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COURT OF APPEALS

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STATE OF WASHINGTON

BY 

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

STATE OF WASHINGTON, RESPONDENT

v.

NORMAN WHITTIER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty Ann van Doorninck

No. 05-1-04496-1

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**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Whether the trial court abused its discretion by providing a Washington State pattern jury instruction which defendant proposed and did not take exception to ..... 1

    2. Whether the defendant has failed to show his counsel was ineffective when he has shown neither deficient performance nor actual prejudice ..... 1

B. STATEMENT OF THE CASE ..... 1

    1. Procedure ..... 1

    2. Facts ..... 3

C. ARGUMENT..... 11

    1. THE TRIAL COURT PROPERLY PROVIDED AN INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF THE DEFENDANT'S THREE PRIOR UNCHARGED ASSAULTS TO THE ISSUE OF WHETHER THE VICTIM'S FEAR WAS "REASONABLE." ..... 11

    2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING THAT HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE ..... 15

D. CONCLUSION ..... 35

## Table of Authorities

### State Cases

<i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn.2d 67, 92, 896 P.2d 682 (1995) .....	11
<i>In Re. Hubert</i> , 138 Wn. App. 924, 929-930, 158 P.3d 1282 (2007) .....	32
<i>Martini v. Boeing</i> , 88 Wn. App 442, 468, 945 P.2d 248 (1997) .....	11
<i>State v. Adams</i> , 91 Wn.2d 86, 90, 586 P.2d 1168 (1978) .....	26
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.3d 396 (1995).....	27
<i>State v. Boyer</i> , 91 Wn.2d 342, 345, 588 P.2d 1151 (1979).....	14
<i>State v. Clark</i> , 116 Wn. App. 1011, not reported in P.3, (2003).....	23
<i>State v. Daniels</i> , 87 Wn. App. 149 155, 940 P.2d 690 (1997) .....	27
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 175, 163 P.3d 786 (2007).....	25
<i>State v. Goebel</i> , 36 Wn.2d 386, 218 P.2d 300 (1950).....	25
<i>State v. Goebel</i> , 40 Wn.2d 18, 21, 240 P.2d 251 (1952), <i>overruled on other grounds by State v. Lough</i> , 125 Wn.2d 847, 860 n.19, 889 P.2d 487 (1995) .....	19
<i>State v. Griffin</i> , 100 Wn.2d 417, 418, 670 P.2d 265 (1983).....	29
<i>State v. Grisby</i> , 97 Wn.2d 493, 508, 647 P.2d 6 (1982).....	24
<i>State v. Hahn</i> , 100 Wn. App. 391, 398, 996 P.2d 1120 (2000) .....	11
<i>State v. Henderson</i> , 114 Wn.2d 867, 870, 792 P.2d 514 (1990) .....	14
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, <i>cert. denied</i> , 497 U.S. 922 (1986) .....	16
<i>State v. Lord</i> , 117 Wn.2d 829, 883, 822 P.2d 177 (1991).16, 17, 24, 26, 34	
<i>State v. Lough</i> , 125 Wn.2d 847, 853, 889 P.2d 487 (1995).....	20

<i>State v. Madison</i> , 53 Wn. App 754, 763, 770 P.2d 662 (1989) .....	18
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).....	17, 28
<i>State v. Myers</i> , 82 Wn. App. 435, 439, 918 P.2d 183 (1996), <i>aff'd</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	12
<i>State v. Piche</i> , 71 Wn.2d 583, 590, 430 P.2d 522 (1967) .....	26
<i>State v. Pirtle</i> , 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995) .....	20
<i>State v. Powell</i> , 126 Wn.2d 244, 259, 893 P.2d 615 (1995) .....	19
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009).....	33
<i>State v. Ragin</i> , 94 Wn. App. 407, 972 P.2d 519 (1999).....	21, 22
<i>State v. Rehak</i> , 67 Wn. App. 157, 165, 834 P. 2d 651 (1992).....	11
<i>State v. Russell</i> , 154 Wn. App. 775, 225 P.3d 478 (2010).....	25
<i>State v. Studd</i> , 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).....	14, 23
<i>State v. Thomas</i> , 123 Wn. App. 771, 779, 98 P.3d 1258 (2004) .....	26, 29

**Federal and Other Jurisdictions**

<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986).....	15
<i>Strickland v. Washington</i> , 466 U.S. 668, 689, 104 S. Ct. 2052 (1984).....	16, 17, 22, 24, 26, 27, 31
<i>United States v. Becker</i> , 720 F.2d 1033, 1037 (9th Cir.1983).....	12

**Constitutional Provisions**

Article 1, Sec. 22 of the Constitution of the State of Washington .....	15
Sixth Amendment.....	15, 35

**Statutes**

RCW 9A.46.020 .....21

**Rules and Regulations**

ER 105 .....12, 23

ER 404(b) .....12, 17, 18, 20, 22, 23, 24, 25

ER 701 .....33

**Other Authorities**

WPIC 5.30 .....12, 13, 23, 25

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

1. Whether the trial court abused its discretion by providing a Washington State pattern jury instruction which defendant proposed and did not take exception to.
2. Whether the defendant has failed to show his counsel was ineffective when he has shown neither deficient performance nor actual prejudice.

