No. 290107

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL ALFRED POSEY, JR.,

Appellant.

BRIEF OF RESPONDENT

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Special Deputy Prosecuting Attorney
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant raises three assignments of error. These can be summarized as follows;

A) Appellant's exceptional sentence should be vacated because it is not supported by the facts; the record does not provide a substantial and compelling basis to justify such a sentence.
B) The Court's instruction relieved the State of the burden of proving all of the elements of First Degree Robbery.
C) The State failed to meet its burden of proving appellant inflicted bodily injury on the victim.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

A) There was a valid basis to impose an exceptional sentence.
B) The jury instructions were sufficient.
C) The State proved the element of injury as alleged.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record in this response as needed.

III. ARGUMENT.

The issues raised by Posey are controlled by clearly settled case law, are of a factual nature or were well within the discretion of the trial court. The Court of Appeals should dismiss this appeal.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971):

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. ....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.)

RESPONSE TO ASSIGNMENT OF ERROR 'A'– THERE WAS A VALID BASIS FOR THE COURT TO IMPOSE AN EXCEPTIONAL SENTENCE.

RCW 9.94A.585(3)(t) reads as follows "[t]he defendant committed the current offense shortly after being released from incarceration."

It is hard to conceptualize a situation more befitting of an exceptional sentence than this case. Posey had been released from jail two days prior to committing this violent offense. It would appear from the terminology used by appellant to address his criminal history that there should be some sort of credit granted or consideration given because his "history consists entirely" of the **two** juvenile **rape convictions** and **one failure to register as a sex offender.**

Appellant had the audacity to request an exceptional sentence downward apparently on the theory that the state "owed" him some time

from one of his past convictions so he should now get, in essence, credit against this present crime a theory that is repugnant to say the least. (CP 21-26)

Appellant was not only just out of jail but he was still under supervision by the Department of Corrections when he committed this violent crime, a crime committed at Wal-Mart at approximately 8:00 PM in the presence of the victim's husband. He was released from jail at 8 PM on Friday and by 8 PM Sunday he had planned and completed an attempted robbery. Mr. Posey was still under the supervision of the state for his other violent crimes, a crime no less heinous or violent because it was committed as a "juvenile." (RP 5)

Both State v. Butler, 75 Wash.App. 47, 876 P.2d 481 (1994), *review denied,* 125 Wash.2d 1021, 890 P.2d 463 (1995) and State v. Saltz, 137 Wash.App. 576, 154 P.3d 282 (2007) addressed this section of the Revised Code of Washington.

The holding in both of those cases makes it clear this section of the law is valid and they addressed a broad spectrum of possible factual scenarios. This section of the law was again addressed by this very court. The two prior cases were addressed in the holding in State v. Combs, infra.

Appellant appears to argue that because he lost his job, his last felony was victimless and that he was homeless when he committed this violent felony, that somehow the fact that less than forty-eight hours has passed since he was released from jail and the time he committed a new violent offense does not comport with the intent of RCW 9.94A.585(3)(t). He now claims his action did not demonstrate a "flagrant disdain for the law." A more complete review of the ruling set forth in State v. Combs 156 Wn. App. 502, 506-7, 232 P.2d 1179 (2010) is as follows:

> Mr. Combs essentially argues that *Butler* and *Saltz* set the boundaries for what constitutes rapid recidivism-a period of time not exceeding 30 days and some connection between the former crime and the current one. We disagree. As described in *Butler,* the gravamen of the offense is disdain for the law. Wash.App. at 54, 876 P.2d 481. The statutory requirement, however, is that the new current offense be committed " shortly after being released from incarceration." RCW 9.94A.535(3)(t). The statute does not require a connection between the offenses and we do not read the cases as requiring one. Instead, the noted connections (similarity of offenses or victims) were simply additional evidence of disregard for the law. (Footnote omitted.)

Once again, the facts were clear, they were established beyond a reasonable doubt and the actions of the jury are not challenged, merely the acts of the judge in imposing the sentence. A sentence clearly mandated by the results of this trial which came about, not because Mr. Posey was sentenced as an adult on his

prior felonies, but because he chose to commit another felony within hours of he release from jail on his last felony.

