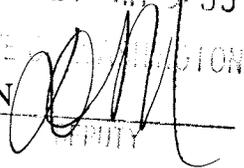


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COURT OF APPEALS

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STATE OF WASHINGTON



NO. 39742-1-II

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

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER AUSTIN PERKINS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00813-4

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of the facts as set forth by the appellant to a certain extent. Where additional information is necessary, it will be provided in the argument section of the brief.

II. RESPONSE TO ASSIGNMENT OF ERROR 1

The first assignment of error raised by the defendant is a claim that the suspension of one of the detectives was not brought to the defense's attention and, because it was not disclosed, therefore it prevented the defendant from receiving a fair trial. Specifically, the claim is that the detective that took the confession from the defendant, Jeffrey Wilkin, was under suspension by the Vancouver Police Department because of allegations of sexual harassment related to a fellow officer.

This matter had previously been brought before the trial court in the companion case of State v. Griffin. In that case, the court reviewed the allegations and found that they had no relevance in the criminal trial and therefore would not be allowed. (3RP 20-22).

A trial court retains broad discretion regarding the admission or exclusion of evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772

(1991). Further, the Appellate Court does not reverse a trial court's rulings on the scope of cross-examination absent a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). "To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value) and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality)." State v. Baldwin, 111 Wn. App. 631, 638-39, 45 P.3d 1093 (2002), *aff'd*, 150 Wn.2d 448, 789 P.3d 1005 (2003); State v. Aguirre, 168 Wn.2d 350, _ P3d _, (2010).

Due process "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" United States v. Bagley, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (*quoting* Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy

of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (*quoting Bagley*, 473 U.S. at 678). Documents relating to a search the defendant cannot challenge are neither favorable to him nor material to guilt or punishment. In re Pers. Restraint of Benn, 134 Wn.2d 868, 909, 952 P.2d 116 (1998). "A witness or a defendant cannot be impeached upon matters collateral to the principal issues being tried." State v. Descoteaux, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), *overruled on other grounds in State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982); State v. Carr, 13 Wn. App. 704, 708, 537 P.2d 844 (1975).

The Appellate Court has adopted the following test for determining whether or not a fact is a collateral matter: Could the fact upon which error is based have been brought into evidence for a purpose independent of the contradiction? State v. Hall, 10 Wn. App. 678, 680, 519 P.2d 1305, *review denied*, 84 Wn.2d 1003 (1974). *Accord*, State v. Descoteaux, *supra* at 37-38 (matter is collateral if the evidence is inadmissible for any purpose independent of the contradiction).

Detective Wilken's involvement in this case was primarily taking the statements from the defendant. The significance is that the defendant

gave statements on tape. Those statements were played, in total, for the jury at the time of trial. (Exhibit 106, 107, and 121). In fact, during the playing of these tapes, the Judge at one time reiterated to the jury how they were to view some of the information in these tapes to make sure that there was a clear understanding as to the use of these statements. (RP 289-290).

When the jury heard Exhibit 121, the defendant clearly backtracked on the statements he had previously made. They were not necessarily true and that during the tape of 121 the defendant gives a full and complete confession as to his activity in the felonies that were on trial. (RP 318; 320-321; 321-331). The substance of the statements by the defendant were subject to a 3.5 hearing and the court entered Findings of Fact and Conclusions of Law (CrR3.5). (CP7). A copy of those Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein. Contrary to what the defendant had maintained, the court found there was no coercion, force, promises, or other inducements or improprieties to get the defendant to talk to the officers. (It's also to be remembered that Officer Wilken also had Officer Gabriel in the room at the time the statements were being made by the defendant, in addition to them being fully and completely recorded and the unedited tapes being played for the jury.). No exceptions have been taken to any of the Findings

or Conclusions relating to the 3.5. As the case law indicates, Findings of Fact entered by the trial court pursuant to CrR3.5 are binding on the Appellate Court if those findings are supported by substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by* Brendlin v. California, ___ U.S. ___, 127 S. Ct. 2400, 168 L. Ed.2d 132 (2007).

The State submits that in Officer Wilken's involvement in this case, there has been no showing of any impropriety or anything that would lead to questioning the validity of the information that he had supplied to the court or to the jury. This matter concerning the suspension of the officer was discussed in full prior to the commencement of the trial. The trial court made the following comments, taking into consideration that it had also reviewed this matter in detail in the previous case:

THE COURT: Alright. Well, with regard to the issue, which I recall from the last trial, I reviewed the information. And I'll preface this by saying, I don't recall Officer Wilkin being asked to testify as an expert witness with regard to police procedures or things of that nature. He testified in the last trial as a – as a fact witness as to what he did. And so he's treated the same as other fact witnesses who are being offered to testify as to what they did and how they did it and what they observed and that sort of thing.

Their credibility can be impeached. In general, witnesses cannot be impeached with unrelated misconduct that

doesn't have anything to do with their truthfulness or honesty. I satisfied myself in reviewing the record that I received from the prosecutor's office concerning the basis for Officer Wilkin's suspension, that if that evidence was all available to the defense and out in the open, it would not be admissible to impeach Officer Wilkin in this case. It would simply not be the kind of thing that would be allowed. So I'll stand by my previous ruling.

-(3RP 20, L12 – 21, L7)

This is further annunciated by the trial court at the time of sentencing, when the defense has raised a motion for new trial and the court is again obliged to respond to the allegations that the defense should have received information concerning Officer Wilkin. The trial court takes time to lay out its thinking so that the parties understand why the court made the rulings that it did.

THE COURT: All right.

Well I have had the opportunity to review the motion for arrest of judgment, and – or in the alternative, for a new trial. I denied the motion, and I'll advise the basis for that.

