

No. 40771-0-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TRAVIS WADE NEWSOME

Appellant.

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COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. THE JURY WAS PROPERLY INSTRUCTED
REGARDING THE "DEADLY WEAPON" ELEMENT OF THE
BURGLARY FIRST DEGREE CONVICTION.....1**

**1. *Sufficient Evidence Supports the Burglary in the
First Degree While Armed With a Deadly Weapon
Conviction.....8***

**2. *The "Inference of Intent" Instruction for the
Burglary Charge was Properly Given.....11***

**B. NEWSOME'S TRIAL COUNSEL WAS NOT
INEFFECTIVE.....12**

**C. THE TRIAL COURT CORRECTLY EXCLUDED
CUMULATIVE, SELF-SERVING HEARSAY STATEMENTS
PROPOSED BY NEWSOME.....17**

**D. A SENTENCE IMPOSED WITHIN THE STANDARD
RANGE CANNOT BE APPEALED.....19**

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	15
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	18
<u>State v. Camarillo</u> , 115 Wash.2d 60, 794 P.2d 850 (1990).....	13
<u>State v. Chiariello</u> , 66 Wn.App. 241, 831 P.2d 1119 (1992)....	2, 6, 7
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	9
<u>State v. Fiser</u> , 99 Wn.App. 714, 995 P.2d 107 (2000).....	8
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	14
<u>State v. Israel</u> , 113 Wn.App. 243, (2002), <i>review denied</i> , 149 Wn.2d 1013 and 1015 (2003).....	14
<u>State v. Lubers</u> , 81 Wn. App. 614, 915 P.2d 1157 (1996).....	9
<u>State v. Madison</u> , 53 Wn.App. 754, 763, 770 P.2d 662 <i>review denied</i> , 113 Wn.2d 1002 (1989).....	15
<u>State v. Mail</u> , 121 Wn.2d 707, 854 P.2d 1042 (1993).....	20
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251.....	14
<u>State v. Nation</u> 110 Wash.App. 651, 41 P.3d 1204(2002).	18
<u>State v. Peterson</u> , 138 Wn.App. 477, 157 P.3d 446 (2007).....	6
<u>State v. Picard</u> , 90 Wn.App. 890, 954 P.2d 336, <i>review denied</i> , 136 Wn.2d 1021, 969 P.2d 1065 (1998).....	1
<u>State v. Piche</u> , 71 Wn.2d 583, 430 P.2d 522 (1967).....	15
<u>State v. Powell</u> , 139 Wn.App. 808 162 P.3d 1180(2007), <i>reversed on other grounds</i> , 166 Wn.2d 73, 206 P.3d 321 (2009).....	10

<u>State v. Renfro</u> , 96 Wn.2d 902, 639 P.2d 737 (1982).....	15
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
<u>State v. Stein</u> , 144 Wash.2d 236, 27 P.3d 184 (2001).....	11
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	18
<u>State v. Stubsjoen</u> , 48 Wn.App. 139, 738 P.2d 306 (1987).....	18
<u>State v. Theroff</u> , 25 Wn. App. 590, 608 P.2d 1254 (1980).....	9
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	14
<u>State v. Thompson</u> , 88 Wn.2d 546, 564 P.2d 323 (1977).....	7
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	9
<u>State v. Winings</u> , 126 Wn.App. 75, 107 P.3d 141 (2005).....	1

STATUTES

RCW 9.94A.533(3).....	6
RCW 9.94A.585.....	20
RCW 9.94A.602.....	6
RCW 9A.04.110(6).....	3, 5
RCW 9A.52.020(1)(a);.....	2

OTHER AUTHORITIES

WPIC 2.06.01.....	3, 5, 6
WPIC 2.07.....	3, 6

FEDERAL CASES

<u>Hendricks v. Calderon</u> , 70 F.3d 1032 (9 th Cir. 1995).....	16
<u>United States v. Velasco</u> , 953 F.2d 1467 (7 th Cir.1992)).....	18

STATEMENT OF THE CASE

Without waiving the right to challenge facts later and except as cited below, the Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE JURY WAS PROPERLY INSTRUCTED REGARDING THE "DEADLY WEAPON" ELEMENT OF THE BURGLARY FIRST DEGREE CONVICTION.

Newsome claims that the trial court erred when it refused "an instruction that a small knife was not deadly per se but only in the manner it was used." Brief of Appellant 9. This argument is without merit because, in fact, the trial court did instruct the jury that whether the knife was a deadly weapon depended upon the manner in which it was used.