B. STATEMENT OF THE CASE.

1. Procedure

The Pierce County Prosecutor's Office filed an information under cause number 05-1-04496-1 charging Norman Floyd Whittier, hereinafter "defendant," with assault in the first degree against victim Keri Connelly, intimidating a witness who was John McDonald, and felony harassment of Connelly, McDonald and Kenneth Neal, occurring on September 12, 2005. CP 476-479. The State filed a Persistent Offender Notice based on defendant's prior convictions for assault in the first degree committed in 1973, and rape in the first degree in 1980. CP 486, 542-553.

On January 17, 2006, defendant's first attorney signed an order for a competency evaluation to determine the defendant's ability to understand the proceedings against him and to assist with his own defense.<sup>1</sup> CP 488-491. An evaluation of defendant's capacity to form a

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<sup>1</sup> The record does not specify who asked for the competency evaluation.

specific mental state at the time of the offense was not requested. Western State Hospital filed a forensic report with the court on April 4, 2006, concluding that defendant was competent. CP 496-507. The trial court entered an order of competency on April 4, 2006. CP 494-495.

On October 31, 2006, this case was assigned for trial. The parties reached a resolution on November 2, 2006, and defendant entered a *Newton* plea. CP 528-529, 531-538. This agreement avoided a third strike conviction for defendant. At his sentencing on November 6, 2006, defendant asked to withdraw his plea based on his misunderstanding of the sentence. CP 1-18. The judge denied the motion and sentenced defendant. CP 542-553. Defendant appealed, and the case was remanded for a new hearing on defendant's motion to withdraw his plea. CP 1-18. The trial court granted his motion on April 10, 2009, and the State reinstated the original charges in the second amended information. CP 54, 55-56.

Defendant was brought to trial before the Honorable Kitty-Ann Van Doorninck on October 21, 2009. CP 207. Defendant's attorney filed proposed jury instructions, including a standard limiting instruction. CP 263-270. That instruction was slightly modified and accepted by defense without exception. 3 RP 427. The jury returned verdicts of guilty on the lesser included crime of assault in the second degree, intimidating a witness, and felony harassment. CP 275, 278, and 279. The jury also returned a special verdict finding that the defendant and the victim had a domestic relationship. CP 280-281. Based on defendant's prior

convictions for assault in the first degree and rape in the first degree, the conviction for assault in the second degree with domestic violence constituted the defendant's third most serious offense.

Defendant was sentenced on December 4, 2009. CP 450-463. The judge ordered life without parole on the assault in the second degree charge, 41 months on the witness intimidation charge, and 14 months on the felony harassment charge. CP 450-463. Defendant timely filed this notice of appeal. CP 469.

## 2. Facts

Victim Kerri Connelly testified that she met defendant through a friend in 2004, and rented a room in his house. 2 RP 149, 206. Connelly did not have a romantic relationship with defendant. Connelly started a landscaping business and sometimes defendant worked with her on the larger jobs. 2 RP 149, 152. When Connelly needed more help with the landscaping jobs, defendant suggested that she ask Kenneth Neil to work with her; Neil agreed. 2 RP 155. Connelly did not have a romantic relationship with Neil. 2 RP 155-157.

Connelly recounted that initially defendant did not take issue with her working with Neil, but later it caused him to get angry and he would

accuse Connelly of having an affair with Neil. 2 RP 157-158. Tensions were increasing between Connelly and defendant. 2 RP 159.

In late August, 2005, Connelly was leaving the house and defendant became angry. 2 RP 163, 217. Connelly went to her own room but defendant kicked in the door, grabbed her by the throat and put her on her bed. 2 RP 162. Defendant was on top of Connelly, saying “I could kill you” or words to that effect. 2 RP 162, 217. The incident, which lasted five or ten minutes, scared Connelly. 2 RP 162-163. Defendant later apologized to Connelly. 2 RP 163. Connelly forgave him, and she stayed at the house. 2 RP 164.

In his testimony, John McDonald, defendants’s co-worker, recalled that Connelly told him about this assault afterward. McDonald recalled that at the time Connelly had a bruise on her face and was holding her ribs. 2 CP 245.

Connelly testified that approximately three weeks after the first incident she was in the kitchen with defendant when he got mad and hit her on the side of her head, knocking her down. 2 RP 164-166, 218. Afterward defendant was sorry, upset, and apologetic. 2 RP 167. The two discussed whether defendant was taking the medication which his counselor gave him to keep him calm. 2 RP 167, 213-214, 216-217, 219, 223.

Connelly recounted that defendant assaulted her a third time just prior to September 12, 2005. Neil and Connelly had just returned home from their work site in Gig Harbor to find defendant in a furious mood. 2 RP 168-169, 220. Defendant grabbed Connelly by the throat and threw her on the loveseat. Neil ran into the house to intervene; when defendant asked him “Do you want a piece of this?” Neil walked away. 2 RP 170. Defendant hit Connelly in the head with a closed fist. The assault left her with a bump on her head, a bruise and marks on her throat. 2 RP 170. Connelly believed that defendant was off his medications at this time. 2 RP 221-222.

John McDonald recalled that Connelly told him about the third assault. 2 RP 177. Defendant came out to the Gig Harbor jobsite the night of the third incident. There, defendant and McDonald had a discussion about the assaults. 2 RP 177, 246. Defendant admitted to McDonald that he had hit Connelly, and that Neil had come to her defense. 2 RP 247. Defendant stated that he threatened Neil, “Do you want some of this?” and Neil backed off. Defendant laughed about Neil’s retreat. 2 CP 247.

