

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

JEREMY JAMES BONO,

Petitioner.

NO. 41912-2-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Should this Court dismiss this petition when petitioner has failed to show either prejudicial constitutional error or a fundamental defect resulting in a complete miscarriage of justice?
2. Should this Court dismiss issues that were rejected on direct review without any further consideration as petitioner has not demonstrated why the interests of justice require their re-litigation?
3. Has petitioner failed to meet his burden of proving prejudicial instructional error of a constitutional nature or that his claims are cognizable for relief in a personal restraint petition?

1 B. STATUS OF PETITIONER:

2
3 Petitioner, Jeremy James Bono, is restrained pursuant to a Judgment and Sentence
4 entered in Pierce County Cause No. 05-1-05264-5. Appendix A. He was sentenced on
5 March 23, 2007, on assault in the first degree. *Id.* Petitioner appealed from entry of this
6 judgment and sentence. Appendix B. The opinion sets forth a summary of the case. *Id.*
7 On appeal, petitioner alleged that: 1) the prosecutor committed misconduct during closing
8 argument; 2) there was insufficient evidence supporting the deadly weapon enhancement;
9 3) there was insufficient evidence supporting the assault conviction; 4) he should not be
10 held accountable for restitution; 4) the prosecutor engaged in a malicious prosecution that
11 included the bribing of witnesses; 5) the trial court improperly denied his motion for
12 severance; and 6) the trial court made several errors in ruling on evidentiary issues. *Id.*
13 His convictions were affirmed by Division II of the Court of Appeals in an unpublished
14 opinion filed on June 30, 2009. *Id.* The mandate issued on March 26, 2010. *Id.*

15
16 On March 24, 2011, petitioner filed a timely first personal restraint petition
17 alleging that his conviction should be vacated. Petitioner alleges that: 1) there was
18 instructional error in the “to convict” instruction and the accomplice liability instruction;
19 2) the court erred in failing to instruct on the definition of “knowledge”; 3) there was
20 prosecutorial misconduct; 4) there was insufficient evidence to support the deadly weapon
21 enhancement; 5) there was insufficient evidence supporting the conviction; 6) the court
22 erred in denying the motion to sever; and 7) cumulative error- based upon the denial of
23 his severance motion, prosecutorial misconduct, and evidentiary error - entitles him to a
24 new trial.
25

1 The State has filed a motion for the report of proceedings from the direct appeal to
2 be temporarily transferred to the file pertaining to this personal restraint petition.

3 Citations to the "RP" refer to the trial proceedings.

4 Petitioner does not claim to be indigent.

5
6 C. ARGUMENT:

- 7 1. THE PETITION SHOULD BE DISMISSED BECAUSE PETITIONER
8 HAS NOT SHOWN PREJUDICIAL CONSTITUTIONAL ERROR OR
9 A FUNDAMENTAL DEFECT RESULTING IN A COMPLETE
10 MISCARRIAGE OF JUSTICE NECESSARY TO OBTAIN RELIEF
11 BY PERSONAL RESTRAINT PETITION.

12 Personal restraint procedure has its origins in the State's habeas corpus remedy,
13 guaranteed by article 4, section 4, of the State Constitution. Fundamental to the nature of
14 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal.
15 A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute
16 for an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral
17 relief undermines the principles of finality of litigation, degrades the prominence of the
18 trial, and sometimes costs society the right to punish admitted offenders. These are
19 significant costs, and they require that collateral relief be limited in state as well as federal
20 courts. *Hagler, Id.*

21 In this collateral action, the petitioner has the duty of showing constitutional error,
22 and that such error was actually prejudicial. The rule that constitutional errors must be
23 shown to be harmless beyond a reasonable doubt has no application in the context of
24 personal restraint petitions. *In re Mercer*, 108 Wn.2d 714, 718-21, 741 P.2d 559 (1987);
25 *Hagler*, 97 Wn.2d at 825. Mere assertions are insufficient in a collateral action to
demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of

1 the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d at 825-26. To
2 obtain collateral relief from an alleged nonconstitutional error, a petitioner must show “a
3 fundamental defect which inherently results in a complete miscarriage of justice.” *In re*
4 *Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). This is a higher standard than the
5 constitutional standard of actual prejudice. *Id.* at 810.

6 Because a collateral attack is not a substitute for an appeal, it is inappropriate to
7 import principles applicable to a direct review, such as cumulative error, and assume that
8 they are applicable on collateral review. As noted above, on collateral review, it is not
9 enough that a petitioner show the existence of error in the trial proceedings. *In re*
10 *Mercer*, 108 Wn.2d at 718-21. It does not matter if petitioner can show one, two, or three
11 errors below, he must show that he was actually prejudiced by constitutional error or that
12 the non-constitutional error resulted in a complete miscarriage of justice. If a petitioner
13 does not make the required showing, he is not entitled to collateral relief.

14
15 Reviewing courts have three options in evaluating personal restraint petitions:

- 16 1. If a petitioner fails to meet the threshold burden of showing actual
17 prejudice arising from constitutional error or a fundamental defect
18 resulting in a miscarriage of justice, the petition must be
dismissed;
- 19 2. If a petitioner makes at least a prima facie showing of actual
20 prejudice, but the merits of the contentions cannot be determined
21 solely on the record, the court should remand the petition for a full
22 hearing on the merits or for a reference hearing pursuant to RAP
23 16.11(a) and RAP 16.12;
- 24 3. If the court is convinced a petitioner has proven actual prejudicial
25 error, the court should grant the personal restraint petition without
remanding the cause for further hearing.

In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

1 In a personal restraint petition, “naked castings into the constitutional sea are not
2 sufficient to command judicial consideration and discussion.” *In re Williams*, 111 Wn.2d
3 353, 365, 759 P.2d 436 (1988) (citing *In re Rozier*, 105 Wn.2d 606, 616, 717 P.2d 1353
4 (1986), which quoted *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

5 That phrase means “more is required than that the petitioner merely claiming in broad
6 general terms that the prior convictions were unconstitutional.” *Williams*, 111 Wn.2d at
7 364. The petition must also include the facts and “the evidence reasonably available to
8 support the factual allegations.” *Id.*

9
10 The evidence that is presented to an appellate court to support a claim in a
11 personal restraint petition must also be in proper form. On this subject, the Washington
12 Supreme Court has stated:

13 It is beyond question that all parties appearing before the courts of this
14 State are required to follow the statutes and rules relating to authentication
of documents. This court will, in future cases, accept no less.

15 *In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001). The petition must include a
16 statement of the facts upon which the claim of unlawful restraint is based and the
17 evidence available to support the factual allegations. RAP 16.7(a)(2); *Petition of*
18 *Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). Personal restraint petition claims
19 must be supported by affidavits stating particular facts, certified documents, certified
20 transcripts, and the like. *Williams*, 111 Wn.2d at 364. If the petitioner fails to provide
21 sufficient evidence to support his challenge, the petition must be dismissed. *Williams* at
22 364. The purpose of a reference hearing “is to resolve genuine factual disputes, not to
23 determine whether the petitioner actually has evidence to support his allegations.” *In re*
24 *Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

1 As will be more fully set forth below, petitioner has failed to meet his burden of
2 showing that he is entitled to relief.

3
4 2. CLAIMS THAT ARE MERELY REFORMULATIONS OF
5 CLAIMS REJECTED IN THE DIRECT APPEAL SHOULD BE
6 DISMISSED AS PETITIONER STILL HAS NOT MADE ANY
7 SHOWING THAT THE INTERESTS OF JUSTICE REQUIRE
8 THEIR RELITIGATION.

9 Collateral attack by personal restraint petition “should not simply be a reiteration
10 of issues finally resolved at trial and direct review, but rather should raise new points of
11 fact and law that were not or could not have been raised in the principal action, to the
12 prejudice of the defendant.” *In re PRP of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250
13 (1999); *In re PRP of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). A petitioner is
14 prohibited from renewing an issue that was raised and rejected on direct appeal unless the
15 interests of justice require relitigation of that issue. *In re PRP of Davis*, 152 Wn.2d 647,
16 670-671, 101 P.3d 1 (2004); *see also Gentry*, 137 Wn.2d at 388. An issue is considered
17 raised and rejected on direct appeal if the same ground presented in the petition was
18 determined adversely to the petitioner on appeal, and the prior determination was on the
19 merits. *In re PRP of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). A petitioner can
20 show the interests of justice are served by reexamining an issue by showing there has
21 been an intervening change in the law or some other justification for having failed to raise
22 a crucial point or argument in the prior application. *In re PRP of Stenson*, 142 Wn.2d
23 710, 720, 16 P.3d 1 (2001).

24 “Simply ‘revising’ a previously rejected legal argument . . . neither creates a ‘new’
25 claim nor constitutes good cause to reconsider the original claim.” *In re Jeffries*, 114
Wn.2d 485, 488, 789 P.2d 731 (1990).

1 [I]dential grounds may often be proved by different factual allegations.
2 So also, identical grounds may be supported by different legal arguments, .
3 . . . or be couched in different language, . . . or vary in immaterial respects.
4 Thus, for example, “a claim of involuntary confession predicated on
alleged psychological coercion does not raise a different 'ground' than does
one predicated on physical coercion.”

5 *Jeffries*, 114 Wn.2d at 488 (citations omitted). A petitioner may not create a different
6 ground for relief merely by alleging different facts, asserting different legal theories, or
7 couching his argument in different language. *Lord*, 123 Wn.2d at 329.