Prior to Mr. Perkins' trial, there was a trial involving a co-defendant, Mr. Griffin, and at the time of Mr. Griffin's trial there was a question raised as to whether Officer Wilken's personnel files and the fact that he was – I believe on administrative suspension at the time could be investigated or looked into by the State – or by the defense – I mean, and brought up for impeachment purposes or other purposes in Mr. Griffin's trial. At the time, the

investigation of Officer Wilken's conduct was ongoing and did not – had not yet resulted in any charges or civil complaints or any actual formal complaints against him that were admissible; so the rulings did not allow for automatic disclosure of these things, and I was asked to review documents in camera related to the investigation. And Deputy Prosecutor Hunter brought over a box of documents, which I took the time too review before Mr. Griffin's trial.

I'm not going to relate in detail what it was that they said other than to say that it was largely consistent with the allegations that have come out in the press related to Officer Wilken's conduct involving Ms. Conroy – I believe it is, who is not a police officer but was a community corrections officer associated with his team. I haven't read anything either in your declaration or in the press accounts that came out about it or in any of the materials submitted that indicates there's any additional information than that which was submitted at the beginning of the Griffin trial.

And at the start of this trial, I was asked again to determine whether or not that my original ruling, which was that the material was inadmissible in Mr. Griffin's trial, applied in Perkins' case; and I did, in fact, find that it was inapplicable in this case. That is still my belief.

And that belief is based primarily on three things. It is not based on the fact that Mr. Wilken's conduct is laudable or appropriate. It was inappropriate, and I expressed the opinion in Mr. Griffin's trial that it was obviously bad – what we would consider other wrongs or acts. But it is not admissible in the sense that it would be available for either substantive or impeachment purposes in either Mr. Griffin's trial or Mr. Perkins' trial. None of the allegations involved either Mr. Griffin's or Mr. Perkins' trial or the investigation of the crimes that they were accused of or their interrogations. Simply none of those allegations were involved in that.

Second, none of the allegations involved – against Officer Wilkin, involved his interrogation of suspects. It's true that in the issuance of a – or execution of a search warrant and various other things, that he did as a police officer engaged in bad or boorish behavior, but none of those allegations had anything to do with the technique he used to interrogate suspects. It largely involved his sexual harassment of the co-worker, which had nothing, obviously, to do with this case.

And, third, most of the incidents involved – were alleged, in my recollection, to have occurred after this; so the idea that he needed to get Mr. Perkins and Mr. Griffin because this investigation against him was ongoing simply doesn't make any sense because most of the incidents were not alleged to have occurred yet and there was no ongoing investigation at that point. So there really isn't anything that would tie that behavior into Mr. Perkins' interrogation. All of that was true then and it appears to be true now.

There's simply nothing there that would allow investigation – at least in the court's mind, to unearth some evidence relevant to Mr. Perkins or Mr. Griffin, and the material would not be available for impeachment purposes because it's basically character evidence, and not character evidence related to his interrogation techniques or that sort of thing; but it would be similar to if there were allegations that Mr. Wilken beat his wife or hollered at his kids or that sort of thing. That may be true that he does those things, but they wouldn't be available for impeachment purposes, so they don't bear on his credibility. And for that reason, I excluded the material and did not require that it be turned over. I'll adhere to those rulings and deny the motion.

-(RP 7, L23 – 11, L7)

It's interesting to note that this discussion, which continues, includes comments that the defense attorneys have received the personnel

file related to Officer Wilkin and didn't find anything in there that they would be questioning him about. The court, which had previously reviewed that personnel file, agreed with that assessment. (3RP 22, L17 – 23, L3).

The State submits that there is nothing in this record to support a conclusion other than this proposed evidence was inadmissible and the trial court exercised its proper discretion in finding it to be so.

III. RESPONSE TO ASSIGNMENT OF ERROR 2

The second assignment of error is similar to the first in that the rules are basically the same, but the issue is the trial court's excluding of evidence of a co-defendant's conviction. Specifically, the defense tried to argue that the victim in the case had identified someone other than Perkins as being at the door and that one of the other co-defendants with the defendant, Mr. Griffin, had been previously convicted of this offense. The defense argued that his conviction was admissible as other suspect evidence, in that it pointed to someone other than Perkins as the perpetrator.

The State incorporates herein the previous case law discussion under its response to the argument No. 1. The trial court didn't appear to have any problems with discussions of this co-defendant but questioned

the validity or purpose of the actual “conviction” of the co-conspirator. Clearly, this took place in front of a different jury, or trier of fact, and could possibly allow the defense to reargue something that had previously been decided elsewhere. Further, it’s obvious they wanted to use this as substantive evidence, not for purposes of impeachment of possible testimony or credibility of a co-conspirator. Admission of a prior conviction under ER 609(a)(1) is discretionary with the court, State v. Alexis, 95 Wn.2d 15, 621 P.2d 1269 (1980), and will not be disturbed absent a clear showing of abuse. State v. Thompson, 95 Wn.2d 888, 632 P.2d 50 (1981).

A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 124 L. Ed. 2d 665, 113 S. Ct. 2449 (1993). In order to be relevant, and therefore admissible, the evidence connecting another person with the crime charged must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party. State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996). The evidence must establish a nexus between the other suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031, 877 P.2d 694 (1994). The

defendant has the burden of showing that the "other suspect" evidence is admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). The admission or refusal of evidence lies largely within the sound discretion of the trial court and is reviewed only for an abuse of discretion. Rehak, 67 Wn. App. at 162.