Connelly testified that she spoke with defendant before September 11<sup>th</sup>, and told him that this was escalating, that it was not working, and that she was going to stay at the job site. 2 RP171. Defendant said he was sorry, and he thought his problem was that he kept going off his

medications. 2 RP 172. Connelly described defendant as upset and “on the edge.” 2 RP 175.

Connelly told the jury that she worked with Neil and McDonald at the job site on September 11, 2005. 2 RP 177. That evening, she and Neil went to defendant’s house to get more of her belongings because she was moving out. 2 RP 178. Defendant was there and argued with Connelly as she moved her belongings from the house to her truck. 2 RP 179. Connelly sensed that she was going to get hurt so she drove away in her truck. 2 RP 180. Defendant hit the hood or window of the truck with his fist as she left. 2 RP 181.

McDonald testified that he was at the job site at 10 p.m. on September 11, 2006, when he got a phone call from defendant. Defendant said that Connelly had been at the house and that he had almost hit her again. 2 RP 248. Defendant promised McDonald that he would not come out to the job site that night. 2 RP 251. Just after the call from defendant, Connelly and Neil returned to the job site. 2 RP 182.

McDonald saw that Connelly was terrified of defendant. For her safety, he and Neil spent the night with Connelly in a trailer at the job site. 2 RP 184. McDonald recalled that Connelly woke him up about 4 a.m. because she believed that defendant was outside. 2 RP 252. She was frightened and shaking. 2 RP 253.

McDonald told the jury that he opened the door of the trailer for defendant. 2 RP 186-187, 253-254. McDonald asked defendant why he had come out there, and defendant replied that he needed to talk with Connelly now, even if he had to go through McDonald to do so. 2 RP 186-187, 253-254. McDonald was afraid of defendant and let him into the trailer. 2 RP 254. Defendant was agitated, so McDonald told him to calm down. 2 RP 255.

Connelly testified that she thought defendant was very angry. He asked her to come back to the house. 2 RP 188-189. Connelly told defendant to calm down and go home, but he didn't. 2 RP 189.

McDonald testified that he observed this conversation. 2 RP 255. He told defendant to calm down, but defendant turned, raised his fist and asked "You want some of this too?" 2 RP 255. McDonald saw defendant hit Connelly hard with his fist on the left side of her face. McDonald then fled out the back door. 2 RP 255, 260. Outside, McDonald could hear defendant tell Connelly, "I know he's calling 911. You better get his ass back in here or you're all dead." 2 RP 256. McDonald did call 911 and while making this call he heard Connelly screaming. 2 RP 257-258.

Connelly recalls that after defendant hit the side of her face with his fist, McDonald fled. 2 RP 190-191. Defendant then beat Connelly repeatedly with his fist on her face and body, while stating "I'll kill you, I'll kill you all." 2 RP 191, 230. Several times he choked her until she

could not breathe. 2 RP 203. Based on their history, Connelly took his threats to kill her seriously. 2 RP 192.

McDonald recalled that while he was outside waiting for the police to arrive, he could hear Connelly screaming as defendant beat her. 2 RP 258. During this time, the defendant also came out onto the porch looking for him, and calling for him to come back in. 2 RP 259. McDonald was afraid of defendant and believed defendant's threat to kill him if he called 911. 2 RP 259.

Connelly testified that as defendant beat her, she fell onto Neil, which woke him. He got up and managed to get defendant out the door. 2 RP 192. Defendant kept beating on the door, saying "You better come out or I'll find you." 2 RP 193. Connelly was afraid he would kill her. 2 RP 204. Defendant then sped away in his truck, saying he would kill them all. 2 RP 193-194.

Deputy Carlson told the jury that he responded to the 911 call and arrived at the trailer at 4:30 to 4:40 a.m. on September 12, 2005. 3 RP 307, 312. He contacted Connelly who was trembling and so terrified that she could barely speak. 3 RP 312. Deputy Carlson stated that it is rare to see anyone that frightened. 3 RP 312. The EMTs transported Connelly to St. Joseph's Hospital so that she could be treated for her injuries. 3 RP 319. McDonald stayed with the police at the site until about 6:30 a.m. He was afraid defendant would return to kill them. 2 RP 261-262.

Connelly listed her injuries; one of her teeth had been knocked out, her eyes were blackened and swollen shut, and she had scratches. 2 RP 195-196. 3 RP 389. She had choke marks on her neck. 2 RP 203. Photos which were taken of her injuries were admitted into evidence. 3 RP 315-516.

Deputy Waterman testified that he was on duty at the County/City Building on September 12, 2005, when defendant came to the Sheriff's Office to turn himself in for beating Connelly. 2 RP 3 RP 298. Defendant told Deputy Waterman that if he stayed out he would just go and do it again. He stated that it was best if he got locked up somewhere for a while, and that "[S]he didn't deserve that." 3 RP 298-301.