A trial court's refusal to give a proposed jury instruction is reviewed for an abuse of discretion. State v. Picard, 90 Wn.App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998). Jury instructions must permit the parties to argue their theories of the case, not mislead the jury and properly inform the jury of the applicable law. State v. Winings, 126 Wn.App. 75, 86, 107 P.3d 141 (2005).

In the present case, Newsome claims that the trial court should have granted Newsome's request for a "more complete deadly weapon instruction" because "the instructions as given permitted the State to argue that any knife, regardless of blade length, is a deadly weapon per se." Brief of Appellant 9. This is not correct.

As charged in the present case, a person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor is armed with a deadly weapon. RCW 9A.52.020(1)(a); CP 23. "The term 'armed,' as used in RCW 9A.52.020, means that the weapon is readily available and accessible for use." State v. Chiariello, 66 Wn.App. 241, 831 P.2d 1119 (1992)(emphasis added). It should also be noted that in the present case, the State did not seek a deadly weapon sentencing enhancement. CP 23. Rather, the deadly weapon in the instant case is an element of the crime of Burglary in the First Degree. CP 23; RCW 9A.52.020(1)(a); Instruction No.'s 4, 5, 6. The jury instructions defining a deadly weapon as an element of the crime, versus a deadly weapon as a sentencing enhancement are different. Compare WPIC 2.06.01 (Deadly Weapon--Definition as

element) with WPIC 2.07 (Deadly Weapon--Definition for Sentence Enhancement--Special Verdict--General).

Furthermore, and contrary to Newsome's claim, the instruction defining a deadly weapon as an element of the Burglary offense in this case did state that whether the knife was a deadly weapon depended upon the circumstances in which it was used.

See Instruction No. 6, which reads:

Deadly weapon means any weapon, device, or instrument, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

The "circumstances" of the use, attempted use, or threatened use include, but are not limited to, the intent and present ability of the user. Ready capacity is determined in relation to surrounding circumstances with reference to substantial bodily harm.

Instruction No. 6. This instruction correctly defined "deadly weapon" as an element of Burglary in the First Degree and also contained the "in the manner in which it was used" language that Newsome now claims is missing. WPIC 2.06.01; Instruction No. 6; RCW 9A.04.110(6). The instructions correctly defined "deadly weapon" where, as here, the knife was not a "per se" deadly weapon, but met the definition of deadly weapon as an element of the crime because the knife was "readily available and accessible

for use" when Newsome had the paring knife in his pocket when leaving the residence. 2RP 107; 3RP 107, 109, 110.

Newsome also gave a rather unlikely explanation about how he came to have the paring knife in his pocket. Newsome said, "I picked up the knife, the only reason I picked up the knife is Renee has a grandson I just noticed it, was going to throw it in the house, and I put it in my pocket on my way over to talk to Dylan." 3RP 107, 108. Similarly, Newsome also had an inventive explanation for why the windows in the residence were open: he said there was a sack of smelly garbage in the kitchen, so he opened the windows to air out the place. 3RP 104. In short, Newsome's version of the incident was just not credible--and obviously the jury agreed.

The evidence presented shows that the paring knife in Newsome's pocket was readily available and accessible for use while Newsome was "in immediate flight" from the residence he unlawfully entered, and the knife was found on Newsome as he was hiding in the grass. 2RP 167; 3RP 109, 110. Who normally carries a knife with an *open blade* in his pants pocket pointed blade down? 2RP 168. Furthermore, the knife found on Newsome matched a set of "Chefmate" kitchen knives in the victim's kitchen. 2RP 174.

But Newsome mischaracterizes remarks made by the prosecutor in closing argument, claiming that the prosecutor argued "that any knife, regardless of blade length, is a deadly weapon *per se*." Brief of Appellant 9. This is not correct. The prosecutor never once argued that the knife was a deadly weapon *per se*. 4RP In fact, the prosecutor correctly discussed the knife in terms of what the jury instruction said, stating, in pertinent part:

PROSECUTOR: Deadly weapon means a weapon, device or instrument which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm. . . . So readily capable of causing death or substantial bodily harm, when you're trying to figure out that question in terms of the circumstances of the use, attempted use, or threatened use, includes but are not [sic] limited to the intent and present ability of the user.