The defense argument is spelled out on 3RP 13 as follows, with a response by the State concerning its understanding of what the defense is doing:

MR. BENNETT (Defense Attorney): What we're offering, Your Honor, is evidence that a third party committed this matter. Now, we know that Mr. Alexander did, and we're also offering evidence now that Mr. L.G., Mr. Griffith [sic] did, also. There were only two people that committed the crime as far as we know. So that's why we would be offering.

MR. GOLIK (Deputy Prosecutor): I did read the brief. And the brief, I think – I think Counsel's arguments deal, in general, with cases where there is a person on trial and the defense wants to bring up evidence that somebody else committed the crime.

In this case, there are three people that were charged with this crime. Mr. Griffin has been convicted. But that, I don't think, is probative of anything with respect to whether Mr. Perkins was one of the other three. I think to just call Mr. Griffin and ask him if you were convicted of these crimes and he said yes, or to just admit the J&S showing Mr. Griffin was convicted of these crimes would not be probative with respect to whether Mr. Perkins was also one

of the co-defendants in these crimes. So I don't think that it tends to prove anything.

THE COURT: Well, I'll review your brief. In the meantime, I will –

MR. MARLTON (Defense Attorney): Before you close it down, Your Honor, on that issue, we – we have secondhand information that maybe Mr. Griffin might come forward and take Mr. Perkins out of the – being at the scene of the crime. And we don't know that until we actually get him – get him here. And he may or may not testify on that matter. I put a call in to the bar association, just to make sure that – Mr. Golik brought up a – was concerned with ethics about a – whether we could talk to him if he's represented. But as far as we know, he's not represented. And I put a call, I think, to the hotline on Thursday.

THE COURT: Would the clerk look at Mr. Griffin's file to see whether his appeal is pending, in fact, if he's represented by counsel, which I suspect he is?

I was about to say that I'll grant the request that in opening statement you not discuss Mr. Griffin's conviction or the fact that you plan to call him as a witness. After we get past that, I'll read the brief and listen to what you have to say about it, and decide whether or not – at least so far I'm not hearing anything relevant about the fact that Mr. Griffin was convicted.

MR. MARLTON: Well, Your Honor if you recall, you tried the original case, and –

THE COURT: I recall that.

MR. MARLTON: And it was Mr. Alexander that stated that Mr. Griffin and Mr. Perkins were at the – at Mr. Atkins' [sic] – Mr. Alexander says that Mr. Griffin and Mr. Perkins were at Mr. Atkinson's house and assaulted him. And if – given the fact that Mr. Griffin has been convicted

of being there as one person, then it goes to the heart of Mr. Perkins' defense that there were two people at the scene. One of the other people has been convicted, and Mr. Alexander has been positively identified over and over and over again by the victim as the person that was there. And (inaudible) teardrops, he knows he's been there before, recognized his voice. And that was fresh, right out of his mouth when he was shot, still in shock. So it really is pretty relevant, Your Honor.

THE COURT: Well again, Counsel, I recall the testimony in some detail. The victim positively identified Mr. Alexander as the person being there. Mr. Alexander positively stated that he was not the person who went up to the door, that he was an accomplice away from the scene. So Mr. Griffin's conviction doesn't resolve that issue one way or the other. The fact that Mr. Griffin's conviction – is convicted doesn't mean Mr. Alexander was or was not at the door, or that Mr. Perkins was or was not there. It doesn't – they don't have anything to do with each other.

But I'll listen to the evidence and read your brief and make a final ruling on it. I'm just telling you that in order to make it relevant, it has to prove or disprove something with regard to Mr. Perkins. And so far you're telling me it doesn't.

-(3RP 13, L8 – 16, L17)

The State submits that the main issue in this is set forth early on in this discussion that was just had between the attorneys and the court: this was not a situation where the defense is trying to put the blame onto a different person, because the facts clearly set forth that there were three individuals involved. The fact of Mr. Griffin's conviction therefore

becomes irrelevant to any of the issues that need to be resolved and could easily lead to confusion or misunderstanding by the jury. It's obvious from the nature of the discussion at trial and in the appellate brief that the defense is trying to utilize this as substantive evidence. Even assuming any of the information was correct, it doesn't absolve the defendant from potential criminal liability. The trial court made correct rulings that this simply is not admissible under the rules of evidence.

IV. RESPONSE TO ASSIGNMENT OF ERROR 3

The third assignment of error raised by the defendant is a claim that his attorneys failed to request an instruction concerning the use of his confession by the jury, therefore rendering ineffective assistance of counsel. The instruction involved is WPIC 6.41. No one in this case, court, State, or defense, requested this instruction be provided to the jury.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-(Strickland, 466 U.S. at 689).

In State v. Smith, 36 Wn. App. 133, 672 P.2d 759 (1983), this court stated that a defendant is entitled to receive a cautionary instruction like WPIC 6.41 if the voluntariness of the defendant's statements is raised at trial. At that time, WPIC 6.41 stated, "You may give such weight and credibility to any alleged confession or admission of the defendant as you see fit, taking into consideration the surrounding circumstances." The right to this instruction is procedural and not constitutionally mandated. State v. Taplin, 66 Wn.2d 687, 691, 404 P.2d 469 (1965). A

nonconstitutional error warrants reversal only if the court finds that, within a reasonable probability, the outcome would have been different but for the error. State v. Aarnold, 60 Wn. App. 175, 181, 803 P.2d 20 (1991). The State submits that even if the jury had received the instruction, it is highly probable that the jury would have reached the same result given the abundant evidence of his guilt. Accordingly, any conceivable error by the trial court in refusing to give the instruction was harmless. The jury had the benefit of listening not only to his confession (in his own words), but also the pre-confession discussion with the police that led up to it. As stated previously, the instruction as to weight and credibility of a confession is a procedural provision rather than an absolute constitutional right. Defendant cannot fail to request this instruction and then assign error to the court's failure to give it. In Seattle v. Love, 61 Wn.2d 113, 377 P.2d 255 (1962), where there was no request by the defense for an instruction on presumption of innocence, burden of proof and reasonable doubt, the conviction was affirmed. The State submits it can be visualized where, for strategic reasons, the defendant may not desire that an instruction as to weight and credibility of a confession be given because it may tend to highlight the confession in the eyes of the jurors. To prevail in an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. State v. McNeal, 145 Wn.2d 352,

