were not similar to the actions in the charged rapes. *Id.* at 779. In the instant case, the notebook was a related link in the overall chain of events on that day. It was not a previous or uncharged crime that the State was trying to link to defendant. It was a piece of evidence that helped to tell the complete story of what occurred and helped to link several pieces of evidence together and to defendant. The case is factually different than *Coe*. The court did not abuse its discretion in admitting the notebook.

Even if this court disputes the trial court's balancing test in this case, the court can still affirm the finding. An appellate court may affirm a defendant's conviction on any theory supported by the record and the law. *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). As

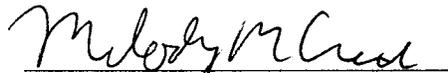
stated above, the notebook was connected to the defendant and the crime in this case. In was a part of the story of what happened that day and while it was prejudicial to defendant, the prejudice cannot be shown to be so substantial as to warrant exclusion. The notebook was found on the front seat of defendant's car when he was stopped by police on the morning of the incident. It has striking similarities to the crime that had occurred. It also explained some of the items found in the backpack that also contained a grocery list with defendant's name on it and a bracelet given to him by the victim. The trial court did not abuse its discretion in admitting the notebook.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction and sentence below.

DATED: September 17, 2009

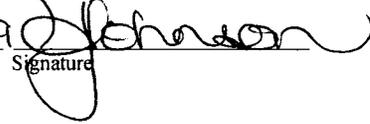
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WSB # 35453

2009 SEP 17 10:00 AM  
COURT REPORTER  
STUDIO CITY, CA  
90904

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/17/09   
Date Signature

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ST. JOHN'S UNIVERSITY  
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