4RP 43, 44(emphasis added). This statement by the prosecutor is an accurate statement of the law regarding the definition of "deadly weapon" when the deadly weapon is an *element of the crime*. WPIC 2.06.01; RCW 9A.04.110(6). Throughout the time the prosecutor discussed the knife, he discussed it in terms of the knife being readily available for use. 4RP 43,44. Nowhere did the prosecutor tell the jury that the knife was a deadly weapon *per se*. Id. Nor was the jury instructed that the knife was a deadly weapon *per se* (because the knife did not qualify as a *per se* deadly weapon). And again, this is not a case where the State sought a

sentencing enhancement for being armed with a deadly weapon.
WPIC 2.07; RCW 9.94A.602 and RCW 9.94A.533(3) or (4).

Furthermore, Newsome relies on cases that are distinguishable from the facts herein. For example, Newsome cites to State v. Peterson, 138 Wn.App. 477, 481, 157 P.3d 446 (2007), stating that this Court in Peterson, "declined to call a knife with a three-inch blade a deadly weapon when nobody else was around when it was used." Brief of Appellant 12. But the Peterson case involves a deadly weapon as a sentencing enhancement--not a deadly weapon as an element of the crime like in the case at bar. Id. As previously mentioned, the jury instructions for the sentencing enhancement are different than the jury instructions used when the deadly weapon is an actual element of the crime. Compare WPIC 2.06.01 (Deadly Weapon--Definition as element) with WPIC 2.07 (Deadly Weapon--Definition for Sentence Enhancement--Special Verdict--General).

Newsome also cites the Chiariello case in support of his argument, but that case is distinguishable as well because in Chiariello, the knife was never recovered. Chiariello, 66 Wn.App. at 243. Thus, in Chiariello, "[t]he jury could not logically infer from the accomplice looking for the knife that he had a weapon readily available and accessible for use." Id. (emphasis added). This

situation is much different than in the instant case where the knife was found in Newsome's pants pocket as he was hiding in the grass right after he had fled the residence. 2RP 168; 3RP 109, 110.

Thus, unlike in Chiariello, in the present case we actually have the knife found on Newsome's person and the knife was "readily accessible for use." 2RP 168. Newsome also references the Thompson case in his argument but Thompson--a pre SRA case--dealt with a deadly weapon in the context of a sentencing *enhancement* and a special verdict. State v. Thompson, 88 Wn.2d 546, 564 P.2d 323 (1977). Even so, the reasoning in Thompson does not harm the State's case here because all Thompson does is state that a knife with a blade less than three inches--like in the instant case--is not a *per se* deadly weapon but can be a deadly weapon depending on how it is used. Id. And the instruction on the deadly weapon in the present case did instruct the jury that whether the knife was a deadly weapon depended upon the manner in which it was used. See Instruction Number 6, and the discussion of the instruction above.

Because the jury was correctly instructed on the deadly weapon as an element of the crime of Burglary in the First Degree,

614, 619, 915 P.2d 1157 (1996). The reviewing Court can infer criminal intent as a logical probability from the facts and circumstances. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We must defer to the trier of fact's decisions resolving conflicting testimony, evaluating the witnesses' credibility, and determining the persuasiveness of evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

It seems that the only element of the burglary charge that Newsome is claiming is not supported by the evidence is the deadly weapon element. Brief of Appellant 13, 14. Accordingly, the State will discuss just that element--which was also discussed in detail in a previous section of this brief. So, for all of the same reasons already discussed in detail and cited to the record in the previous section of this brief, when viewed in the light most favorable to the State, including all inferences therefrom, sufficient evidence supports Newsome's conviction for Burglary in the First Degree while armed with a deadly weapon, to wit: a knife. The paring knife was picked up by Newsome as a "weapon of opportunity" found at the residence, and Newsome had actual possession of the knife when he placed it in his pocket, where it was easily accessible and readily available for offense or defensive use. See e.g., State v. Powell, 139 Wn.App. 808, 822, 823, 162 P.3d 1180(2007),

reversed on other grounds, State v. Powell, 166 Wn.2d 73, 206 P.3d 321 (2009).

Although the Powell case involves a firearm (enhancement)-it is still instructive here because, like Newsome, the defendant in Powell claimed he was not "armed" with a firearm because there was no evidence that he used the handgun in any way during the Burglary. Id. at 322. The Court disagreed because, "[w]hile being handcuffed, a loaded, fully-functional firearm fell from his waistband. He had actual possession, his weapon was easily accessible and readily available for offense or defensive use." Id. Here, as in Powell, Newsome argues that because Newsome did not "use" the knife and no other person was present at the residence, he was not "armed" with a deadly weapon. But Newsome was every bit as "armed" with the deadly weapon as was the defendant in Powell, because officers found the knife in Newsome's pants pocket where it was readily accessible to use as Newsome fled the residence and hid from the police. 2RP 168; 3RP 109, 110. Indeed, common-sense-wise, what other purpose would there be for Newsome to put the paring knife, blade-side-down, in his pants pocket while fleeing the residence? The knife was readily accessible and ready for use as a weapon, and the jury was correctly instructed on the definition of a deadly weapon as an

element of the crime, and that instruction said that whether the knife was a deadly weapon depended on its use. See Instruction No. 6.