362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that his attorney's performance fell below an objective standard of reasonableness. *Id.* To establish prejudice, a defendant must demonstrate that but for the deficient representation, the outcome of the trial would have differed. *Id.*

The case law would seem to indicate that the use of this instruction is not of constitutional grounds and therefore subject to a harmless error type of approach. The State submits that clearly in our situation the jury was allowed to hear all of the statements of the defendant. Both those incriminating himself and those where he was trying to get himself off. Further, there was nothing about this that prevented the defense from adequately arguing this case to the jury.

V. RESPONSE TO ASSIGNMENT OF ERROR 4

The fourth assignment of error raised by the defendant is a claim that the attempted robbery and assault in the first degree convictions should have merged for purposes of sentencing. At the time of the sentencing hearing, the State went through the criminal history of the defendant and determined that it constituted a total of four points. This was agreed to by the defense. (Sentencing Hearing RP 13). That criminal history that was agreed to by the parties was two juvenile felonies,

counting one-half point each, a Robbery in the First Degree for two points, and a Possession of Weapon by Prisoner for another point. This was the criminal history that was used in the Judgment and Sentence (CP 117). A copy of the Felony Judgment and Sentence dated September 2, 2009 is attached hereto and by this reference incorporated herein.

At the time of sentencing the prosecutor reminded the court that it had been the trial Judge in the Griffin matter and that the court, at the time of sentencing in that matter, had found that the Attempted Burglary, Robbery in the First Degree, and Assault in the First Degree were not the same course of conduct because the Attempted Burglary I was completed and the victim was trying to flee and was shot in the back. (Sentencing Hearing RP 14). The prosecution therefore used a total scoring of "8" points as it relates to the defendant. The prosecution went on to acknowledge to the court that the Assault in the First Degree was the greater scoring offense and that all three of the offenses had firearm enhancements. The Assault in the First Degree with a 60 month enhancement created a range of 269-337 and then the two other firearm enhancements automatically run consecutive to the underlying crimes and each other. So the total therefore, under the Assault I, would be 389-457 with the enhancements included in that calculation. (Sentencing Hearing RP 15-16).

After the presentation by the defense and the defendant having an opportunity to address the court, the Judge explained his reasoning for the separate conduct Burglary anti-merger use:

The jury rendered its verdict, found you guilty based upon the evidence which included not only your own statements but video evidence, and it appeared to me that you received a fair trial and the jury rendered its verdict.

With regard to the three counts involved, I'll adhere to my previous ruling that the assault in the first degree and the attempted burglary first-degree are, in fact, separate criminal conduct. The victim in this case was at home and could – after he broke away and ran away from the two people at his door, one of whom was found to be you, could have let him go. You could've let him run off. You could've run off and let him be frightened but otherwise physically uninjured. Instead he was shot. And that shooting was a separate act which was completely unnecessary to complete the burglary or the attempted burglary in this case. So that's the – those are the same – not the same criminal conduct, and they will not be treated as such by the court.

With regard to the attempted burglary and the attempted robbery, it appears they would be the same criminal conduct; however, the legislature indicates that with regard to a burglary and a robbery, the burglary anti-merger statute should apply; and I have discretion to treat those as separate criminal conduct. It appears to me they should be treated separately in this case, and I will do so for scoring purposes.

The offender score we'll use then is 8, and the standard range with sentence enhancements are as indicated by the State.

-(Sentencing Hearing RP 22, L15 – 23, L19)

The defense did not contest that those were the facts that the jury heard at the time of the trial. The State submits that the trial court was within its rights to determine that the Assault in the First Degree was totally separate conduct from the Attempted Burglary and Attempted Robbery.

For offender score purposes, multiple crimes encompass the same criminal conduct when they involve the same objective criminal intent, the same victim, and the same time and place. State v. Nitsch, 100 Wn. App. 512, 521, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000); RCW 9.94A.589(1)(a). Failure to meet any one element precludes a finding of the same criminal conduct. State v. Morris, 123 Wn. App. 467, 475, 98 P.3d 513, 517 (2004).

Our sentencing court used the anti-merger burglary statute. It has recently been re-affirmed in State v. Elmore, 154 Wn. App. 885, 900-901, 228 P.3d 760(2010):

The merger doctrine is a rule of statutory construction courts use to determine whether the legislature intended to authorize multiple punishments for a single act. State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983); see also State v. Freeman, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). Under the doctrine, when a particular degree of crime requires proof of another crime, we presume the legislature intended to punish both offenses through a

greater sentence for the greater crime. *See Freeman*, 153 Wn.2d at 772-73; *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). But multiple punishments for crimes that appear to merge will not violate the prohibition on double jeopardy if the legislature expresses its intent to punish each crime separately. *State v. S.S.Y.*, 150 Wn. App. 325, 330, 207 P.3d 1273 (2009).