8 In his direct appeal, petitioner challenged, among other claims: 1) the denial of
9 his motion to sever his case from his co-defendant’s; 2) the sufficiency of the evidence
10 supporting his deadly weapon enhancement; 3) the sufficiency of the evidence supporting
11 his conviction; 4) the propriety of the court’s evidentiary rulings; and 5) the prosecutor’s
12 actions, alleging that he committed misconduct. The appellate court found no error. *See*
13 Appendix B. In his collateral attack, petitioner reiterates these claims directly or through
14 reformulations. Petitioner makes no effort to show why the interests of justice require re-
15 litigation of these issues or even acknowledge that he has this burden. As such, this Court
16 should summarily dismiss petitioner’s claims challenging the sufficiency of the evidence
17 supporting the conviction and enhancement, the denial of severance, the court’s
18 evidentiary rulings and claiming that the prosecutor committed misconduct.

19 3. PETITIONER HAS FAILED TO DEMONSTRATE ANY
20 CONSTITUTIONAL INSTRUCTIONAL ERROR OR SHOW
21 THAT HE SUFFERED ACTUAL PREJUDICE.

22 Jury instructions are adequate if they accurately state the law, permit each side to
23 argue its theory of the case, and are not misleading. *State v. Clark*, 143 Wn.2d 731, 24
24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S. Ct. 475, 151 L.Ed.2d 389 (2001). It is a
25 well settled principle of law in Washington that unchallenged jury instructions become
the law of the case. *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988); *see also State v.*

1 **Hickman**, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); **State v. Salas**, 127 Wn.2d 173, 182,
2 897 P.2d 1246 (1995); **State v. Dent**, 123 Wn.2d 467, 869 P.2d 392 (1994); **State v.**
3 **Hames**, 74 Wn.2d 721, 725, 446 P.2d 344 (1968); **Peters v. Union Gap Irr. Dist.**, 98
4 Wash. 412, 413, 167 P. 1085 (1917) (declaring the law of the case doctrine to be “so well
5 established that the assembling of the cases is unnecessary.”). The law of the case
6 doctrine precludes any later objection to a jury instruction unless the instructional error is
7 of constitutional magnitude. **State v. Dent**, 123 Wn.2d 467, 869 P.2d 392 (1994); **State v.**
8 **Fowler**, 114 Wn.2d 59, 69, 785 P.2d 808 (1990), *disapproved on other grounds* in **State**
9 **v. Blair**, 117 Wn.2d 479, 487, 816 P.2d 718 (1991)); RAP 2.5(a)(3). The Washington
10 Supreme Court has articulated several examples of “manifest” constitutional errors in jury
11 instructions that can be raised for the first time on direct appeal; these are: 1) directing a
12 verdict; 2) shifting the burden of proof to the defendant; 3) failing to define the “beyond a
13 reasonable doubt” standard; 4) failing to require a unanimous verdict; and, 5) omitting an
14 element of the crime charged. **State v. Scott**, 110 Wn.2d 682, 688 n.5, 757 P.2d 492
15 (1988); **State v. O’Hara**, 167 Wn.2d 91, 100-101, 217 P.3d 756 (2009). Conversely, this
16 Court’s examples of instructional errors that do not fall within the scope of manifest
17 constitutional error are: 1) failure to instruct on a lesser included offense; and, 2) failure
18 to define individual terms. *Id.*

19 A personal restraint petition is not to operate as a substitute for a direct appeal. **In**
20 **re Hagler**, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Procedural bars to raising a claim
21 in a direct appeal cannot be avoided simply by raising the claim in a personal restraint
22 petition instead. Thus petitioner, in order to obtain collateral relief, must demonstrate that
23 there was constitutional error in his instructions and that he was actually prejudiced by the
24 error. **In re Mercer**, 108 Wn.2d at 718-21. This he has failed to do.

1 a. Petitioner has failed to show that he preserved any claim of
2 error with regard to the accomplice liability instruction
3 given in his case or that the given instruction was
4 constitutionally deficient.

5 Washington's accomplice liability statute permits the jury to convict a defendant
6 as an accomplice to the crime only when the defendant knew that he or she was
7 promoting or facilitating "the crime." RCW 9A.08.020; *State v. Cronin*, 142 Wn.2d 568,
8 579, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 510, 14 P.3d 713 (2000).
9 *Cronin* and *Roberts* held that it is error to instruct the jury that it can convict a defendant
10 as an accomplice if the defendant knew his actions would promote or facilitate the
11 commission of "a crime," because such an instruction could lead the jury to believe that it
12 could convict a defendant who unknowingly facilitated the crime charged as long as the
13 defendant knew some crime was going to occur. In reaching this decision, the
14 Washington Supreme Court reaffirmed its holding in *State v. Davis*, 101 Wn.2d 654, 656,
15 682 P.2d 883 (1984), which stated that instructions that track the language of the
16 accomplice liability statute, RCW 9A.08.020, are correct statements of the law. *Roberts*,
17 142 Wn.2d at 512, 14 P.3d 713. It is not necessary to reference the charged crime by
18 name in the accomplice liability instruction. *State v. Mullin-Coston*, 115 Wn. App. 679,
19 64 P.3d 40 (2003), *aff'd on other grounds*, 152 Wn.2d 107, 905 P.3d 321 (2004).

20 Under RCW 9A.08.020(3)(i)-(ii), an accomplice is one who, "[w]ith knowledge
21 that it will promote or facilitate the commission of the crime ... encourages ... or aids"
22 another person in committing a crime. An accomplice associates himself with the venture
23 and takes some action to help make it successful. *In re Welfare of Wilson*, 91 Wn.2d 487,
24 491, 588 P.2d 1161 (1979). The evidence must show that the accomplice aided in the
25 planning or commission of the crime and that he had knowledge of the crime. *State v.*
Trout, 125 Wn. App. 403, 410, 105 P.3d 69 (2005). Where criminal liability is predicated

1 on accomplice liability, the State must prove only that the accomplice had general
2 knowledge of his coparticipant's substantive crime, not that the accomplice had specific
3 knowledge of the elements of the coparticipant's crime. *State v. Rice*, 102 Wn.2d 120,
4 125, 683 P.2d 199 (1984). Mere presence of the defendant, without aiding the principal,
5 is not sufficient to establish accomplice liability. *State v. Parker*, 60 Wn. App. 719, 724-
6 25, 806 P.2d 1241 (1991).

7 Petitioner contends that the court's instruction on accomplice liability was an
8 "ambiguous" statement of the law, which relieved the State of its burden to prove any
9 essential elements of the charged offense. The instruction was the Plaintiff's proposed
10 instruction No 6. *See* Appendix C, Instruction 6. Petitioner took no exception to this
11 instruction in the trial court. *See* RP 513 (Volume 6). It was eventually given as the
12 Court's Instruction No. 7, which stated:

13 A person is guilty of a crime if it is committed by the conduct of another
14 person for which he or she is legally accountable. A person is legally
15 accountable for the conduct of another person when he or she is an
accomplice of such other person in the commission of the crime.

16 A person is an accomplice in the commission of a crime if, with
17 knowledge that it will promote or facilitate the commission of the crime,
he or she either:

18 (1) solicits, commands, encourages, or requests another person to commit
19 the crime; or

20 (2) aids or agrees to aid another person in planning or committing the
21 crime.

22 The word "aid" means all assistance whether given by words, acts,
23 encouragement, support, or presence. A person who is present at the scene
24 and ready to assist by his or her presence is aiding in the commission of
25 the crime. However, more than mere presence and knowledge of the
criminal activity of another must be shown to establish that a person
present is an accomplice.

1 Appendix D, Instruction No. 7. The instruction given in petitioner's case tracks the
2 language of the accomplice liability statute. RCW 9A.08 020; *see* Appendix E. The
3 challenged instruction is materially indistinguishable from instructions previously upheld
4 by Washington courts as being correct statements of the law. *State v. Davis*, 101 Wn.2d
5 654, 656–57, 682 P.2d 883 (1984) (upholding instruction identical in the material
6 portions to the instruction given in this case); *State v. Roberts*, 142 Wn.2d 471, 511–12,
7 14 P.3d 713 (2000). Petitioner has failed to show any error in the given instruction.

8 Petitioner argues that the “Supreme Court struck down an instruction *almost*
9 identical to the instruction” given in his case, citing *State v Cronin*, 142 568, 14 P.3d 752
10 (2000). *See* Petition at p. 6 (emphasis added). As noted above, an accomplice liability
11 jury instruction is deficient if it refers to the defendant's knowledge of “a crime,” rather
12 than “the crime.” While the first paragraph of Instruction 7 was not contained in the
13 instruction approved of in *Davis*; the remainder of the instruction is identical to that given
14 in *Davis*. The instruction given in *Roberts* included the initial paragraph but the wording
15 of the last sentence of this paragraph differed. The last sentence of the first paragraph of
16 the instruction in *Roberts* stated: “A person is legally accountable for the conduct of
17 another person when he is an accomplice of such other person in the commission of *a*
18 *crime.*” *Roberts*, 142 Wn.2d at 488-489 (emphasis added). It was this second reference
19 to “a crime” that was found to be erroneous, not the use of “a crime” in the first sentence
20 of the paragraph. *Id.* at 509-12.

21 The accomplice liability instruction given in petitioner's case was a correct
22 statement of the law; petitioner has failed to show any constitutional error, much less that
23 he was actually prejudiced and this claim should be dismissed.

1
2 b. Petitioner did not preserve a claim of error as to the lack of
3 an instruction defining “knowledge” and cannot show any
4 error of constitutional magnitude cognizable for relief in a
5 collateral attack.