Newsome's claim that "the jury was not even asked to consider the manner of use of this paring knife" is categorically wrong because Instruction No. 6 clearly does just that. Instruction No. 6 says, "[d]eadly weapon means any weapon, device, or instrument, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm. . . ." See Instruction No. 6. And the jury is presumed to follow the instructions given. State v. Stein, 144 Wash.2d 236, 247, 27 P.3d 184 (2001). Because sufficient evidence was presented to support all of the elements of the burglary conviction, this Court should affirm.

2. *The "Inference of Intent" Instruction for the Burglary Charge was Properly Given.*

Newsome also argues that the facts here did not support giving the "inference of intent" jury instruction pertaining to the burglary charge. Newsome is wrong.

Newsome claims that "it was undisputed that Newsome had been coming and going freely in and out of Johnson's house for years." Brief of Appellant 17. Tellingly, Newsome makes no

citation to the record for this allegation. Id. What the record does show is that the victim said she and Newsome never lived together, and that around June of 2008 she and Newsome had a "falling out" and after that Newsome was no longer welcome to come over to her house. 2RP 70, 71. The victim also said that Newsome never had a key to her residence. 2RP 72. She also said that Newsome never kept anything at her house. 2RP 73. Then, during the weeks leading up to the weekend of September 25, 2009, Newsome showed up at her residence and the victim asked him to leave. 2RP 77.

The victim's daughter, Carissa Johnson, also said that several weeks before the burglary she witnessed her mother crying while speaking to Newsome at the residence and that multiple persons told Newsome he needed to leave. 2RP 58. Carissa said that her mother made it clear to Newsome that he was no longer welcome in her home. 2RP 59. Carissa said the Newsome had not been welcome at her mother's residence for a "long time." 2RP 67.

Suffice it to say that a person who has an innocent reason for going inside a residence does not enter said residence by climbing through the windows when no one is home--especially given the circumstances leading up to Newsome's unlawful entry as

previously stated. 2RP 58, 59. Furthermore, there is no support in the record-- and Newsome cites none-- for his assertion that he had "a four-year accumulation of personal items" at the victim's residence. Brief of Appellant 17. Additionally, Newsome's flight from the residence and his hiding from authorities in the grass certainly do not appear to be the actions of someone who was inside the residence for a lawful purpose. 2RP 168; 3RP 109, 110.

Finally, when analyzing this issue, we must remember that "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal," and thus it was for the jury to decide whether to believe the victim and her daughter over Newsome in this case. State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). Obviously, the jury found the victim and her daughter more credible than Newsome. The evidence supports the permissive inference instruction and this Court should affirm.

B. NEWSOME'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Newsome also argues that his trial counsel was ineffective. Because Newsome cannot meet the high burden for proving his trial counsel was ineffective, this argument fails.

To prevail on an ineffective assistance claim, a defendant must prove both that counsel's representation was deficient, and

that counsel's representation prejudiced the defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). In order to show prejudice, we must determine that but for counsel's failure to object, the outcome would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). The defendant bears the burden of showing prejudice. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Israel, 113 Wn.App. 243, 270 (2002), *review denied*, 149 Wn.2d 1013 and 1015 (2003). "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 (citing Strickland, 466 U.S. 668), *review denied*, 113 Wn.2d 1002 (1989). In addition, "[w]hile it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

And defense counsel is not, "at the risk of being charged with incompetence, obliged to raise every conceivable point . . . or to argue every point to the court and jury which in retrospect may seem important to the defendant." See State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Moreover, the reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. At 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). "What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television." Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

In the instant case, Newsome cannot meet the very high bar set by the cases cited above. Newsome argues that his trial counsel was ineffective for failing to object to hearsay statements

made by the victim to police officers. However, Newsome makes no citation to the record for these factual assertions, nor does he explain the content of the alleged hearsay statements. Brief of Appellant 19, 20. Accordingly, the State has no idea what statements Newsome is referencing, so it cannot properly analyze the alleged "prejudicial" impact of the alleged hearsay as compared with the overall evidence presented.