One exception to the merger doctrine is the burglary anti-merger statute, which states, “Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.” RCW 9A.52.050. The plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both. *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999); *see also State v. Bonds*, 98 Wn.2d 1, 15, 653 P.2d 1024 (1982) (“[T]he anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary.” (*quoting State v. Hoyt*, 29 Wn. App. 372, 377-78, 628 P.2d 515 (1981))); *State v. Michielli*, 132 Wn.2d 229, 237, 937 P.2d 587 (1997) (when the words in a statute are clear and unequivocal, a court must apply the statute as written). In *Sweet*, the Supreme Court held that, although the assault charged was also an element of first degree burglary, the unambiguous anti-merger statute allowed the State to charge the two crimes separately and the trial court to punish them separately. *Sweet*, 138 Wn.2d at 479. Although no Washington court has explicitly held that the burglary anti-merger statute allows for separate punishment when burglary is the predicate crime of the felony murder, under *Sweet*, the clear legislative intent behind the burglary anti-merger statute compels such a result. Accordingly, Elmore is unable to show prejudice sufficient to raise a manifest constitutional error.

The State submits that the defendant was properly sentenced.

VI. CONCLUSION

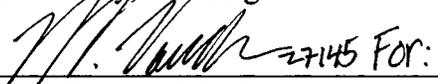
The trial court should be affirmed in all respects.

DATED this 17 day of June, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

 For:
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

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FILED
MAR 10 2009
Sherry W. Parker, Clerk, Clark Co

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

STATE OF WASHINGTON,)	No. 08-1-00813-4
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	(CrR 3.5)
)	
CHRISTOPHER PERKINS,)	
)	
Defendant.)	
)	

THIS MATTER came on regularly before the undersigned Judge of the above-entitled Court, on November 21, 2008, January 23, 2009, January 29, 2009, and February 25, 2009, for hearing on the admissibility of the statements of the defendant, pursuant to CrR 3.5. The State of Washington was represented by and through Deputy Prosecuting Attorney Anthony Golik. The defendant, Christopher Perkins, was present, and represented by and through his attorneys, George Marlton and Alfred A. Bennett. The Court considered the records and files herein, the testimony of the witnesses for the plaintiff and the defendant, and the exhibits admitted into evidence. The Court also considered the oral arguments of the parties. Based on this consideration, and being fully advised, the Court makes the following Findings of Fact:

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FINDINGS OF FACT

A. Undisputed Facts:

1. On May 19, 2008, Vancouver police officer Leonard Gabriel arrested the defendant, Christopher Perkins, on suspicion of involvement in an attempted home invasion robbery. The incident was alleged to have occurred on Friday, May 16, 2008, in Vancouver, Washington. Earlier in the day on May 16th, Perkins had participated in a trial in Clark County District Court. He was found not guilty by the jury in that case, then given a ride to his grandmother's home by his court-appointed attorney, Todd Pascoe.

2. On May 19, 2008, Gabriel observed the defendant driving a vehicle near the home of Perkins' grandmother, which is located on Council Bluff Way in Vancouver, Washington. Gabriel recognized Perkins from a booking photograph. The officer advised Perkins that he was under arrest, and the nature of the charges. Perkins was handcuffed and placed in the officer's patrol vehicle. He was then transported to the East Precinct of the Vancouver Police Department.

3. In a conference room at the East Precinct, Perkins met with Gabriel and Officer Jeffrey Wilken of the Vancouver Police Department. Wilken introduced himself to Gabriel, and described the nature of his interest in the case. He then asked Perkins for permission to tape record their conversation. The defendant agreed to allow the conversation to be recorded.

4. Wilken began the recorded conversation with Perkins at 12:58 p.m. Wilken asked Perkins to confirm on the recording that the defendant had given his permission for recording. Wilken then advised Perkins of his constitutional rights, using a standard

form. Wilken read the form to Perkins, and asked Perkins to initial the form as he read along. The defendant initialed each right, and indicated, both verbally and in writing, that he understood his rights and wished to speak to the officer. He then signed the form, and this was witnessed by Officers Wilken and Gabriel.

5. Wilken questioned Perkins from 1:01 p.m. through 1:24 p.m., concerning his whereabouts and activities on May 15 and 16, 2008. Perkins told Wilken about these activities in some detail, and described individuals he said could verify his whereabouts. Perkins did not ask to speak with an attorney during this time, and did not seek to terminate the interview.

6. At 1:24 p.m., Wilken asked to stop the tape, so that he could step from the room. Wilken left for approximately 20 minutes, to receive an update concerning other interviews in the case. During this period, Perkins remained in the conference room with Gabriel and engaged in some conversation.

7. Officer Wilken resumed the recorded interview at 1:45 p.m. He confirmed that Gabriel and Perkins were still in the room, and that Perkins agreed to continue to allow the interview to be recorded. Wilken conducted this portion of the interview with Perkins between 1:45 p.m. and 2:02 p.m.

8. Wilken confronted Perkins about the inconsistencies between his statement, and other information available to the officers. He asserted that Perkins was lying, and gave a detailed description of his theory of the sequence of events surrounding the attempted robbery. Wilken advised Perkins that he was in serious trouble if he maintained his story through trial, and forcefully asserted that a conviction would likely result in a third strike against him. In response to Perkins' question as to what he should

do, Wilken replied, "I want you to tell the truth. . .". He asserted that the defendant had a "responsibility to convince me why I should believe you and not them."

9. Perkins continued to assert that his involvement in the incident under investigation was minimal. He also expressed his reluctance to testify or provide information against others. The defendant then asked, "Well, could I talk to you without this [the tape recorder] on for a minute?" Wilken honored the request, and turned the tape recorder off at 2:02 p.m.