Defendant was interviewed by Deputy Decker. 3 RP 359-362. Deputy Decker testified that defendant told him that he had found a note in this house from Connelly stating that she was moving out. This angered him, and despite the fact that he had promised McDonald he would not go the job site, he went anyway in the early morning. 3 RP 362-363. When Deputy Decker asked what he did to Connelly, defendant answered "I'm going to say I slapped her. I'll say that. I'll say I slapped her." 3 RP 364. Defendant then demonstrated for Deputy Decker how he had backhanded Connelly with a closed fist. 3 RP 364. Deputy Decker testified that

defendant admitted that he had assaulted Connelly on three to four prior occasions. 3 RP 365. Defendant told the deputy that he was sorry that he had gone to the job site, and that he had broken a promise not to go. 3 RP 367. Defendant seemed rational and calm during the interview. 3 RP 367. Defendant affirmed that Connelly had no injuries to her face when he went to the job site that morning. 3 RP 366.

Defendant declined to testify on his own behalf.<sup>2</sup> 3 RP 424-425. Defendant requested that four witnesses testify on his behalf. These witnesses were present on the first day of trial, and defense counsel presented an offer of proof for the court to assess whether they had relevant evidence. The court, after listening to the proffers, determined that only two witnesses had relevant information. Those two witnesses testified for defense at trial. One witness testified that when she visited defendant's house in June of 2005, Connelly was missing two teeth. 3 RP 409-411. The second witness was a neighbor who testified that Connelly had missing teeth prior to September 11, 2005. 3 RP 416.

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<sup>2</sup> When asked by the court whether defendant wanted to testify at trial, he stated that he would let his attorney be his mouthpiece. 3 RP 423-425. This contradicts his statement at sentencing that he "did not get to talk." 3 RP 517.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY PROVIDED AN INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF THE DEFENDANT'S THREE PRIOR UNCHARGED ASSAULTS TO THE ISSUE OF WHETHER THE VICTIM'S FEAR WAS "REASONABLE."

A trial court's decision to give a specific jury instruction is reviewed for an abuse of discretion. *Martini v. Boeing*, 88 Wn. App 442, 468, 945 P.2d 248 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or imposed for untenable reasons. *State v. Hahn*, 100 Wn. App. 391, 398, 996 P.2d 1120 (2000). The trial court has considerable discretion as to how the instructions to the jury will be worded. *State v. Rehak*, 67 Wn. App. 157, 165, 834 P. 2d 651 (1992). There is no abuse of discretion where the instructions (1) permit the parties to argue their theory of the case; (2) are not misleading; and (3) properly inform the jury of the applicable law, when read as a whole. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Further, instructions are sufficient if, when considered as a whole, they are readily understood and are not misleading to the ordinary mind. *Id.* 165.

In Washington, when evidence is admissible for one purpose, but inadmissible for another, a trial court should grant a criminal defendant's request for limiting instructions. ER 105 provides:

When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

When evidence is admitted under ER 404(b), the court should give a limiting instruction to mitigate the prejudicial affect of the evidence. *See State v. Myers*, 82 Wn. App. 435, 439, 918 P.2d 183 (1996), *aff'd*, 133 Wn.2d 26, 941 P.2d 1102 (1997). Limiting instructions benefit the defendant by removing the possibility that the jury might draw improper inferences from the evidence or proceedings. *United States v. Becker*, 720 F.2d 1033, 1037 (9th Cir.1983).

The Washington Pattern Jury Committee (WPIC) has proposed jury instructions. WPIC 5.30 deals with evidence limited as to purpose;

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of \_\_\_\_\_ and] may be considered by you only for the purpose of \_\_\_\_\_. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

The State has found no case law which challenges the language on this instruction.

Defense proposed a slight modification of WPIC 5.30 to be read regarding the defendant's prior assaults on Connelly. The proposed instruction read:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you only for the purpose of assessing Kerri Lee Connelly's state of mind on September 12, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 263-270, 3 RP 382, 1 RP 137, Appendix A. This same jury instruction was given by the trial court with the modification that it included the name of John McDonald, and the date of the incident.<sup>3</sup>

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you only for the purpose of assessing both Kerri Connelly's state of mind and John McDonald's state of mind on the 12<sup>th</sup> day of September, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 215-257, instructions numbered 6 and 34, Appendix B. Other than the inclusion of McDonald's name, the judge gave the jury instruction as proposed by defense. Defendant did not take exception to the instruction as given. Defendant is precluded from now claiming he was

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<sup>3</sup> The charge of witness intimidation does not have an element relating to the victim's state of mind or reasonable fear. CP 215-257, instruction six.

prejudiced by a limiting instruction which he proposed and accepted. The doctrine of invited error prohibits a party from setting up an error at trial, and then complaining of it on appeal. *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). “[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (*emphasis omitted*) (*quoting State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)).

*Henderson* involved erroneous WPIC instructions proposed by a defendant who complained on appeal that it was incorrectly given. The Supreme Court of Washington held in *Henderson* that “even if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error.” *Henderson, Supra* at 870.

This case falls squarely within the doctrine of invited error. Therefore, defendant is barred from challenging the propriety of the jury instruction he requested, drafted and accepted. *Henderson* is directly on point. “There can be no doubt that this is a strict rule, but we have rejected the opportunity to adopt a more flexible approach.” *Id.* at 872.

The limiting instruction given by the court merely completed the blanks in the instruction proposed by the WPIC. The instruction prevented unfair prejudice by telling the jury that the evidence of prior

assaults had been admitted for a limited purpose, and was not to be considered for any purpose other than the victim's state of mind. CP 236-270.