Newsome also faults his counsel for not moving for a mistrial when a juror allegedly saw Newsome in handcuffs outside the courtroom. Rather than request a mistrial, Newsome decided to tell the jury that he was serving time on an unrelated DUI offense. This was a strategic decision made by Newsome's counsel quite likely because his attorney knew the jury was going to find out about the DUI anyway. And that is because the jury would find out Newsome had a prior alcohol offense anyway because to prove the driving while license suspended charge a certified copy of Newsome's driving record was admitted-- and that document references refusing to take a breath test. 3RP 5. Thus, the jury was going to figure out that Newsome had an alcohol-related offense anyway--mitigating the reference to the DUI by Newsome. Newsome's counsel was not ineffective, and this Court should affirm.

C. THE TRIAL COURT CORRECTLY EXCLUDED CUMULATIVE, SELF-SERVING HEARSAY STATEMENTS PROPOSED BY NEWSOME.

Newsome claims that "it is error to exclude any relevant evidence that may be deemed even slightly extenuating or exculpatory." Brief of Appellant 24. This is not the rule when it comes to the admissibility of self-serving hearsay statements made by the defendant. Furthermore, the statements at issue were cumulative because Newsome himself testified to the content of the statements.

The decision whether to admit or exclude evidence is reviewed for an abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Generally, a defendant's self-serving hearsay statement is not admissible unless it is " 'part and parcel of the very statement a portion of which the Government was properly bringing before the jury.' "United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir.1992)). *Id.* at 909, 34 P.3d 241 (quoting United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir.1993)). Self-serving hearsay is not admissible on a defendant's behalf. State v. Stubsjoen, 48 Wn.App. 139, 147, 738 P.2d 306 (1987) (out-of-court admissions of

party not admissible as exception to hearsay rule when self-serving); State v. Nation 110 Wash.App. 651, 660, 41 P.3d 1204(2002).

In the instant case, Newsome wanted to call a friend of his to testify that he told her that he was thinking about breaking up with the victim in this case. 3RP 45. The trial court did not allow this testimony. However, the jury did hear Newsome's statement that he had been thinking about breaking up with the victim before the incident, because Newsome himself testified to this:

COUNSEL: ...what was your thought process here on your relationship, did you see a future or did you see problems? What were you intending to do?

NEWSOME: I really didn't see a future with me and Renee. At times I wanted to, it just didn't work out. We had too m any differences between family issues and too many-- . . . it just wasn't going to work at this point in our lives. I think we knew that, both knew that. . . .

3RP 74. Newsome later said that the victim "never really wanted the relationship to come to an end . . . nor did I for that matter. . . I knew we both wanted it to come to an end the night we both went out." 3RP 125. Thus, Newsome himself put his version of events before the jury, and having another witness testify as to what Newsome told her about the same topic would be cumulative and redundant because the person who best knew exactly what he

thought about the relationship--Newsome himself--told the jury about his off-and-on, troubled relationship with the victim. 3RP 125. Therefore, Newsome didn't need his friend to testify about what Newsome told her because Newsome himself testified as to the content of those statements. Accordingly, the trial court did not abuse its discretion in excluding this cumulative, self-serving testimony, and this Court should affirm.

D. A SENTENCE IMPOSED WITHIN THE STANDARD RANGE CANNOT BE APPEALED.

Newsome claims that the trial court violated his due process rights when it imposed a sentence at the high end of the standard range. Brief of Appellant 28,29. This argument is without merit.

As Newsome himself admits, "[t]he general rule is that a standard range sentence cannot be appealed." Brief of Appellant, 28, citing RCW 9.94A.585; State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). As Newsome also notes, "the rules of evidence do not apply at sentencing." Brief of Appellant 29, citing ER 1101(c)(3).

The trial court did not abuse its discretion when it allowed a probation officer who had supervised Newsome on some District Court cases testify about Newsome's compliance or progress in various treatment programs. First of all, Newsome did not object to

the probation officer testifying at sentencing. Secondly, Newsome was able to fully cross examine the probation officer. 5/21/10RP 8,9. Thirdly, a sentence anywhere within the standard range--as this sentence was-- is not appealable. This Court should accordingly affirm.

CONCLUSION

For all of the foregoing reasons, this Court should affirm Newsome's convictions and sentence in all respects.

RESPECTFULLY SUBMITTED this 22nd day of December 2010.

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DECLARATION OF SERVICE

The undersigned certifies that on this date a copy of the Response Brief was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

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Dated this 23rd day of December, 2010, at Chehalis, Washington.

Lori Smith

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