The full ruling of the trial court here is the final answer:

> THE COURT: Okay. Alright. Well, there's a couple things I need to keep in mind here and some things that I need to pagical (phonetic) I guess -- there's probably a better way to describe it but it just come to mind right now. First off, the aggravating factor that was found by the jury was rapid recidivism and whether Mr. Posey was in jail for robbery or whether he was in jail for shoplifting or whether he was in jail for the crime of failing to register as a sex offender is really irrelevant according to the language of the statute. It's simply a question whether he committed a new offense shortly after being released from incarceration. It doesn't require that the incarceration -- did the earlier incarceration be related in some fashion to the later crime. And we can understand -- I can certainly understand why it is that the legislature and the public would think that somebody just getting out of jail and then immediately or shortly thereafter committing crime is worse than somebody who waits some period of time before they commit a new offense, so in this particular instance we're talking about a couple days between when Mr. Posey was released from the jail and when he attempted to steal Mrs. Maltos's purse in the parking of the Wal-Mart. So clearly, there is rapid recidivism. The jury rightfully found that as a fact. So, I have to compartmentalize that over here and also look, however, at the crime Mr. Posey committed and the nature of the crime and the impact of that crime upon Mrs. Maltos and also her husband as well.
>
> This is a coward's crime. There's probably no other way to describe this particular offense, purse snatching from somebody regardless of who that person is but -- that is a coward's crime and not the crime of anybody who has any (inaudible) that Mrs. Maltos is in her 40s probably, maybe a little bit older than that. She's not

80 but on the other hand she's not a 250 pound linebacker or a professional athlete. She was selected to be Mr. Posey's victim by Mr. Posey because she seemed to be a likely victim. A person who would be a good victim from the criminal standpoint and so Mr. Posey instead of stealing from Wal-Mart or, you know, prowling cars or doing something else decided that he would steal her purse, and then when she resisted his effort, he punched her in the face, and it's clear to me that that's what happened and his attempt to wrest the purse from her was without success and so he stands convicted of attempted first degree robbery, but it was a -- I guess the point I'm getting to is that in my estimation given the nature of the offense, that a certain amount -- the degree of sophistication involved as well because I think that Mr. Posey cased the Maltoses in the store and then followed them out and this wasn't a crime of -- there was some planning involved here, maybe not a lot, but there was some. It wasn't a spur of the moment thing that Mr. Posey decided to do as he walked through the parking lot. There was some thought beforehand. So given the nature of the offense, the impact -- significant impact upon Mrs. Maltos and understandably so, that I believe within the standard range or the upper end of the standard range is appropriate of 76.5 months. That said, there's additional time that's warranted because of the finding of the aggravating factor and I believe an additional sentence, term of confinement of 30 months, two and a half years, is appropriate. So a total sentence of 106.5 months is the Court's judgment.

...

One point I'd make for Mr. Posey (inaudible) Mr. Dold (inaudible) as well is in looking at the Judgment and Sentence that was originally imposed upon Mr. Posey when he was convicted of the rape charges back some years ago now, is that he was, and it's been mentioned, that he was sentenced to life in prison and if the Supreme Court hadn't reversed the convictions and remanded the matter just for entry of judgment in the Juvenile Court, in all likelihood Mr. Posey would still

> be in Walla Walla waiting for the Board to set his minimum term. This was a gift from God, Mr. Posey, when the Supreme Court vacated the sentence and ordered you to be sentenced anew. You ignored it. You made very little change in your lifestyle. You didn't see the light and decide that this was the time to give up the criminal lifestyle, that you continued your criminal lifestyle and so I don't think society owes you anything, and that you owe -- you had an opportunity, Mr. Posey, to turn your life around and you walked away from it.
> (SRP 12-14)

If Mr. Posey had in deed spent these two years out of prison as a "productive" member of the community it is even more impressive that he could cultivate a relationship with the other person or persons, who helped in this robbery, concoct the scheme and put those plans into action within forty-eight hours. Most "productive" members of society would not have the resources available to them to get a violent felony planned and completed with such short notice.

While the case law with regard to this subsection of RCW 9.94A.585 may not be voluminous, it is specific. This case fits this law; the jury was properly charged and found the act was committed, beyond a reasonable doubt.

The fact that Posey may have been wrongly sentenced in the past does not somehow lessen the facts of this crime, nor does it somehow mitigate the fact that he was convicted of two rapes, a felony violation of

the registration laws. This court must do as the trial court did, compartmentalize the matters and address them as the separate acts they were.