6 An appellant on direct review cannot claim error predicated on the failure to give
7 an instruction that was never requested. *State v. Hoffman*, 116 Wn.2d 51, 111-12, 804
8 P.2d 577 (1991); *State v. Scherer*, 77 Wn.2d 345, 351-52, 462 P.2d 549 (1969). While
9 the constitution requires that the jury be properly informed of the elements of the charged
10 crime, the failure of the trial court to further define one of those elements or a term used
11 in the elements is not of constitutional magnitude. *State v. O’Hara*, 167 Wn.2d 91, 105,
12 217 P.3d 756 (2009); *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992); *State v.*
13 *Gordon*, ___ Wn.2d ___; ___ P.3d ___ (2011)(2011 WL 4089893, issued September 15,
14 2011). “Even an error in defining technical terms does not rise to the level of
15 constitutional error.” *Stearns*, 119 Wn.2d at 250, citing *State v. Lord*, 117 Wn.2d 829,
16 880, 822 P.2d 177 (1991) and *Scott*, 110 Wn.2d at 689-90.

17 [W]e find nothing in the constitution, as interpreted in the cases of this or
18 indeed any court, requiring that the meanings of particular terms used in an
19 instruction be specifically defined. Because [defendant] failed to propose
20 a defining instruction at trial, therefore, he may not raise the absence of
21 such an instruction for the first time on appeal.

22 *State v. Scott*, 110 Wn.2d at 691. Here, petitioner asserts the trial court erred in failing to
23 define the term “knowledge” as used in the accomplice liability instruction. But
24 petitioner did not preserve this claim in the trial court as he did not propose such an
25 instruction or take exception to the court’s failure to give such an instruction. RP 531-
533. As the above authority clearly establishes, failure to provide a definitional
instruction does not present an issue of constitutional magnitude. The Court should

1 dismiss this claim as failing to be one that is cognizable for relief by personal restraint
2 petition.

3 c. The “to convict” instruction properly set forth the elements
4 of the crime and petitioner’s challenge to this instruction
5 shows a misapprehension of Washington’s accomplice
6 liability law.

7 The “to convict” instruction must contain all elements essential to the conviction.
8 *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). The jury has a right to regard the
9 “to-convict” instruction as a complete statement of the law and should not be required to
10 search other instructions in order to add elements necessary for conviction. *Mills*, 154
11 Wn.2d at 8. Automatic reversal is required only where the trial court failed to instruct the
12 jury on all elements of the charged crime. *State v. DeRyke*, 149 Wn.2d 906, 911–12, 73 P
13 .3d 1000 (2003). A court reviews the adequacy of a challenged “to convict” jury
14 instruction de novo. *Mills*, 154 Wn.2d at 7.

15 A person accused of being an accomplice need not know of the specific elements
16 of the crime charged; general knowledge of the specific crime is sufficient. *State v.*
17 *Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). Courts have noted that

18 [A]n accused who is charged with assault in the first or second degree as
19 an accomplice must have known generally that he was facilitating an
20 assault, even if only a simple, misdemeanor level assault, and need not
21 have known that the principal was going to use deadly force or that the
22 principal was armed.

23 *In re Personal Restraint Petition of Sarausad v. State*, 109 Wn. App. 824, 836, 39 P.3d
24 308 (2001); *State v. McChristian*, 158 Wn. App. 392, 401, 241 P.3d 468 (2010).

25 Therefore, an accused who knows that his conduct will aid an assault is liable as
an accomplice to assault whether or not he knows of the facts that would determine the
degree of the crime. The prosecution is not required to prove that the accused had
knowledge that the principal intended to assault the victim with a deadly weapon or that

1 the principle intended to inflict great bodily harm. Rather, the prosecution needs to prove
2 only that the accused knew that the principal intended to commit an assault generally. By
3 facilitating an assault on the victim, the accused runs the risk that an accomplice would
4 elevate the assault to a first degree offense. *See Davis*, 101 Wn.2d at 655, 682 P.2d 883
5 (accomplice's use of a firearm elevated robbery to first degree offense).

6 Petitioner challenges the "to convict" instruction used at his trial. *See Appendix*
7 *D*, Instruction No. 16. The "to convict" instruction was the Plaintiff's proposed
8 instruction No. 14. *See Appendix C*, Instruction No. 14. Petitioner did not object to this
9 instruction in the trial court and it is the law of the case. RP 514 (Vol. 6). Petitioner is
10 precluded from challenging this instruction on either direct appeal or collateral attack
11 unless he raises an issue of constitutional magnitude. He does not allege, however, that
12 any element was omitted from the instruction which might raise a constitutional issue.
13 Rather, he argues that the wording of the instruction could have led the jury to conclude
14 that his co-defendant

15 had both the mens rea and the actus reus and yet have convicted [him]
16 simply because he was an accomplice, even though he had not either the
17 mens rea or the actus reus. The jury could have, and probably did, convict
18 [him] even though it did not find that he had either the requisite intent or
that he acted with a deadly weapon or force or means likely to produce
great bodily harm.

19 Petition at p. 14.

20 This argument misperceives the law applicable to accomplice liability.
21 Washington law does not require the prosecution to prove that petitioner assaulted the
22 victim or that he used a deadly weapon or that he had the intent to inflict great bodily
23 harm in order to convict him of assault in the first degree. Under *Davis*, the prosecution
24 was required to prove that petitioner knew his codefendant was going to assault the victim
25 and that petitioner somehow facilitated the commission of that assault. By facilitating the
assault on the victim, petitioner ran the risk that his co-defendant would elevate the

1 assault to a first degree offense. Thus, petitioner's concern about how the jury could have
2 interpreted the instruction does not show an interpretation inconsistent with Washington
3 law. Petitioner has failed to articulate how the jury could have interpreted the instruction
4 in a constitutionally erroneous manner. As petitioner has failed to show the existence of
5 any constitutional error in the instructions, this claim should be dismissed.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

D. CONCLUSION:

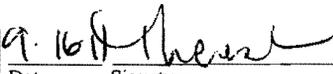
The State respectfully requests that this Court dismiss this personal restraint
petition.

DATED: September 16, 2010.

MARK E. LINDQUIST
Pierce County Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail
to the petitioner a true and correct copy of the document to which this
certificate is attached. This statement is certified to be true and correct
under penalty of perjury of the laws of the State of Washington. Signed
at Tacoma, Washington, on the date below.

9.16.10 
Date Signature

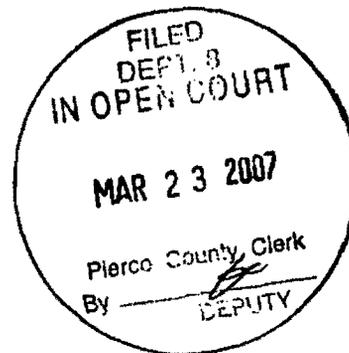
APPENDIX “A”

Judgment and Sentence

Case Number: 05-1-05264-5 Date: September 011
SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



05-1-05264-5 27198138 JDSWCD 03-28-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 05-1-05264-5

MAR 26 2007

vs.

JEREMY JAMES BONO,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

Case Number: 05-1-05264-5 Date: September 16, 2007
SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

05-1-05264-5

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 3.23.07

By direction of the Honorable

Kevin Stock

JUDGE

KEVIN STOCK

By: *Melissa Engler*

CLERK
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date MAR 26 2007 By *Melissa Engler* Deputy

FILED
DEPT. 8
IN OPEN COURT

MAR 23 2007

Pierce County Clerk
By *[Signature]*
DEPUTY

STATE OF WASHINGTON

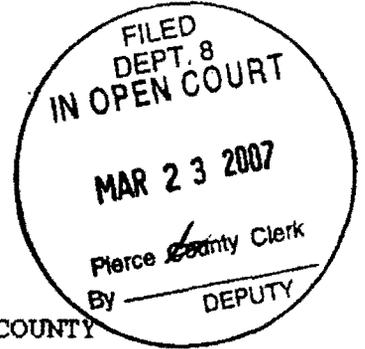
ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____

KEVIN STOCK, Clerk
By: _____ Deputy

mms



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05264-5

MAR 26 2007

vs

JEREMY JAMES BONO

Defendant.

JUDGMENT AND SENTENCE (FJS)

Prison [] RCW 9.94A.712 Prison Confinement

[] Jail One Year or Less

[] First-Time Offender

[] SSOSA

[] DOSA

[] Breaking The Cycle (BTC)

Clerk's Action Required, para 4.5 (DOSA),
4.15.2, 5.3, 5.6 and 5.8 *Notify Dept Licensing*

SID: 20608703
DOB: 11/19/1978

I. HEARING

1.1 A sentencing hearing was held and 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, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 2/21/07 by [] plea [X] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a) 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530	D	10/12/05	052850819

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, See RCW 9.94A.533(8).

as charged in the JURY VERDICT Information

[X] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) I.
RCW 9.94A.602, .510

07-9-03577-1

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ATT UMCS	06/17/02	PIERCE CO.	02/23/02	A	NV

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	1	XII	102 - 136 MOS.	24 MOS.	126 - 160 MOS.	LIFE

- 2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

- 2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):
-

- The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:
-

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

III. JUDGMENT

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

- 3.2 The court DISMISSES Counts _____ The defendant is found NOT GUILTY of Counts _____
-

RJN JARED NATHANIEL 05-1-05263-7
METCALF

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

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

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.7 [] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with Garrett Wilson (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 OTHER:

Check, will notify Dept of Licensing of this conviction

4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN \$ LOE Restitution to: _____
 \$ _____ Restitution to: _____
 (Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment
 DNA \$ 100.00 DNA Database Fee
 PUB \$ 1,500 Court-Appointed Attorney Fees and Defense Costs
 FRC \$ 200.00 Criminal Filing Fee
 FCM \$ _____ Fine
 WFR \$ _____ Witness Costs
 JFR \$ _____ Jury Fee
 FPS/SFR/SFS
 SFW/SFM/WRF \$ _____ Service of Process

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____
 \$ _____ Other Costs for: _____
 \$ 7,300 TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____, RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

[] The above total does not include all restitution 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.