10. Perkins spoke with Gabriel and Wilken from 2:02 p.m. to 2:54 p.m. This interview was not recorded. During the conversation, Perkins made a number of statements incriminating himself, and indicating that he was involved in the robbery.

11. At 2:54 p.m., Wilken resumed recording the conversation with Perkins. The defendant agreed to this continued recording, and gave a detailed statement implicating himself in the attempted home invasion robbery under investigation. Perkins indicated that he was the driver of the vehicle used to transport two co-defendants to the scene of the robbery. He claimed that he left the robbery site without waiting to pick up the two men actually involved. The tape recorded statement ended at 3:15 p.m.

12. Wilken and Gabriel planned to take Perkins to the Clark County Jail following the interview. Perkins continued to speak with the officers after the first tape recorded statement. He indicated that portions of the statement were not accurate, and that he wished to go back on the record, in order to correct those statements. Wilken obtained a new tape, restarted recording at 3:37 p.m., and asked Perkins to confirm that he wished to make an additional taped statement. The defendant confirmed that he wished to make an additional statement. Wilken offered to readvise Perkins of his

constitutional rights. Perkins refused this offer, indicating "I remember them, sir". Perkins made additional statements between 3:37 p.m. and 3:50 p.m. In this statement, Perkins indicated that he was not the driver of the vehicle involved in the robbery. Instead, he stated that a co-defendant had driven, while Perkins and another individual had actually attempted the robbery.

13. After the second taped statement was completed, the defendant agreed to accompany Vancouver Police Officers Michael Chylack and Gabriel to a neighborhood near the scene of the incident. He pointed out an apartment, and asserted that he and a co-defendant had been at the apartment shortly after the robbery attempt. He also directed the officers to a playground, where items of clothing had been dropped.

14. During the entire taped portion of Perkins' questioning by Vancouver police officers, the defendant did not invoke his right to remain silent at any time. Perkins did not request the appointment of an attorney, and did not ask to contact counsel during the taped interviews. At one point during the interviews, Perkins mentioned Pascoe, his court-appointed attorney for the District Court trial. He did not ask the officers to contact Pascoe, and he did not ask that the interview stop until he had the opportunity to speak with Pascoe.

15. After advising the officers of the location of the apartment and the playground area where items were discarded, Perkins was transported to the Clark County Jail. He did not attempt to contact Pascoe, or any other attorney, prior to his first appearance in Clark County Superior Court on May 20, 2009. Sometime after his first appearance, Perkins spoke to Pascoe, but did not retain him in this matter.

B. Disputed Facts:

1. Perkins testified that he repeatedly asked the officers for the opportunity to speak with an attorney. He asserts that these requests were made prior to the beginning of the taped interrogation, and at each of the breaks from recording. Perkins indicated that he specifically asked to speak with Pascoe, and to retrieve Pascoe's number from his personal belongings and cell phone for that purpose. He testified that the officers repeatedly denied his requests. The officers denied that any requests for counsel were made during the non-taped portions of the interview.

2. Perkins also testified that he was advised by the officers that he would need to change his story, and implicate himself, before being allowed to contact an attorney or anyone else. He indicated that he was denied the opportunity to make phone calls, or to communicate with others, until he had made his statement. The officers denied in their testimony that these statements were made.

C. Conclusions as to the Disputed Facts:

1. The defendant's testimony concerning his requests for counsel was not credible. It is not reasonable to believe that Perkins made multiple requests to speak to an attorney while the tape recorder was off, and then dropped those requests whenever the recording was resumed. In addition, the defendant did not contact an attorney, or attempt to communicate with Pascoe, even after being given the opportunity to do so. The Court finds that no requests for contact with counsel were made.

2. The officers did not coerce Perkins into changing his statement. Wilken used very aggressive interrogation techniques during the tape recorded portions of the interview with Perkins. He asserted his belief that Perkins was lying to him, and that he

should tell the truth. There is no persuasive evidence that the defendant was forced to change his statement, to obtain access to other individuals, or that officers told him how to respond to their questions.

Based on the Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of these proceedings, and over the parties to this action.

2. The statements made by the defendant, Christopher Perkins, in response to custodial interrogation, were knowing, voluntary and intelligent. Perkins was able to understand the officer's questions, and to respond to them as he chose. At first, he chose to deny his involvement in the incident under investigation. Later, confronted with the evidence that implicated him, he chose to alter his statement, admitting his participation but minimizing his involvement. Finally, he decided to cooperate with officers, to give a more complete statement, and to point out the location of evidence which might implicate others. In each instance, the defendant made rational, calculating decisions as to what he should say.

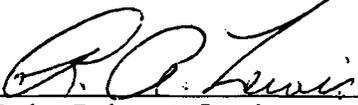
3. The defendant's statements were obtained without trick or coercion. The defendant was not threatened with consequences if he refused to waive his right to remain silent. The officers did not promise Perkins any benefit in exchange for making his statements.

4. Before custodial interrogation commenced, the defendant was advised of his constitutional rights, both orally and in writing. Perkins understood those rights, and

voluntarily agreed to waive them. The defendant did not seek to invoke his rights at any point, although he was advised that he could do so. The defendant did not request counsel, either appointed or retained, at any point during his interrogation.

5. Subject to the rules of evidence, the statements of the defendant, Christopher Perkins, made to law enforcement officers on May 19, 2008, are admissible.

DATED this 10th day of March, 2009.



Judge Robert A. Lewis

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FILED

SEP 02 2009

4:17pm

Sherry W. Parker, Clerk, Clark Co.

**Superior Court of Washington
County of Clark**

State of Washington, Plaintiff,

vs.