The trial court's decision to give this model instruction was not manifestly unreasonable or untenable. Even if the limiting instruction had contained an error, defendant would still have been barred by the doctrine of invited error from challenging the instruction he proposed on appeal, and would be limited to making a claim of ineffective assistance of counsel claim.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING THAT HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN THIS CASE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The U.S. Supreme Court has stated that "the essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986). In determining whether defense counsel was ineffective, the judicial scrutiny of counsel's performance must be

highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052 (1984).

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The *Strickland* test has two prongs, both of which must be met by defendant. The first prong is:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" as guaranteed to the defendant by the Sixth Amendment.

The Washington State Supreme Court gave further clarification to the application of the first prong of the *Strickland* test. The Supreme Court in *State v. Lord* stated:

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If defense counsel's trial conduct can be characterized as legitimate trial strategy or

tactics, then it cannot serve as a basis for a claim of ineffective assistance of counsel. *Id.* Because the presumption runs in favor of effective representation, the defendant must show from the record an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

The second prong of the *Strickland* test is:

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Under the second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lord, Supra at 883-884*. Because the defendant must prove both prongs of *Strickland*, it may be found that he did not meet his burden based upon a lack of prejudice, without determining if counsel's performance was deficient. *Id.*

Defendant challenges the effectiveness of his counsel on three issues. First, he argues that his attorney was ineffective when she did not object to the admissibility of 404(b) evidence regarding his three prior

uncharged assaults against Connelly. Second, he finds fault with the instruction his attorney drafted to limit the purpose for which the jury considered the 404(b) evidence. Third, he alleges that his attorney was ineffective for failing to pursue a diminished capacity defense. When viewed in light of all the circumstances, counsel was reasonably professional in her trial tactics and strategies. Nor has defendant shown that prejudice resulted or that it affected the outcome of his trial.

- a. Defendant Received A Fair Trial Since His Three Prior Uncharged Assaults Against This Victim Would Have Been Admitted Even Over His Attorney's Objection.

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App 754, 763, 770 P.2d 662 (1989). In order to show ineffective assistance of counsel, defendant must show that his counsel failed to make a meritorious objection to the admission of the State's 404(b) evidence.

Evidence of prior bad acts may be admissible pursuant to ER 404(b) which allows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

But "[t]his list of exceptions is not necessarily exclusive, the true test being whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 860 n.19, 889 P.2d 487 (1995). Evidence is relevant and necessary if the purpose for admitting it is of consequence to the action and makes the existence of the identified fact more probable. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Defendant's prior uncharged assaults were relevant to the felony harassment charge.

The State sought to admit evidence to the jury of defendant's three prior uncharged assaults which he committed against victim Connelly. "Reasonable fear" is an element of felony harassment. This evidence was relevant because it showed it was reasonable for Connelly and McDonald to be afraid of the defendant. 1 RP 133-135, CP 217-257, instruction 6. "Reasonable fear" is an element of felony harassment. Therefore, the prior assaults were relevant and necessary to prove those charges against defendant.

When the State seeks to admit evidence of other crimes, wrongs or acts under ER 404(b), the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

All the prongs of *Pirtle* were met in this case. 1 RP 135-137. First, defendant admitted to his prior assaults against Connelly when he turned himself in to the police. 3 RP 364-365. He also admitted to McDonald that he had assaulted Connelly in the past. 2 RP 247-249. Second, defense stated on the record that the evidence was admissible to explain and prove the victim's "reasonable fear" of defendant, which is an element of felony harassment. 1 RP 133-134, CP 217-257, instruction 6. Third, the "logical relevance" was that the evidence of the prior assaults explains the reasonableness of the victim's fear of defendant, an element of the felony harassment charge. 1 RP 133-135.

Fourth, defense addressed the balancing test on the record, and concluded her with opinion that the probative value of the evidence outweighed its prejudice, so the 404(b) evidence was admissible. 1 RP 134-135. All the prongs of the *Pirtle* test for the admissibility of the three prior uncharged assaults were met. This evidence was admissible and

would inevitably have been presented to the jury, even over defense counsel's objections.

Defendant now argues that his trial attorney should have opposed the admission of his three prior uncharged assaults. His objection fails because the decision to object or not is a "classic example" of trial strategy. The failure to object constitutes ineffective assistance only in egregious circumstances. This circumstance was not egregious since the State's evidence was admissible regardless of defense challenge.

As shown by *State v. Ragin*, 94 Wn. App. 407, 972 P.2d 519 (1999), the evidence was clearly admissible. In this case, Ragin and the victim were acquaintances. *Id.* at 409. Ragin had told the victim that he could build bombs, had access to guns and ties to organized crime, and that he could level the City Church and "waste" the pastors. *Id.* at 410. Later, Ragin called the victim from jail wanting the victim to post bail for him. *Id.* When the victim refused, Ragin threatened the victim by telling him he would murder him and "take care of" his family. *Id.* Ragin was charged with felony harassment under RCW 9A.46.020. The trial court admitted evidence of the prior bad acts that Ragin had told the victim about to prove the reasonableness of the victim's fear. The Court of Appeals, Division I, affirmed the conviction. *Id.* at 413.