[X] is scheduled for 4.20.07

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[] RESTITUTION. Order Attached

[X] Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
-------------------------	--------------	---------------	-------------

136 months on Count I months on Count
A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

24 months on Count No I months on Count No

Sentence enhancements in Counts I shall run
 concurrent consecutive to each other underlying count.
Sentence enhancements in Counts shall be served
 flat time subject to earned good time credit

Actual number of months of total confinement ordered is: 160 months

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) contain(s) a mandatory minimum term of .

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced.

Confinement shall commence immediately unless otherwise set forth here:

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 30 days

4.13 **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count for months;

Count for months;

Count for months;

COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 24 to 48 Months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

PROVIDED: That under no circumstances shall the combined term of confinement and term of community custody actually served exceed the statutory maximum for each offense

While on community placement or 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 service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with: Garrett Wilson

Defendant shall remain within outside of a specified geographical boundary, to wit: Per CCO.

The defendant shall participate in the following crime-related treatment or counseling services: Per CCO.

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: See Appendix F

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.14 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. 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 total confinement. The conditions of community custody are stated above in Section 4.13.

4.15 **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: _____

V. NOTICES AND SIGNATURES

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion 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, must be filed 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.** For an offense committed prior to July 1, 2000, the defendant 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. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.
- 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 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 may be taken without further notice. RCW 9.94A.7602.
- 5.4 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.
- 5.5 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, 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 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. N/A
- 5.7 **RESTITUTION AMENDMENTS.** The portion of the sentence regarding restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

58

OTHER: Clark will notify Dept of Licensing of this conviction

DONE in Open Court and in the presence of the defendant this date: 3-23-07

JUDGE

Print name

Brian Talleberg
Brian Talleberg

GR

Deputy Prosecuting Attorney

Print name: GREGORY L. GREGG

WSB # 22936

Attorney for Defendant

Print name: Kent Underwood

WSB # 27250

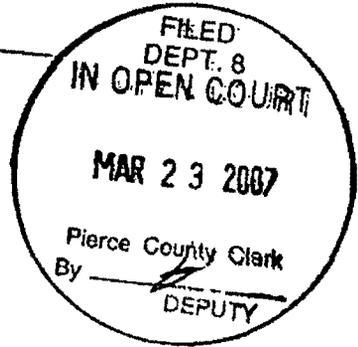
Jeremy J Bond

Defendant

Print name: Jeremy Bond

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: 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 92A.84.660.

Defendant's signature: Jeremy J Bond



Case Number: 05-1-05264-5 Date: September 16, 2007
SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

05-1-05264-5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 05-1-05264-5

I, KEVIN STOCK 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 said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

Court Reporter

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: Per CCO.

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: Garrett Wilson

(III) The offender shall participate in crime-related treatment or counseling services, Per CCO.

(IV) The offender shall not consume alcohol;

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections, or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: _____

Case Number: 05-1-05264-5 Date: September 11
SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

05-1-05264-5

FILED
DEPT. 8
IN OPEN COURT

MAR 23 2007

Pierce County Clerk
By [Signature]
DEPUTY

IDENTIFICATION OF DEFENDANT

SID No. 20608703 Date of Birth 11/19/1978
(If no SID take fingerprint card for State Patrol)

FBI No. 65099WB7 Local ID No. UNKNOWN

PCN No. 538580201 Other

Alias name, SSN, DOB: _____

Race:				Ethnicity:		Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male		
<input type="checkbox"/> Native American	<input type="checkbox"/> Other: :		<input checked="" type="checkbox"/> Non-Hispanic	<input type="checkbox"/> Female		

FINGERPRINTS

Left four fingers taken simultaneously

Left Thumb



Right Thumb

Right four fingers taken simultaneously



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, _____ Dated: _____

DEFENDANT'S SIGNATURE: Jeremy J Bond

DEFENDANT'S ADDRESS: 12201 223rd Ave E Bonney Lake Wa 98391

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00 containing 13 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/BARBARA KNIGHTON, Deputy.

Dated: Sep 16, 2011 11:37 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to: <https://www.co.pierce.wa.us/cfapps/secure/linx/courtfilling/certifieddocumentview.cfm>, enter SerialID: 7387568F-F20F-6452-D38BC0FF850ABA00. The copy associated with this number will be displayed by the Court.

APPENDIX “B”

Mandate and Opinion



05-1-05263-7 34070229 MND 04-06-10

4/7/2010 8470 90069

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BEDE0-F20D-AA3E-5150B918B67A1094
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

FILED
IN COUNTY CLERK'S OFFICE
A.M. APR - 6 2010 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JEREMY BONO and JARED METCALF,
Appellants.

No. 36131-1-II consolidated with
No. 36243-1-II

MANDATE

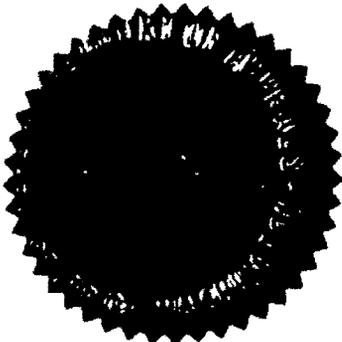
Pierce County Cause No.
05-1-05264-5 / 05-1-05263-7

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

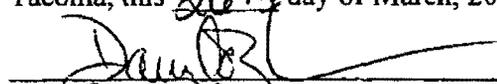
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 30, 2009 became the decision terminating review of this court of the above entitled case on March 3, 2010. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs have been awarded in the following amount:

Judgment Creditor, State of Washington, \$6.48
Judgment Creditor, Appellate Indigent Defense Fund, \$4472.72
Judgment Debtor, Jeremy Bono, \$4479.20

Judgment Creditor, State of Washington, \$6.48
Judgment Creditor, Appellate Indigent Defense Fund, \$342.72
Judgment Debtor, Jared Metcalf, \$5349.20



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 26th day of March, 2010.


Clerk of the Court of Appeals,
State of Washington, Div. II

CASE #: 36131-1-II, Mandate Pg 2
State of Washington, Respondent v Jeremy Bono and Jared Metcalf, Appellants

Kathleen Proctor
Pierce County Prosecuting Atty Ofc
930 Tacoma Ave S Rm 946
Tacoma, WA, 98402-2171

Lisa Elizabeth Tabbut
Attorney at Law
PO Box 1396
Longview, WA, 98632-7822

Reed Manley Benjamin Speir
Attorney at Law
3800 Bridgeport Way W Ste A23
University Place, WA, 98466-4495

Sheri Lynn Arnold
Attorney at Law
PO Box 7718
Tacoma, WA, 98417

Hon. Brian M. Tollefson
Pierce Co Superior Court Judge
930 Tacoma Ave S
Tacoma, WA 98402

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BEDE0-F20D-AA3E-5150B918B67A1094
Digitally Certified By: Kevin Stock Pierce, County Clerk, Washington

FILED
COURT OF APPEALS
NOV 16 2011

09 JUN 30 AM 8:20

STATE OF WASHINGTON

BY *sp*
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JEREMY JAMES BONO and
JARED NATHANIEL METCALF,
Appellants.

No. 36131-1-II
consolidated with
No. 36243-1-II

UNPUBLISHED OPINION

VAN DEREN, C.J.—In consolidated appeals, codefendants Jeremy Bono and Jared Metcalf appeal their convictions for first degree assault with a deadly weapon of Garrett Wilson. They both argue that the prosecutor committed misconduct during closing argument by relying on facts not in evidence. Metcalf also argues sentencing error. Both defendants filed statements of additional grounds for review (SAGs)¹ raising various issues without merit.

We affirm the convictions and we do not reach Metcalf’s sentencing issue because it will require additional evidence to resolve and, therefore, should be raised in a personal restraint petition (PRP).

¹ RAP 10.10.

No. 36131-1-II consolidated with No. 36243-1-II

FACTS

On October 26, 2005, the Pierce County prosecutor charged Jeremy Bono and Jared Metcalf with first degree assault of Garrett Wilson. In October 2005, Wilson was staying at Tracy Vasquez's home. Vasquez saw Bono drive by his house on October 12, 2005. Twenty minutes later, Bono and Metcalf came to the open door and Metcalf asked for Wilson. Wilson knew Jeremy Bono because he had dated Bono's sister. They generally had gotten along, although Bono recently told Wilson that he would kill him if he slept with his sister. Wilson did not expect Bono and Metcalf as visitors that day.

Bono and Metcalf said that they needed to go for a ride and Wilson left with them. Wilson testified later that he left with the two men because he thought they were angry and because he did not want anything to happen in Vasquez's home. Vasquez looked out of the window and saw the three men driving away in a pickup truck. He saw Bono driving, with Wilson sitting in the middle and Metcalf sitting on the passenger side.