CHRISTOPHER AUSTIN PERKINS,
Defendant.

SID: WA18428776

If no SID, use DOB: 8/16/1982

No. 08-1-00813-4

09-9-06423-6 ✓

**Felony Judgment and Sentence -
Prison
(FJS)**

**Clerk's Action Required, para 2.1, 4.1, 4.3, 5.2,
5.3, 5.5 and 5.7**

Defendant Used Motor Vehicle

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon

guilty plea jury-verdict 9/2/2009 bench trial :

Count	Crime	RCW (w/subsection)	Class	Date of Crime
01	ATTEMPTED ROBBERY IN THE FIRST DEGREE	9A.08.020(3)/9A.56.190 /9A.56.200/9A.56.200(1) (a)(i) /9A.28.020(3)(b)	FB	5/19/2008
02	ATTEMPTED BURGLARY IN THE FIRST DEGREE	9A.08.020(3)/9A.52.020 /9A.52.020(1)(a) /9A.28.020(3)(b)	FB	5/19/2008
03	ASSAULT IN THE FIRST DEGREE	9A.08.020(3)/9A.36.011 /9A.36.011(1)(a)	FA	5/19/2008

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant used a **firearm** in the commission of the offense in Count 01, 02, 03. RCW 9.94A.602, 9.94A.533.

The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ . RCW 9.94A.602, 9.94A.533.

*Felony Judgment and Sentence (FJS) (Prison)(Nonsex Offender)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))*

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- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____, RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang-related** felony offense in which the defendant compensated, threatened, or solicited a **minor** in order to involve that minor in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang member** or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):**

	Crime	Cause Number	Court (county & state)
1.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv	Type of Crime
1	See attached criminal history					

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525)
- The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
01	8	IX-75%	81-108 Months	5 years	141-168 Months	10 YEARS	\$20,000.00
02	8	VII-75%	57.75-76.5 Months	5 years	117.75-136.5 Months	10 YEARS	\$20,000.00
03	8	XII	209-277 Months	5 years	269-337 Months	LIFE	\$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.
 Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

- below the standard range for Count(s) _____.
 - above the standard range for Count(s) _____.
 - The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
 - Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.
 - within the standard range for Count(s) _____, but served consecutively to Count(s) _____.
- Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

- That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.
- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

- The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

120 months on Count 1 120 months on Count 2
303 months on Count 3

- The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
- The confinement time on Count 01, 02, 03 includes 60 months as enhancement for firearm deadly weapon VUCSA in a protected zone On Each Count.
 manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: 4/23 Months

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Firearm Enhancements on Cts. II, III & IV shall be served consecutive to underlying crimes and each other.

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

Confinement shall commence immediately unless otherwise set forth here: _____

(b) **Credit for Time Served:** The defendant shall receive 471 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures

(c) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count 1 36 Months ~~36 months for Serious Violent Offenses~~
 Count 2 18 Months ~~18 months for Violent Offenses~~
 Count 3 18 Months ~~12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)~~

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol,
 have no contact with: Gary Lee Atkinson
 remain within outside of a specified geographical boundary, to wit:

not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.

participate in the following crime-related treatment or counseling services:

undergo an evaluation for treatment for domestic violence substance abuse
 mental health anger management, and fully comply with all recommended treatment.

comply with the following crime-related prohibitions:

Additional conditions are imposed in Appendix 4.2, if attached or are as follows:

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

<i>RTN/RJN</i>	\$ <u>NONE</u>	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
<i>PCV</i>	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
<i>PDV</i>	_____	Domestic Violence assessment	RCW 10.99.080
<i>CRC</i>	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ <u>250.00</u>	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
<i>PUB</i>	\$ <u>1,500.00</u>	Fees for court appointed attorney	RCW 9.94A.760
	\$ _____	Trial per diem, if applicable.	
<i>WFR</i>	\$ <u>5,446.00</u>	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ _____	DUI fines, fees and assessments	
<i>FCM/MTH</i>	\$ <u>500.00</u>	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
<i>CDF/LDI/FCD</i> <i>NTF/SAD/SDI</i>	\$ _____	Drug enforcement Fund # <input type="checkbox"/> 1015 <input type="checkbox"/> 1017 (TF)	RCW 9.94A.760

Felony Judgment and Sentence (FJS) (Prison)(Nonsex Offender)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2009))

\$ 100.00 DNA collection fee RCW 43.43.7541
 CLF \$ _____ Crime lab fee suspended due to indigency RCW 43.43.690
 FPV \$ _____ Specialized forest products RCW 76.48.140
 RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum) RCW 38.52.430
 \$ _____ Other fines or costs for: _____
 \$ _____ **Total** RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.
 is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with GARY LEE ATKINSON including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

GARY LEE ATKINSON (name of protected person(s))'s

home/ residence work place school

(other location(s)) _____

other location _____

for _____ years (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: _____

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly

payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Reserved

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

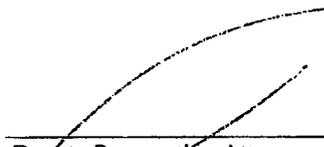
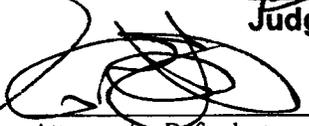
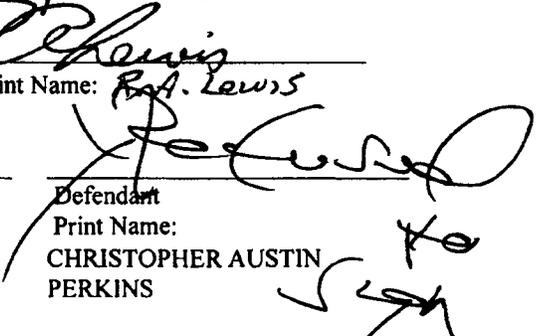
5.8 Other: _____

5.9 Persistent Offense Notice

The crime(s) in count(s) 01, 02, 03 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) _____ is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: September 2, 2009

 Deputy Prosecuting Attorney WSBA No. 25172 Print Name: Anthony F. Golik	 Attorney for Defendant WSBA No. 04736 Print Name: George A. Marlton	 Judge/Print Name: <u>Pat. Lewis</u> Defendant Print Name: CHRISTOPHER AUSTIN PERKINS
--	--	---

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.060. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

I, Sherry Parker, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____.