The baseline for the trial court to determine the length of an exceptional sentence was recently addressed by this court in State v. Mann, 157 Wn. App. 428, 441237 P.3d 966 (Wash.App. Div. 3 2010):

> A sentence outside the standard range may be reversed if the reviewing court finds that the sentence imposed was clearly too excessive. RCW 9.94A.585(4)(b). Whether a sentence is clearly too excessive is reviewed for an abuse of discretion. State v. Oxborrow, 106 Wash.2d 525, 530, 723 P.2d 1123 (1986). A trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

This court need look no further than the lengthy quote from the ruling made by the trial court to see that this sentence was not "clearly too excessive." The court in Oxborrow sentence far exceeded the one imposed here. Posey fails to demonstrate how the additional thirty months imposed, based on the decision of the jury, was an abuse of the courts discretion.

RESPONSE TO ASSIGNMENT OF ERROR 'B' – THE JURY INSTRUCTIONS GIVEN WERE PROPER THEY DID NOT RELIEVE THE STATE OF ITS BURDEN.

The jury instruction while did not mirror the WPIC's however they did correctly set forth the elements of the crime of attempted robbery. They may not state that the crime proven is "robbery" but the specific elements do in fact, in total, add up to robbery. The instructions do not need to state "robbery" if they list the elements of that offense. The court stated that the instructions "got to the same place" which they do, they just don't use the phrase robbery to define robbery. Which as the court states is less confusing to the jury but apparently it was to the attorneys reviewing this case.

A trial court's refusal to submit a proposed jury instruction is reviewed for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998). Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Both parties objected to the instruction which the court submitted to the jury. An analysis of the instructions does show that as a whole they are as the court says:

> THE COURT: Alright. Well, the way I structured the instructions that the State is objecting to, I think, gets to the same point, slightly different route and a less confusing route that I think will be of benefit to the jury in making their decision on this particular case. And so consequently, I'm going to adhere to the instructions that I have already shown to counsel. (RP 108-09)
>
> THE COURT: Okay. Alright. Again, I'm going to adhere to the giving of Instruction 5 as I've constructed it and I think it is less confusing and adequately and directly and appropriately defines the elements of the crime of attempted first degree robbery as alleged in this particular case. (RP 110)

It would appear that the instructions created by the trial court meet the definition set forth in RCW 9A.56.190 Robbery -- Definition;

> A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person

> from whom taken, such knowledge was prevented by the use of force or fear.

As well as:

> **RCW 9A.56.200 Robbery in the first degree.**
> (1) A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> ...
> (iii) Inflicts bodily injury;

It would also appear that what the court was attempting to do was to define the crime without using that self – same crime as a portion of the definition a confusing problem that is so often the case in the WPIC definitions.

While it may be true that the attorneys who reviewed this both at the trial level and here on appeal were not and, are not, comfortable with the method the court used to define this crime the instruction does comport with the statute and is allowed pursuant to the case law cited above. It is also clear from the record that the State factually substantiated all of the elements needed to prove the crime of attempted first degree robbery and that it was an act which was done intentionally. There is no mistaking the actions of Posey to have been merely an attempted assault or a burglary. There was no other act on his part other than his attempt to steal the purse of the victim and when his effort was frustrated and stymied he assaulted the victim by punching her in the head. The only reason, as stated by the

deputy prosecutor, that it was an attempt was that like a "wish-bone" when the purse straps snapped the winner of the tug-of-war was the victim not Posey.

Even if this court were to consider this instructional err that err would be harmless. This court will review jury instruction errors for constitutional harmless error. The Berube court stated " 'not every omission or misstatement in a jury instruction relieves the State of its burden' " so as to require reversal. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). A constitutional error is harmless if it appears "beyond a reasonable doubt that the error did not contribute to the ultimate verdict." Berube, 150 Wn.2d at 505. "'When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.'" Berube, 150 Wn.2d at 505 (*quoting* State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). But if "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *see also* State v. Jennings, 111 Wn. App. 54, 64, 44 P.3d 1 (2002) (stating the same).