In *Ragin*, the court was mindful that a jury may not objectively believe that a victim was placed in reasonable fear unless the entire context of the relationship is disclosed. *Id.* at 412. The court also

recognized that the evidence was prejudicial to Ragin, and noted:

“Although [it] may have put Ragin in a bad light before the jury, the evidence was necessary to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect.” *Id.*

*Ragin* is analogous to the instant case. The 404(b) evidence was properly admitted because it is highly probative of Connelly’s and McDonald’s state of mind, which is an essential element of the felony harassment charge. Any argument that the 404(b) evidence was not admissible would have been meritless. Defense counsel’s agreement that the evidence was admissible was a reasonable decision, neither erroneous nor defective.

Because defendant has not shown that his counsel erred or that her performance was deficient, he fails to meet the first prong of *Strickland* and cannot prevail in his claim that she was ineffective. Even if defendant had objected to the admission of the three prior uncharged assaults, this evidence was relevant and necessary to prove an essential element of the charge defendant faced. CP 520-523 and 61-134. This evidence would properly have been admitted pursuant to ER 404(b), and over defendant’s objections. An opposition to its admissibility would not have succeeded. Therefore, no prejudice accrued to defendant when his counsel acceded to the admissibility of this evidence. Defendant has failed to meet either prong of *Strickland*.

b. As Defendant's Counsel Effectively Drafted An Adequate Limiting Instruction Which Followed The Format Of The Washington Practice Instruction Committee, Defendant Fails To Show Deficient Performance.

As outlined in section 1 of this brief, evidence of defendant's three prior assaults on victim Connelly were admitted in this case pursuant to ER 404(b). ER 105 instructs a judge to grant a limiting instruction when evidence presented to a jury is admissible for one purpose but not for another. The 404(b) information admitted in this case meets that definition.

Defense now argues that the instruction his attorney drafted and offered to limit the jury's use of the 404(b) evidence was inadequate. (*See* jury instruction in section 1, page 12.) While the invited error doctrine discussed in section one, above, prevents a challenge to a jury instruction which was proposed by the defendant, it does not prevent a challenge based on ineffective assistance of counsel. *State v. Clark*, 116 Wn. App. 1011, not reported in P.3, (2003), *citing State v. Studd, supra*.

In *Studd*, the Washington State Supreme Court rejected the claim that a defense counsel could be ineffective for proposing a jury instruction which was based on an unchallenged WPIC instruction. WPIC 5.30 has not been challenged. Since requesting a jury instruction based upon an unchallenged WPIC does not fall below the objective standard of effective representation, defendant cannot sustain his burden of meeting both

prongs of *Strickland*. In this event, the court need not consider the “prejudice” prong of the *Strickland* test. *Id.* at 551.

Defense argues that the limiting instruction in this case did not specify that the 404(b) evidence was to be considered only when deliberating of the felony harassment charge, so the jury could have used the evidence of the prior assaults when deliberating on the assault charge. Defendant provides neither rationale nor evidence to support this claim. Nor does he identify an element of assault for which Connelly’s or McDonald’s state of mind would have been at issue.

“[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.”

*State v. Grisby*, 97 Wn.2d 493, 508, 647 P.2d 6 (1982).

Defendant has not shown evidence sufficient to overcome the presumption that his counsel was effective in giving a model WPIC. *Lord, supra* at 883. The purpose of the instruction was readily apparent from reading it. The pattern limiting instruction directs the jury to consider the assaults only for the victims’ state of mind. CP 215-257. The assault and intimidation charges have no elements regarding the victims’ state of mind. The jury could not have used the limiting instruction for

any purpose other than determining the victim's state of mind on the felony harassment charge.

Defense cites *State v. Russell*, 154 Wn. App. 775, 225 P.3d 478 (2010) as establishing a "mandatory requirement" that a trial court provide a limiting instruction which "**clearly**" explains the purpose of the instruction and the limitations." Defense Brief at page 19. Defense has taken this phrase out of context and added emphasis inappropriately. The *Russell* court stated:

...the record failed to support a contention that the jury used the ER 404(b) evidence for an improper purpose; **as the limiting instruction was given clearly and repeatedly** and a jury is presumed to follow the trial court's instructions.

*Russell, supra at 785. Russell* does not set forth a mandate that an instruction be "clear" as to its purpose.

Defense implies *Russell* gets this mandate from *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). *Foxhoven* did not even address the clarity of the limiting jury instruction given in that case. Defense also cites *State v. Goebel*, 36 Wn.2d 386, 218 P.2d 300 (1950). *Goebel* was decided in 1950. Its requirements for appropriate limiting instructions are incorporated in WPIC 5.30 which was used in this case.

The proposal and acceptance of a WPIC is reasonable professional conduct. Defendant has not shown that his counsel was ineffective. Furthermore, defendant has pointed out no prejudice which accrued to him

because this instruction was given. Defense counsel's representation in this case was adequate and a new trial is not warranted.

c. Defense Counsel's Decision To Present A General Denial Defense Was A Legitimate Trial Strategy And Cannot Serve As The Basis For A Claim Of Ineffective Assistance Of Counsel.

"There are countless ways to provide effective assistance in any given case." *Strickland supra* at 689. The law, accordingly, gives defense attorneys considerable latitude and flexibility to choose a trial strategy. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). So long as counsel's decision to present a "general denial" defense can be characterized as a legitimate trial strategy, then defendant can not provide evidence sufficient to overcome the presumption that his trial counsel was ineffective. *Lord, supra* at 883, *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). There are several legitimate reasons why a diminished capacity defense is not appropriate in this case. If even one of these represents a legitimate trial strategy, defendant cannot meet the first prong of *Strickland*.