In the truck, Metcalf restrained Wilson and hit him. Metcalf punched Wilson with his fist and hit him with an empty liquor bottle. Metcalf uttered obscenities, some of which may have been of a sexual nature involving what might happen to Wilson. When Wilson asked Bono "why [he] was getting beat up," Bono said something about his sister being arrested. Report of Proceedings (RP) at 327. Metcalf told Wilson to empty his pockets; Wilson complied. Wilson defecated in his pants. He testified that he did this to be funny but he also suggested, prior to testifying at trial, that he did it to make himself repugnant to his assailants.

After driving for 20 minutes, Bono parked the truck on an isolated logging road. Metcalf told Wilson to remove his clothes, which Wilson did. Metcalf tried to grab Wilson and they both fell to the ground. Wilson ran toward some bushes and two rocks hit him as he ran away. He

No. 36131-1-II consolidated with No. 36243-1-II

hid in the bushes until Bono and Metcalf drove away. He then dressed and walked down the road, where a man driving by picked him up, called 911, and drove him to a fire station.

Paramedics transported Wilson to the hospital. Daniel Brocksmith, a physician's assistant, took photographs to document Wilson's condition when he first arrived at the hospital. Brocksmith testified that Wilson suffered a nasal fracture and skull fracture and that he was covered in feces and had numerous lacerations to his head and face. Wilson told Brocksmith that "he had been assaulted with bottles and fists." RP at 293.

At the hospital, Wilson indicated that he did not want to speak to police officers. Brocksmith reported that Wilson was "[c]ooperative to a point where he could tell them his personal information. But anything about the incident, he wouldn't say anything about it."² RP at 295. A week or so later, after he had been released from the hospital, Wilson spoke with an officer concerning the assault on October 12. As a result of the interview, the police arrested Bono and Metcalf. The prosecutor's office charged them with first degree assault of Wilson. Both informations included a deadly weapon enhancement.

After his arrest, Metcalf repeatedly contacted Wilson and offered him money to make the case go away. The State eventually arrested Wilson as a material witness; Wilson testified that he thought the case should not be prosecuted. Metcalf also called Vasquez multiple times and offered Vasquez money to write a statement that would "help him out." RP at 188. Vasquez eventually authored two statements—one for Metcalf and one for Bono—which indicated that they had not assaulted Wilson.

² At trial, Wilson denied speaking to officers at the hospital. But the State introduced testimony from a deputy sheriff, who interviewed Wilson on the day of the assault, that Wilson told him "that it was Jared that had assaulted him while Jeremy stood by and watched." RP at 453-54.

No. 36131-1-II consolidated with No. 36243-1-II

The trial court consolidated the two cases for trial. A jury found both Bono and Metcalf guilty as charged. The trial court sentenced Bono to 136 months plus 24 months for the deadly weapon enhancement. The court sentenced Metcalf to 176 months plus 24 months for the deadly weapon enhancement.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Both Bono and Metcalf argue that the prosecutor committed misconduct during closing argument. Specifically, they contend that when the prosecutor argued that Wilson soiled himself to prevent Bono or Metcalf from sexually assaulting him, the prosecutor did not base his argument on facts in the record and the argument was highly prejudicial.

A. Standard of Review

As recently stated by our Supreme Court:

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, *cert. denied*, 128 S. Ct. 2964 (2007); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *cert. denied*, *Warren v. Washington*, 129 S. Ct. 2007 (2009). When objecting to closing argument for the first time on appeal, an appellant must show that the argument was "so flagrant and ill-intentioned that no instruction could have cured [it]." *Warren*, 165 Wn.2d at 30.

In analyzing prejudice alleged to arise from a prosecutor's argument, we look at the challenged comments "in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *Warren*, 165 Wn.2d at 28. In addition, a jury is presumed to follow a court's instructions. *Warren*, 165 Wn.2d at 28.

No. 36131-1-II consolidated with No. 36243-1-II

B. Objections At Trial to State's Closing Argument

In response to Bono and Metcalf's claims of prosecutorial misconduct, the State first asserts that Bono and Metcalf failed to object to the challenged substance of the closing argument at various times. But the record shows that counsel objected at least once to the argument. All statements—whether objected to at trial or not—challenged by Bono or Metcalf on appeal go to whether the prosecutor improperly implied that Bono or Metcalf threatened to sexually assault Wilson and that Wilson soiled himself for this reason.

Bono objected to the prosecutor's statement regarding Wilson's reluctance to testify, specifically, the statement that "he doesn't want to come before you and talk about the fact that he potentially was raped and had to poop all over himself to prevent" RP at 591. The prosecutor was interrupted by a defense objection based on an insufficient factual basis of the prosecutor's argument. And Metcalf objected to the statement that:

Mr. Metcalf's intent was to cause great bodily harm to Mr. Wilson, and probably other crimes, other acts such as rape. But as Mr. Wilson at one point said, he pooped on himself - he didn't use that word but I'm going to use it - in order to dissuade these two individuals from further humiliating him.

RP at 546-47. The trial court overruled both objections.

C. Factual Support for the State's Closing Argument

Metcalf and Bono argue that the prosecutor's comments lacked factual support. The State counters that its argument was supported by a reasonable inference from the evidence.

The relevant portions of Wilson's testimony state:

[STATE:] I want to ask you a question that I don't mean to embarrass you, it's just obviously part of this --
 [WILSON:] Yeah, I sh[*]t myself. You got a problem with that?
 [STATE:] When did you do that?
 [WILSON:] Shortly after we got in the truck while I was in a sleeper hold.
 [STATE:] Why did you do it?

No. 36131-1-II consolidated with No. 36243-1-II

[WILSON:] Just because I thought it would be funny.

.....

[STATE:] Well, did you ever explain that differently?

[WILSON:] I don't know, possibly.

[STATE:] Did you ever explain it in relation to the sexual comments that were made about you?^[3]

[WILSON:] No.

.....

[STATE:] Well, I think you indicated in the affirmative that the comments were of a sexual nature of things that were going to be done to you, is that correct?

[WILSON:] Yeah, it was well after I sh[*]t myself.

[STATE:] Did you not say that you sh[*]t yourself in order to avoid that kind of contact?

[WILSON:] No.

[STATE:] You did not say that --

[WILSON:] No.

[METCALF COUNSEL:] Objection, asked and answered.

[THE COURT:] Objection overruled.

[STATE:] -- in front of all three of the attorneys here?

[WILSON:] Not that I recall. I do not think I did. *I might have.* I don't know.

.....

[STATE:] Okay. Now, why would you take your clothes off?

[WILSON:] I had pants full of crap.

.....

[STATE:] Which person out of the people that were there told you to take your clothes off?

[WILSON:] Well, if I don't think it was [Bono], who does that leave?

[STATE:] [Metcalf]?

[WILSON:] Yep.^[4]

[STATE:] And that's why you took your clothes off, correct?

[WILSON:] No, it's not why.

[STATE:] Well, you already --

[WILSON:] It's a totally confusing situation, letting it come to an end.

RP at 338-40 (emphases added).

³ Prior testimony by Wilson admitted that the defendants "possibly" directed rude language of a sexual nature at him and that these comments "possibly" included descriptions of what would happen to him. RP at 331.

⁴ Wilson previously testified that, "I was asked to get naked." RP at 334.

No. 36131-1-II consolidated with No. 36243-1-II

Here, the record supports a reasonable inference that Wilson soiled himself to prevent sexual assault. Wilson testified that Bono and Metcalf directed sexual comments, "possibly" including threats, at him; that Metcalf told him to remove his clothing; and that he "might" have told attorneys that he soiled himself to avoid sexual contact. The State argued that Wilson had previously indicated that the defendants made sexual comments and that he defecated on himself "to avoid that kind of contact." RP at 338-39.

Although Wilson's answers at trial were equivocal regarding key events, the jury could reasonably weigh the evidence and assess the credibility of Wilson's trial testimony (1) minimizing the impact of the sexual comments, (2) explaining that he defecated on himself to be "funny," and (3) denying that anyone told him to remove his clothing. The jury also heard that Wilson previously indicated that he was unwilling to testify and was arrested as a material witness; in addition, the jury could observe that during Wilson's testimony he appeared hostile to the State. Furthermore, Wilson testified that Metcalf had tried to influence his testimony and an officer testified that Wilson told him he feared Bono and Metcalf.

Although Wilson at times denied that he feared sexual assault, the record reflects that the State impeached his testimony. Wilson denied speaking to officers but the State introduced testimony from a deputy that Wilson told him "Jared" assaulted him and "Jeremy" watched. Finally, the trial court instructed the jury that "lawyer's statements are not evidence," and that "you must disregard any remark, statement, or argument that is not supported by the evidence." Bono Clerk's Papers (CP) at 99.

"[P]rosecuting attorneys will be permitted a reasonable latitude in argumentative deduction from the evidence presented at trial." *State v. Ranicke*, 3 Wn. App. 892, 897, 479 P.2d 135 (1970). When the prosecutor's statements regarding sexual assault are viewed in light of the

No. 36131-1-II consolidated with No. 36243-1-II

entire record, they do not rise to the level of prosecutorial misconduct. Here, we hold that the prosecutor's closing argument was based on logical inferences from the evidence in the record and, thus, was not improper. Because Wilson failed to show that the challenged argument was improper, we need not reach the issue of prejudice.⁵

II. JUVENILE ADJUDICATIONS SCORED IN OFFENDER SCORE

At sentencing, Metcalf stipulated to his criminal history. A 1995 burglary, was listed and was described as an "adult" conviction. It was scored as one point, making Metcalf's offender score 5. Metcalf now argues that he was 14 years old in 1995. He argues here that the burglary conviction in 1995 should be scored as one half point because it was a juvenile adjudication.