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

CHRISTOPHER AUSTIN PERKINS

08-1-00813-4

SID No: WA18428776
(If no SID take fingerprint card for State Patrol)

Date of Birth: 8/16/1982

FBI No. 998136JB0

Local ID No. 148972

PCN No. _____

Other _____

Alias name, DOB:

Race: B

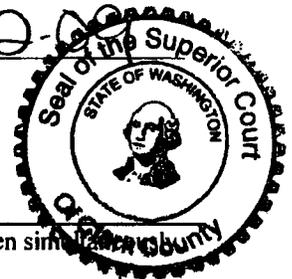
Ethnicity:

Sex: M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, Heather Hunt

Dated: 9-2-09



The defendant's signature:

X [Handwritten Signature]

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

CHRISTOPHER AUSTIN PERKINS,

Defendant.

SID: WA18428776

DOB: 8/16/1982

NO. 08-1-00813-4

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
01	ATTEMPTED ROBBERY IN THE FIRST DEGREE	9A.08.020(3)/9A.56.190/9A.56.200/ 9A.56.200(1)(a)(i) /9A.28.020(3)(b)	5/19/2008
02	ATTEMPTED BURGLARY IN THE FIRST DEGREE	9A.08.020(3)/9A.52.020/9A.52.020 (1)(a) /9A.28.020(3)(b)	5/19/2008
03	ASSAULT IN THE FIRST DEGREE	9A.08.020(3)/9A.36.011/9A.36.011 (1)(a)	5/19/2008

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
01	ATTEMPTED ROBBERY IN THE FIRST DEGREE	120 Days Months
02	ATTEMPTED BURGLARY IN THE FIRST DEGREE	120 Days Months

COUNT	CRIME	TERM
03	ASSAULT IN THE FIRST DEGREE	303 Days Months

These terms shall be served concurrently to each other unless specified herein: *total sentence is 423 Months*

The defendant has credit for 471 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

HEREIN FAIL NOT.

WITNESS, Honorable *[Signature]*

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE: 9/2/09

SHERRY W. PARKER, Clerk of the
Clark County Superior Court

By: *Heather Hunt*
Deputy



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

STATE OF WASHINGTON,
Plaintiff,

v.
CHRISTOPHER AUSTIN PERKINS,
Defendant

No. 08-1-00813-4

APPENDIX 2.2

DECLARATION OF CRIMINAL HISTORY

COME NOW the parties, and do hereby declare, pursuant to RCW 9.94A.100 that to the best of the knowledge of the defendant and his/her attorney, and the Prosecuting Attorney's Office, the defendant has the following undisputed prior criminal convictions:

CRIME	COUNTY/STATE CAUSE NO.	DATE OF CRIME	DATE OF SENTENCE	PTS.
THEFT 2 ((NOT FIREARM))	CLARK/WA 98-8-01282-5	11/17/1998		1/2
INDECENT LIBERTIES	CLARK/WA 97-8-00356-9	4/1/1997	5/14/1997	1/2
ASSAULT 2	CLARK/WA 98-1-02330-9	12/19/1998	2/16/1999	/
ROBBERY 1	CLARK/WA 01-1-00484-1	1/17/2001	7/18/2001	2
WEAPONS - POSSESSION BY PRISONER	CLALLAM/WA 03-1-00111-1	3/10/2003	5/16/2003	1
WEAPONS - POSSESSION BY PRISONER	CLALLAM/WA 03-1-00111-1	3/10/2003	5/16/2003	1
FELON IN POSSESSION OF WEAPON - RESTR WEAPON	MULTNOMAH/OR 070444818	4/22/2007	5/31/2007	/
HARASSMENT	MULTNOMAH/OR 070444818	4/22/2007	5/31/2007	/
STRANGULATION	MULTNOMAH/OR 070444818	4/22/2007	5/31/2007	/

*Subst
course of
conduct*

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

4 points total for prior Criminal History

DECLARATION OF CRIMINAL HISTORY
Revised 9/14/2000

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

DATED this 2 day of ^{September,} ~~June, 2008.~~ 2009

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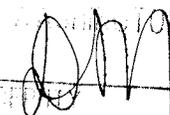
Defendant

George A. Marlton, WSBA#04736
Attorney for Defendant

Anthony F. Golik, WSBA#25172
Deputy Prosecuting Attorney

FILED
COURT OF APPEALS

10 JUN 21 AM 9:55

STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER AUSTIN PERKINS,
Appellant.

No. 39742-1-II

Clark Co. No. 08-1-00813-4

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On June 17, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

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

Catherine E Glinski
Attorney at Law
PO BOX 761
Manchester WA 98353

CHRISTOPHER AUSTIN PERKINS
DOC # 792462
Washington State Penitentiary
1313 N 13th Avenue
Walla Walla, WA 99362-1065

DOCUMENTS: Brief of Respondent

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


Date: June 17, 2010.
Place: Vancouver, Washington.