First, diminished capacity is a defense which may be used when either "specific intent" or "knowledge" is an element of the crime charged. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004).

Washington recognizes three forms of assault, (1) assault by battery, (2)

assault by attempt to cause great bodily injury, and (3) assault by placing the victim in reasonable apprehension.<sup>4</sup> Assault by battery does not require specific intent to inflict harm or create apprehension. Battery requires the general intent to do the physical act constitution assault.<sup>5</sup> *State v. Daniels*, 87 Wn. App. 149 155, 940 P.2d 690 (1997).

Defendant was convicted of assault in the second degree and felony harassment. Assault in the second degree requires a *mens rea* of general intent to commit an assault, and of recklessness. CP 215-257, instruction number 18. It does not require evidence of “specific intent.” Felony harassment has a mental element of “knowingly.” CP 215-257, instruction number 34.

The defense of diminished capacity is not available for use against crimes which have a *mens rea* of general intent or recklessness. Therefore, counsel can not be branded as ineffective for not presenting this defense. Since defendant has failed to meet the first prong of *Strickland*, this Court need not decide whether defendant was prejudiced by a defense of “general denial.”

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<sup>4</sup> Defendant cites *State v. Byrd* which concerns assault by apprehension, where “assault is committed merely by putting another in apprehension of harm whether or not the actor intends to inflict that harm. 125 Wn.2d 707, 712, 887 P.3d 396 (1995).

<sup>5</sup> “Specific intent” is an element of assault in the first degree, and assault in the fourth degree, charges on which defendant was acquitted. CP 215-257.

*Assuming arguendo* that the defendant had been entitled to a diminished capacity defense, this Court would next decide whether his counsel's decision not to present a diminished capacity defense was a legitimate trial strategy. The fact that a diminished capacity defense was not presented by either defendant's first or his second counsel leads to the conclusion that a legitimate reason existed to forego this defense. CP 519-519, 58-60. Defendant has not provided additional evidence to defeat the presumption that counsel's decision not to pursue a diminished capacity defense was tactical.

Second, defendant has not shown that he did in fact have a viable diminished capacity defense. Defense cites testimony in the record mentioning that defendant was not taking his medications which calm him during the time he committed these assaults. There was no indication in the record of what the medication is or what it was used for.<sup>6</sup> Defendant may not supplement the record on direct appeal. *McFarland, supra at* 335. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so

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<sup>6</sup> 2 RP, 213-214 and 218-219 indicate that defendant was not taking his medications during two of the prior assaults. There is no evidence that he was not on his medications on the date of this assault. 2 RP 167 refers to medication he took for pain after he underwent surgery in early 2005.

is through a personal restraint petition. As it stands, the trial record does not contain sufficient evidence to justify a diminished capacity defense.

Third, defendant stated in his Forensic Psychological Report that he was “not interested in pleading not guilty by reason of insanity.” CP 496-507. To present a diminished capacity defense,

“there must be substantial evidence of such a condition, [and] the evidence must logically and reasonably connect the defendant’s alleged mental condition with the asserted inability to form the required specific intent.”

*State v. Griffin*, 100 Wn.2d 417, 418, 670 P.2d 265 (1983). *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). Defendant is not entitled to a diminished capacity instruction absent any showing that he was mentally impaired on the date of this incident.

At trial, defendant offered no expert witness to testify about his mental state at the time of the assault. Defendant’s reluctance to cooperate would be a legitimate reason to forego a diminished capacity defense. No reasonable professional attorney would request a jury instruction regarding diminished capacity given an uncooperative client and absent expert testimony.

Fourth, this case teems with facts which support the conclusion that defendant was able to form intent on September 12, 2005. The evidence

was that defendant called McDonald on September 11<sup>th</sup>, and admitted that he has just tried to assault Connelly. 2 RP 248. Defendant knew that he was likely to assault Connelly again. He promised he would not see Connelly that night so that she would be safe. 2 RP 182. Despite this foresight, he went to see Connelly. 2 RP 186-187, 253-254, 3 RP 362-363. When he arrived at her work site, McDonald tried to keep him from seeing Connelly. Defendant threatened to assault McDonald if he did not get out of his way. 2 RP 186-187, 253-254. Defendant also told McDonald that he better not call 911. 2 RP 256. Why would defendant worry that there would be a 911 call unless he anticipated an assault, or one was currently taking place.

On September 12<sup>th</sup>, defendant turned himself into police for “beating his girlfriend.” His statements to Deputy Decker indicate that he recalled the morning’s events, but he tried to minimize the seriousness of the injury he had inflicted on Connelly. He stated that if he were not in custody he would just do it again. He admitted to prior assaults, even though he felt remorse afterward. He never commented on his state of mind during the assault. In this case, the State presented sufficient evidence to disprove any theory of diminished capacity.

Fifth, if defense counsel had put forth a diminished capacity defense, evidence about defendant’s state of mind would have been

admissible in trial. This may have further prejudiced the jury against defendant. Defendant's psychological exam prepared on the issue of his competency was rife with his statements such as "I got so much hate inside me" and "Yes, I did a crime but I don't think it was so bad", as well as information about his inability to control his rage and his lack of remorse about the injuries his victims suffered. CP 496-507. There is no reason to believe that a reasonable jury would have heard this information and decided to acquit him of these crimes. Given the statements made by defendant in his psychological evaluation, and the evidence of his behavior during the assaults, the decision against opening the door to this evidence is a legitimate trial strategy.