The State does not argue that Metcalf's sentence is proper. Rather, it first argues that he stipulated to an erroneous fact and that he cannot raise this error on direct appeal.⁶ See *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Although the State contends that Metcalf waived this argument,⁷ the issue is whether Metcalf's argument requires additional evidence to resolve. If so, Metcalf should raise it in a collateral attack. "[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record." *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

The State also argues that "[i]t is impossible to tell from the record on review whether or not the challenged burglary conviction was a juvenile conviction or whether the

⁵ Moreover, because Metcalf's and Bono's argument regarding prosecutorial misconduct fails to meet the requirements for finding the objected-to portions of the closing argument improper, we need not analyze portions of the argument neither of them objected to. *Warren*, 165 Wn.2d at 26, 30.

⁶ The State concedes that Metcalf "will not be precluded from seeking relief by personal restraint petition." Br. of Resp't at 30 n.3.

⁷ Because the State acknowledges that Metcalf can raise this issue at some point, it is unclear how the matter has been waived.

No. 36131-1-II consolidated with No. 36243-1-II

offense/sentencing dates were improperly listed in the stipulation or whether some other error occurred.” Br. of Resp’t at 30 n.3. We agree.

It is unclear whether the offender score calculation contains a scrivener’s error or a factual error (the date of the burglary) or a legal error (the offender score). Should Metcalf be able to produce evidence on his age in 1995, whether the burglary occurred in 1995, and what his proper offender score should be, then a PRP will allow additional evidence and will allow review of how the 1995 conviction should be properly scored. *McFarland*, 127 Wn.2d at 338 n.5.

III. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A. Deadly Weapon

Metcalf’s and Bono’s SAGs both challenge the deadly weapon enhancement in their assault on Wilson. Metcalf argues, “In my [p]olice report and in the [h]ospital report the victim claims he was hit with a bottle Half way through trial it comes out that this bottle is plastic then the weapon changes to a rock. There is no evidence to support a we[a]pon at all.” Metcalf SAG at 1. Bono appears to argue that the prosecution changed the weapon to a rock from a bottle as well.

The information does not identify a specific deadly weapon. The trial court correctly defined a deadly weapon for the jury as “any weapon, device, instrument, substance or article, which under the circumstances it is used . . . is readily capable of causing death or substantial bodily injury.” Bono CP at 113; *see* RCW 9A.04.110(6).

Wilson testified that he was hit with two rocks after he exited the truck, one in the back of the head, causing a skull fracture, and one near his ribs. He also testified that Metcalf previously hit him with a bottle in the truck. At trial, the defense moved to dismiss the deadly

No. 36131-I-II consolidated with No. 36243-I-II

weapon enhancement. The trial court did not dismiss the enhancement and, in closing, the State argued that either the bottle or the rocks were deadly weapons.

Whether an object is readily capable of causing substantial bodily harm depends on the circumstances of its use. *State v. Cobb*, 22 Wn. App. 221, 223, 589 P.2d 297 (1978).

Circumstances include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (quoting *People v. Fisher*, 234 Cal. App. 2d 189, 193, 44 Cal. Rptr. 302 (1965)). This determination is a question of fact and, thus, the jury must resolve it. *State v. Carlson*, 65 Wn. App. 153, 160, 828 P.2d 30 (1992).

Here, Wilson testified that he was hit with rocks, thrown with sufficient force to cause him serious injury. These circumstances support the jury’s finding that rocks were used as deadly weapons. *Sorenson*, 6 Wn. App. at 273. In addition, although Wilson testified that he was hit with a plastic bottle, the State argued that the jury need not believe that the bottle was plastic in light of the extensive injuries to Wilson’s face. In *State v. Pomeroy*, 18 Wn. App. 837, 844, 573 P.2d 805 (1977), for example, a glass beer bottle was considered a deadly weapon.

The State’s argument in closing was plausible, given Wilson’s reluctance to testify and the documented facial and other injuries he sustained. And in *State v. Mines*, 163 Wn.2d 387, 392, 179 P.3d 835 (2008), the photographic documentation of the victim’s injuries supported an assault conviction. Sufficient evidence of use of a deadly weapon exists in this case and we hold that the matter properly went to the jury to weigh the testimony and determine whether the State had proven that Bono and Metcalf assaulted Wilson with a deadly weapon.

B. Bono’s SAG Issues

Bono raises several additional issues in his SAG.

No. 36131-1-II consolidated with No. 36243-1-II

1. Sufficiency of the Evidence⁸

a. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In determining whether evidence supports a jury verdict, we “view the evidence in the light most favorable to the State.” *State v. McNeal*, 145 Wn.2d 352, 359-60, 37 P.3d 280 (2002). “Credibility determinations are for the trier of fact and are not subject to review.” We “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

b. Corpus Delicti

Bono first argues that the State’s evidence fails to demonstrate corpus delicti. He argues that the prosecution must prove that a crime occurred and that the proof of a crime cannot be based solely on a defendant’s incriminating statements.

We do not consider a corpus delicti argument when raised for the first time on appeal.⁹ “[T]he corpus delicti rule is a judicially created rule of evidence, not of constitutional magnitude” and, thus, not reviewable when raised for the first time on appeal. *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 531 (1996).

⁸ Bono’s claims of error that relate to matters of credibility and weight of evidence have no merit. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We also do not separately consider assignments of error in a SAG that are already addressed in appellate briefing submitted by defense counsel and the State.

⁹ Bono raised this issue in the trial court, but his counsel did not.

No. 36131-1-II consolidated with No. 36243-1-II

Moreover, a *corpus delicti* argument is inapplicable in this case because neither defendant testified or otherwise made incriminating statements used at trial. *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) notes that the *corpus delicti* rule functions to prohibit admission of a defendant's confession absent independent *prima facie* evidence that the crime was committed. *See also Dodgen*, 81 Wn. App. at 492. We do not further address the claim.

c. Mens Rea and Actus Reas

Bono argues that the State's evidence was insufficient to prove *actus reas* and *mens rea*. We consider Bono's *mens rea* and *actus reas* contentions as assertions that the State failed to present sufficient evidence of essential elements of the crime charged.

To prove assault in the first degree, the State had to show that (1) Bono or an accomplice assaulted Wilson, (2) the assault was committed with a deadly weapon or by force likely to produce great bodily harm, and (3) Bono or an accomplice intended to inflict great bodily harm. RCW 9A.36.011(1)(a). Viewed in the light most favorable to the State, the evidence shows that Bono was angry at Wilson and had previously threatened to harm him; Metcalf punched Wilson and struck him with a bottle in the truck; Metcalf threatened Wilson with further harm; as they exited the truck, Metcalf grabbed Wilson and they both fell; as Wilson was running away from the truck, he was hit with two rocks; and Bono and Metcalf left Wilson, who they had seriously injured, in a remote area. This evidence is sufficient to prove all elements of assault in the first degree. *Green*, 94 Wn.2d at 221-22.

Bono also argues that there were no allegations that he contributed to Wilson's assault.

No. 36131-1-II consolidated with No. 36243-1-II

The jury instructions allowed for principal or accomplice¹⁰ liability for the assault against Wilson. The evidence shows that, at a minimum, Bono accompanied Metcalf to Vasquez's house, Wilson did not know Metcalf but knew Bono, Bono drove a truck while Metcalf assaulted Wilson, and Bono and Metcalf left Wilson in a remote area. Viewed in the light most favorable to the State, sufficient evidence shows that Bono acted, at the very least, as an accomplice to the assault against Wilson and, in fact, may have also directly assaulted him when Wilson was hit by two rocks as he ran from the truck. *E.g., State v. Trout*, 125 Wn. App. 403, 413, 105 P.3d 69 (2005) (concluding that a jury could find that the defendant "promoted or facilitated" others who committed an assault).

Bono further argues that "[t]here existed no causal contact to support restitution on behalf of Mr. Bono." Bono SAG at 23. For the reasons discussed previously demonstrating that sufficient evidence exists to convict Bono of assault, this claim fails.

2. Alleged Prosecutorial Misconduct

Bono next argues prosecutorial misconduct and malicious prosecution. To obtain a reversal of a criminal conviction on the ground of prosecutorial misconduct, the defendant must show the impropriety of that conduct and its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Much of the argument in Bono's SAG focuses on the closing argument issue raised by counsel and previously resolved. We address only additional misconduct arguments.

¹⁰ RCW 9A.08.020(3) provides:

A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he
 - (i) solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) aids or agrees to aid such other person in planning or committing it;
- (b) His conduct is expressly declared by law to establish his complicity.

No. 36131-1-II consolidated with No. 36243-1-II

When Wilson arrived at court, he was wearing leg braces. At the beginning of his testimony, the prosecutor asked him about his most recent employment. Wilson responded, "I was doing tree work." Wilson said the reason he was wearing leg braces was that he had fallen 40 feet, "shattered [his] left heel, broke [his] tibia and fibula, and fractured [his] right ankle." RP at 314.

Bono maintains that the prosecutor deliberately confused the jury by asking Wilson about his broken legs at trial, when neither Bono nor Metcalf broke Wilson's legs. But the record shows that the State elicited evidence that Wilson injured his legs while trimming trees. Bono cannot show prejudice from the State's introductory questioning and his claim fails. *Brown*, 132 Wn.2d at 561, 563; *see also State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Bono also argues that certain statements in the prosecutor's opening and closing remarks were "baseless." Bono SAG at 29. But the record supports the prosecutor's arguments. Further, "prosecuting attorneys will be permitted a reasonable latitude in argumentative deduction from the evidence presented at trial." *Ranicke*, 3 Wn. App. at 897.

Bono further makes claims of prosecutorial misconduct related to filing the initial information, the decision to charge first degree assault, and the prosecutor's failure to offer him a plea agreement. These decisions are within the proper exercise of prosecutorial discretion. *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). "[P]rosecutors are vested with wide discretion in determining how and when to file criminal charges." *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). We give great deference to matters within a prosecutor's discretion. *State v. Pettitt*, 93 Wn.2d 288, 294-96, 609 P.2d 1364 (1980); *State v. Talley*, 122 Wn.2d 192, 214-16, 858 P.2d 217 (1993). Furthermore, any plea negotiations are matters outside the record and cannot be addressed on direct appeal. *State v. McFarland*, 127 Wn. 2d at

No. 36131-1-II consolidated with No. 36243-1-II

338 n.5. Sufficient evidence supports the charged crimes and we do not find the prosecutor's charging decisions unreasonable.

Bono additionally asserts that the prosecutor improperly caused Vasquez to testify about an unrelated beating. The record shows that the prosecutor questioned Vasquez about why his "attitude towards testifying ha[d] changed from what it was this morning." Vasquez explained that it was because he had previously "had a beating by two guys . . . for supposedly being a snitch." RP at 192. Vasquez, however, emphasized that neither Bono nor Metcalf had hurt him and that Bono or Metcalf never threatened him. Bono's counsel moved to strike the answer and the court denied the motion.

Evidence is unfairly prejudicial if it "is more likely to arouse an emotional response than a rational decision by the jury." *Cronin*, 142 Wn.2d at 584 (quoting *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)); ER 402. Even assuming that testimony about an unrelated beating could be prejudicial, Vasquez took care to divorce Bono and Metcalf from the beating and it is clear that the trial court did not abuse its discretion in overruling the defense motion to strike Vasquez's answer. *State v. Allen*, 57 Wn. App. 134, 143-44, 788 P.2d 1084 (1990).

Bono next claims that the prosecutor bribed witnesses and committed other misconduct to force witnesses to testify for the State, such as granting immunity. A prosecutor may grant immunity to an unwilling witness to assure his testimony at trial. *See State v. Bryant*, 146 Wn.2d 90, 97, 42 P.3d 1278 (2002). Absent additional evidence, this does not rise to the level of bribery. *McFarland*, 127 Wn. 2d at 338 n.5. Moreover, the trial record lacks any evidence of monetary or other bribes by the State or that the State arrested material witnesses to intimidate them or otherwise change their testimony. Consequently, Bono's claims fail.

No. 36131-1-II consolidated with No. 36243-1-II

3. Severance

Bono also contends that he should not have been tried with Metcalf. He asserts that in 2005 or early 2006, he unsuccessfully filed a motion to sever against the advice of his attorney. Bono further asserts that he was prejudiced by a joint trial for a number of reasons, including testimony that Metcalf had evaded police at the time of his arrest, that Metcalf had tried to pay witnesses to change their statements, and that there was no testimony that Bono assaulted Wilson.

We will not disturb the trial court's decision regarding joinder or severance absent manifest abuse of discretion. "Washington law disfavors separate trials." *State v. Johnson*, 147 Wn. App. 276, 283, 194 P.3d 1009 (2008) (quoting *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982)), review denied, *State v. Balaski*, 165 Wn.2d 1050 (2009). "Trial courts properly grant . . . severance motions only if a defendant demonstrates that a joint trial would be 'so manifestly prejudicial as to outweigh the concern for judicial economy.'" *State v. Johnson*, 147 Wn. App. at 283-84 (quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)).

Here, neither Bono nor Metcalf testified. Consequently, the trial court was not faced with the situation in which one defendant sought to blame the other or where defendants presented mutually antagonistic defenses. *Johnson*, 147 Wn. App. at 284. Moreover, trial testimony makes clear that it was Metcalf, not Bono, who evaded police and contacted witnesses. Finally, as discussed previously, sufficient evidence exists to show Bono assaulted Wilson or was an accomplice to the assault. Bono's arguments of improper joinder fail.

Bono next argues that testimony by Vasquez that Metcalf told him he was not involved in the assault constituted a *Bruton v. United States*, 391 U.S.123, 88 S. Ct. 1620 (1968) error and necessitated separate trials. Bono's counsel argued that use of statements by Metcalf that could

No. 36131-1-II consolidated with No. 36243-1-II

implicate Bono required a limiting instruction if the State introduced Vasquez's testimony about Metcalf's attempts to change Vasquez's testimony and requested exclusion of "any reference to any of those phone conversations with regard to Mr. Bono." RP at 35. The State did not object to Bono's request.

Under *Bruton*, a criminal defendant may be entitled to severance if (1) his codefendant implicates him in a confession, (2) the confession is introduced into evidence without sufficient redaction, and (3) the defendant who confessed does not testify and is, therefore, not subject to cross-examination. 391 U.S. at 135-37. Vasquez testified that Metcalf told him that he did not commit the assault. Vasquez did not testify that Metcalf said Bono committed the crime against Wilson. The record lacks any testimony that Metcalf mentioned Bono during his conversations with Vasquez. Further, Vasquez's statement, made at Metcalf's request, implicates an unknown third party, not Bono. Vasquez also testified that Bono never threatened him. Finally, Metcalf did not confess and implicate Bono nor did any testimony suggest that Metcalf implicated Bono by word or action. Consequently, the trial court did not abuse its discretion in refusing to sever Bono and Metcalf's trial. *State v. Lane*, 56 Wn. App. 286, 298, 786 P.2d 277 (1989).

4. Evidentiary Issues

Bono asserts that Vasquez's statement regarding Bono's threat to kill Wilson if he slept with his sister was hearsay,¹¹ that it was unduly prejudicial, and that the trial court abused its discretion in admitting it. Bono's counsel moved to exclude any statement by Wilson speculating about why the beating occurred. The State offered the statement to show motive. It

¹¹ Because he did not raise the hearsay objection at trial, the court need not address it for the first time on appeal. *State v. Wixon*, 30 Wn. App. 63, 78, 631 P.2d 1033 (1981); RAP 2.5(a). In any event, a statement is not hearsay when it is offered against a party and is his own statement. ER 801(d)(2)(i).

No. 36131-1-II consolidated with No. 36243-1-II

reasoned that Wilson would testify that he was threatened approximately two weeks before the beating, that the statement was relevant to demonstrate motive for the assault, and that the relevance of the statement outweighed its prejudice. The court adopted the State's argument and denied the defense request.

We review a decision to admit or exclude evidence for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under ER 404(b), evidence of past crimes, conduct or acts can be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In determining whether evidence of prior misconduct is admissible under ER 404(b), the trial court must identify the purpose for introducing the evidence, determine whether the evidence is relevant to prove the charged crime, and weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

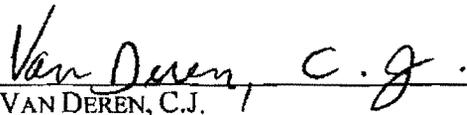
The trial court concluded that Bono's threat was highly relevant to and probative on the issue of motive. As the State argued, "[I]t's obviously highly probative because of the nature of the assault. It was a very serious assault." RP at 89. Moreover, the threat occurred only two weeks before the beating. Consequently, we conclude the trial court did not abuse its discretion in allowing the testimony. *DeVincentis*, 150 Wn.2d at 17.

No. 36131-1-II consolidated with No. 36243-1-II

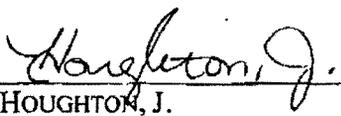
Bono also argues that photographs of Wilson's injuries were prejudicial and should have been either in black and white or not used at all. Photographs of victim injuries are relevant. *See State v. Finch*, 137 Wn.2d 792, 812-13, 975 P.2d 967 (1999). The decision of whether to admit photographs lies within the trial court's sound discretion. *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991). Here, a medical witness testified about the circumstances under which he took the pictures. Moreover, neither defense counsel objected to the State's use of the photographs at trial. The failure to object to the admission and use of an exhibit precludes appellate review. *State v. O'Neill*, 91 Wn. App. 978, 993, 967 P.2d 985 (1998). Even assuming we should address this unobjected-to admission of photographs, we find no abuse of discretion. *Lord*, 117 Wn.2d at 970.

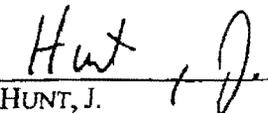
We affirm Bono and Metcalf's convictions for first degree assault with a deadly weapon and do not reach Metcalf's sentencing issue, noting that the matter may be properly developed in a PRP, provided Metcalf can produce evidence to support his assertion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


 VAN DEREN, C.J.

We concur:


 HOUGHTON, J.


 HUNT, J.

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: 738BEDE0-F20D-AA3E-5150B918B67A1094 containing 21 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/BARBARA KNIGHTON, Deputy.

Dated: Sep 16, 2011 11:42 AM

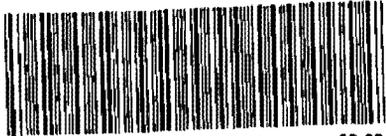


Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to: <https://www.co.pierce.wa.us/cfapps/secure/linux/courtfilling/certifieddocumentview.cfm>, enter SerialID: 738BEDE0-F20D-AA3E-5150B918B67A1094. The copy associated with this number will be displayed by the Court.