Defendant's arguments that his attorney was ineffective fail because a general defense was her only legitimate trial strategy. Defendant has not shown evidence in the record that diminished capacity was a viable defense. Defendant has not met the first prong of *Strickland*, so his argument that his counsel was ineffective fails.

Defendant has failed in his burden to show that his counsel's decision to present a "general denial" defense was not reasonable professional judgment. Defendant must meet both prongs of *Strickland*, which demands that defendant also show that his counsel's deficient performance prejudiced the defense. Because defendant has not met the

first prong of Strickland, he cannot meet his burden to show that his counsel was ineffective.

Defense cites *In Re Hubert* and *State v. Powell* to support her argument that defense counsel's representation was deficient for failing to raise a diminished capacity defense. *Hubert* was a collateral attack, a process which allows defendant to present evidence to supplement the record in order to support his claim. Hubert was allowed to supplement the trial record by obtaining a post trial statement from his attorney that bolstered his claim of deficient performance. In this direct appeal, defendant must rely on the evidence within the trial record to support his argument.

In *Hubert*, the defense counsel admitted that he had not been aware that the law allowed a "reasonable belief" defense to a rape charge. *In Re. Hubert*, 138 Wn. App. 924, 929-930, 158 P.3d 1282 (2007). The *Hubert* court stated that counsel's failure to investigate the relevant law could not be characterized as a legitimate trial tactic, and amounted to deficient performance. This trial record shows no evidence that defendant's attorney was unaware of the defense of diminished capacity.

Powell's attorney presented evidence that though the victim was intoxicated, his client still held a reasonable belief that she was capable of

consenting to sexual intercourse with him.<sup>7</sup> *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009). On appeal, Powell argued that his attorney was ineffective for not requesting a jury instruction on his reasonable belief. Division 2 of the Court of Appeals found numerous facts in the record that would support Powell's "reasonable belief" defense, and that his attorney's failure was indeed ineffective for failing to request a "reasonable belief" instruction. *Powell* is not analogous to this case because defendant has not shown substantial evidence in the record to substantiate his theory of diminished capacity.

Defendant has not shown that there was sufficient evidence of diminished capacity to entitle him to present this defense. Again, the defendant stated in his psychological evaluation that he would not pursue a mental defense. CP 496-507. He has not established any other reason beyond that for the absence of a diminished capacity defense in this case.

Even had defense counsel presented a diminished capacity defense, there is no reasonable possibility that the presentation of this defense would have changed the outcome of the trial. Defendant has not met either prong of the *Strickland* test.

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<sup>7</sup> The diminished capacity defense in *Powell* involves intoxication, which is not based on scientific, technical or other specialized knowledge, and does not require expert testimony. ER 701.

d. Defendant Has Not Shown That His Counsel's Conduct Was Unreasonable In Light Of All The Circumstances Of This Particular Case.

There is a strong presumption that defendant's counsel gave him adequate legal assistance and exercised reasonable professional judgment in all her decisions, when viewed in light of all the circumstances in this case. *Lord, supra* at 883. Defendant's counsel was diligent and effective in her representation during this case. Defense counsel cross-examined the State's witnesses during the 3.5 hearing, she presented four potential defense witnesses, although only two were called to testify after the court heard their offers of proof. 1 RP 17, 20, 36, 85-120. Counsel also prevailed in her argument that an improper tape recording of the defendant's confession should be excluded.

Defense counsel extensively cross-examined the emergency medical technician who treated Connelly at the scene. 3 RP 325. She also effectively cross-examined the victim in this case, by challenging her testimony on several issues: rental arrangements, 2 RP 207 2 RP 212, 216; romance, 2 RP 212, 216; prescriptions, 2 RP 213-214, 216, 219, 221-222, 223; possible theft by the victim from the defendant, 2 RP 224; and her credibility and memory, 2 RP 207, 212, 224, 225-226, 229, 232-233. She indicated to the court that sometimes she had chosen not to object to

evidence for tactical reasons. She requested two limiting instructions which were given. 3 RP 343, 380-382, CP 215-257.

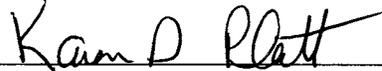
Defendant has failed to overcome the strong presumption that counsel rendered adequate assistance. Defendant has failed to show that he was, in essence, without counsel in this trial. His claim that he was denied his Sixth Amendment right to counsel is meritless.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the judgment entered below.

DATED: August 4, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
Karen D. Platt  
Deputy Prosecuting Attorney  
WSB # 17290

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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:

8-5-10   
\_\_\_\_\_  
Date Signature

## **APPENDIX “A”**

## INSTRUCTION NO. \_\_\_\_\_

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you only for the purpose of assessing Kerri Lee Connelly's state of mind on 12<sup>th</sup> day of September, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

## **APPENDIX "B"**

INSTRUCTION NO. 6

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of prior allegations of assaults and may be considered by you only for the purpose of assessing both Kerri Connelly's state of mind and John McDonald's state of mind on the 12<sup>th</sup> day of September, 2005. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

**APPENDIX "C"**

INSTRUCTION NO. 18

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12<sup>th</sup> day of September, 2005, the defendant intentionally assaulted Kerri Lee Connelly;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Kerri Lee Connelly; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.