APPENDIX “C”

Plaintiff's Proposed Instructions

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



05-1-05263-7 27014148 PLPIN 02-22-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

JARED NATHANIEL METCALF,
JEREMY JAMES BONO,
Defendant.

CAUSE NO. 05-1-05263-7 ✓
05-1-05264-5

***PLAINTIFF'S PROPOSED INSTRUCTIONS
TO THE JURY***

Before the Honorable Brian Tollefson
Judge of the Superior Court
Department No. 8

Gregory L. Greer
Deputy Prosecuting Attorney
Attorney for Plaintiff

Shane Silverthorn
Attorney for Defendant Jared Nathaniel Metcalf

Kent Underwood
Attorney for Defendant Jeremy James Bono

OR AL

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JARED NATHANIEL METCALF,

JEREMY JAMES BONO,

Defendant.

CAUSE NO. 05-1-05263-7
05-1-05264-5

COURT'S INSTRUCTIONS TO THE JURY

DATED this ____ day of February, 2007.

JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 3

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 1

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 5

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All of the instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 6

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 7

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 8

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 10

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 11

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 12

Deadly weapon means any weapon, device, instrument, substance or article, 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 injury.

INSTRUCTION NO. 13

To convict the defendant Jared Nathaniel Metcalf of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 12th day of October, 2005, the defendant or an accomplice assaulted Garrett Wilson;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) 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.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 14

To convict the defendant Jeremy James Bono of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 12th day of October, 2005, the defendant or an accomplice assaulted Garrett Wilson;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) 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.

INSTRUCTION NO. 15

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 16

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms for recording your verdicts. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 17

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime in Count I. The State must also prove beyond a reasonable doubt that there is a connection between the deadly weapon and the defendant or an accomplice, and between the deadly weapon and the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible for offensive or defensive purposes. If one participant in a crime is armed with a deadly weapon all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

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

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY JAMES BONO,

Defendant.

CAUSE NO. 05-1-05264-5

VERDICT FORM A

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of assault in the first degree as charged in Count I.

PRESIDING JUROR

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
JARED NATHANIEL METCALF,
Defendant.

CAUSE NO. 05-1-05263-7
VERDICT FORM A

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of assault in the first degree as charged in Count I.

PRESIDING JUROR

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEREMY JAMES BONO,

Defendant.

CAUSE NO. 05-1-05264-5

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the defendant Jeremy James Bono armed with a deadly weapon at the time of the commission of the crime?

ANSWER: _____ (Yes or No).

PRESIDING JUROR

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
JARED NATHANIEL METCALF,
Defendant.

CAUSE NO. 05-1-05263-7

SPECIAL VERDICT FORM

We, the jury, return a special verdict by answering as follows:

Was the defendant Jared Nathaniel Metcalf armed with a deadly weapon at the time of the commission of the crime?

ANSWER: _____ (Yes or No).

PRESIDING JUROR

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 18

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of assault in the first degree, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of assault in the first degree necessarily includes the lesser crime of assault in the second degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 19

A person commits the crime of assault in the second degree when under circumstances not amounting to assault in the first degree he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 20

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 21

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Case Number: 05-1-05263-7 Date: September 16, 2011
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 22

To convict the defendant Jared Nathaniel Metcalf of the lesser included crime of assault in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of October, 2005, the defendant or an accomplice:
 - (a) intentionally assaulted Garret Wilson and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Garrett Wilson with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

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.

INSTRUCTION NO. 23

To convict the defendant Jeremy James Bono of the lesser included crime of assault in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of October, 2005, the defendant or an accomplice:
 - (a) intentionally assaulted Garrett Wilson and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Garrett Wilson with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

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.

INSTRUCTION NO. 24

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and A-1 for each defendant. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of assault in the first degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank

provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form A-1. If you find the defendant not guilty of the crime of assault in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A-1 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A-1.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JARED NATHANIEL METCALF,

Defendant.

CAUSE NO. 05-1-05263-7

VERDICT FORM A-1

We, the jury, having found the defendant not guilty of the crime of assault in the first degree as charged, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the lesser included crime of assault in the second degree.

PRESIDING JUROR

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05264-5

vs.

JEREMY JAMES BONO,

VERDICT FORM A-1

Defendant.

We, the jury, having found the defendant Jeremy James Bono not guilty of the crime of assault in the first degree as charged, or being unable to unanimously agree as to that charge, find the defendant _____ (Not Guilty or Guilty) of the lesser included crime of assault in the second degree.

PRESIDING JUROR

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64 containing 36 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/BARBARA KNIGHTON, Deputy.

Dated: Sep 16, 2011 11:42 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to: <https://www.co.pierce.wa.us/cfapps/secure/linx/courtfilling/certifieddocumentview.cfm>, enter SerialID: 738BF061-F20D-AA3E-5E06D9BBA09CFE64. The copy associated with this number will be displayed by the Court.

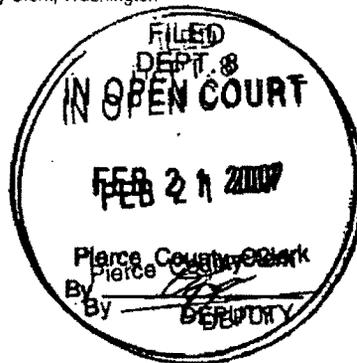
APPENDIX “D”

Court’s Instructions

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington



05-1-05264-5 27014015 CTINJY 02-22-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-05263-7

05-1-05264-5 ✓

vs.

JARED NATHANIEL METCALF,

JEREMY JAMES BONO,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 16th day of February, 2007.

[Handwritten Signature]

JUDGE

ORIGINAL

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 3

Evidence has been introduced in this case on the subject of statements alleged to have been made by Garrett Wilson to Deputy Jason Conner on June 6, 2006, for the limited purpose of impeachment. You must not consider this evidence for any other purpose.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 4

Each defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 6

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All of the instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 7

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 8

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 9

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 11

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 12

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 13

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 14

Deadly weapon means any weapon, device, instrument, substance or article, 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 injury.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 15

To convict the defendant Jared Nathaniel Metcalf of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 12th day of October, 2005, the defendant or an accomplice assaulted Garrett Wilson;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) 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.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 16

To convict the defendant Jeremy James Bono of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 12th day of October, 2005, the defendant or an accomplice assaulted Garrett Wilson;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and
- (4) 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.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 17

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of assault in the first degree, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of assault in the first degree necessarily includes the lesser crime of assault in the second degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 18

A person commits the crime of assault in the second degree when under circumstances not amounting to assault in the first degree he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 19

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 20

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 21

To convict the defendant Jared Nathaniel Metcalf of the lesser included crime of assault in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of October, 2005, the defendant or an accomplice:
 - (a) intentionally assaulted Garret Wilson and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Garrett Wilson with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

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.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 22

To convict the defendant Jeremy James Bono of the lesser included crime of assault in the second degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of October, 2005, the defendant or an accomplice:
 - (a) intentionally assaulted Garrett Wilson and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Garrett Wilson with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

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.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 23

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 24

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and A-1 for each defendant. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of assault in the first degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank

provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form A-1. If you find the defendant not guilty of the crime of assault in the first degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of assault in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A-1 the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A-1.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Case Number: 05-1-05264-5 Date: September 16, 2011
SerialID: 738BF181-F20F-6452-DE63193D7CB63522
Digitally Certified By: Kevin Stock Pierce County Clerk, Washington

INSTRUCTION NO. 25

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime in Count I. The State must also prove beyond a reasonable doubt that there is a connection between the deadly weapon and the defendant or an accomplice, and between the deadly weapon and the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible for offensive or defensive purposes. If one participant in a crime is armed with a deadly weapon all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

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

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: 738BF181-F20F-6452-DE63193D7CB63522 containing 29 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/BARBARA KNIGHTON, Deputy.

Dated: Sep 16, 2011 11:42 AM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted electronically by the Court, sign on to: <https://www.co.pierce.wa.us/cfapps/secure/linux/courtfilng/certifieddocumentview.cfm>, enter SerialID: 738BF181-F20F-6452-DE63193D7CB63522. The copy associated with this number will be displayed by the Court.

APPENDIX “E”

RCW 9A.08.020

Westlaw

West's RCWA 9A.08.020

Page 1

C

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.08. Principles of Liability (Refs & Annos)

→ 9A.08.020. Liability for conduct of another--Complicity

- (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
- (2) A person is legally accountable for the conduct of another person when:
- (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or
 - (b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or
 - (c) He or she is an accomplice of such other person in the commission of the crime.
- (3) A person is an accomplice of another person in the commission of a crime if:
- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
 - (i) Solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) Aids or agrees to aid such other person in planning or committing it; or
 - (b) His or her conduct is expressly declared by law to establish his or her complicity.
- (4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.
- (5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

CREDIT(S)

[2011 c 336 § 351, eff. July 22, 2011; 1975-'76 2nd ex.s. c 38 § 1; 1975 1st ex.s. c 260 § 9A.08.020.]

Current with all 2011 Legislation

(C) 2011 Thomson Reuters.

END OF DOCUMENT

PIERCE COUNTY PROSECUTOR

September 16, 2011 - 3:01 PM

Transmittal Letter

Document Uploaded: prp2-419122-Response.pdf

Case Name: In Re: The PRP of Bono

Court of Appeals Case Number: 41912-2

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us