See State v. Brown, 147 Wash.2d at 332, 58 P.3d 889. "An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* Whether a flawed jury instruction is harmless error depends on the facts of a particular case. *Id.*

The facts of this case are unrefuted. The victim and her husband testified they did not know appellant and that he had watched them before he made the attempt to rob the victim of her purse. As the victim stated;

Q As both of you had the purse --
A Yes.
Q -- what happened?
A Well, I pulled back towards me. I jerked on it.
Q And what did the defendant do?
A He punched me.
Q Did he have a free hand to punch you with?
A Yes.
Q And where did he punch you?
A Right here.
Q Did that cause any pain?
A Yes.
Q Did he have your permission to punch you?
A No.
Q And backing up for a second, when you gesture and say right here, you're pointing to an area on your forehead just above your right eye?
A Yes.
Q Did you let go of the purse?
A No.
Q What happened after that?
A Right about then my husband came around and told the defendant, come on, and they both were going to -- I mean, they both like squared off at each other.
Q So where was the purse then?
A I still had it.

Q You still -- but the defendant did not?
A No, because the handles broke.
Q The handles broke.
A Yes.
Q Okay, when you say the handles broke, could you be a little more specific?
A The handle that he had a hold of tore off totally and the one I had one side came off.
Q One side came off. And what happened to the purse when the handles came off?
A I kept a hold of it as far as I remember.
...
Q Had you ever been hit before?
A Not like that.
Q Had you ever had something -- something fall and strike you in the head before?
A Yes, but not -- not to that force.
Q Not to that force. Was there a difference between the impact of your head of the defendant punching you in the face and the impact to your head when something else had hit -- and we haven't gotten into what that is, book, falling glass, whatever.
A Yes, I mean, it snapped my head.
Q It snapped your head. What do you mean by snapped your head?
A Well, you know.
Q Your head moved -- you're king of gesturing back with your head?
A Yeah.
(RP 29-31)

In this case "but for" a snapped purse strap this would have become a completed crime. This is a stranger on stranger crime in a parking lot of a Wal-Mart at about 8:30 PM on a January night that as recorded by video surveillance cameras, the record made by those cameras was shown to the jury and narrated by the victim and her husband. (RP 33,34-8, 67-69)

The victim and her husband positively identified appellant as the person who committed this crime. Both at a location near the crime as well as in the courtroom.

Mrs. Maltos testified as follows:

Q Do you see that young man in the courtroom today?
A Yes, he's right there.
Q When you mean right there, would you be a little more specific.
A He's next to the defense lawyer. That's him.
MR. BOWMAN: Record reflect identification, Your Honor.
THE COURT: It will.
...
Q And then how long after the police officer arrived before you went to go look at anybody?
A Just a few -- just a couple of minutes.
Q A couple minutes later. And do you recall where the police officers took you?
A I can't remember the road exactly but it was by a park.
Q It was by a park?
A Yes.
Q Did they show you anyone?
A Yes, they showed us two young men.
Q Are either of those young men in the courtroom today?
A Yes.
Q Who?
A The one -- the defendant.
(RP 25, 39-40)

Mr. Maltos testified as follows:

Q After you left the checkout area, was there anyone in the store that caught your eye?
A Before I left the store.
Q Before you left the store.
A Inside, yeah.
Q Inside. Is that person here today? Are you referring to the gentleman in the
white shirt to the left raising his hand?

A Yes.
MR. BOWMAN: Let the record reflect identification.
THE COURT: It will.
Q Where was that person in the store when you first saw him?
A Standing in front of the restaurants.
Q Why did he catch your eye?
A Just because he was standing there by himself and just motionless and the other thing was the tattoo on his neck. 61-62
Q What did you do then when you heard the commotion?
A I turned and seen -- looked towards my wife and then --
Q And what did you see when you looked towards your wife?
A The defendant and my wife were both holding onto to her purse.
Q Do you recall how they were holding onto the purse, who had which part of the
purse, what kind of a grip they were using, any of those details?
A No, it seemed like they both had an equal grip on it.
Q And what were they doing as they held onto the purse?
A Just she wasn't letting go and he was trying to get it from her.
Q So a tussle?
A (Shakes head yes)
Q What happened next?
A That's probably when he swung at her and struck her in the face and --
Q You say probably is that probably when that happened or --
A (Inaudible -- both talking at once) --
Q -- he probably swung at her?
A No, he -- I seen his -- he swung at her and hit her.
Q Where did he hit her?
A From what I could tell it was in the front area right around her eye or upper –
right above her eye.
Q Did let go of the purse in order to swing at her eye?
A No, he still had -- I think he had one hand still on it and then – it was all really quick, you know, it was just -- so I just remember I seen the fist coming towards her and he was still holding on with one hand.
(RP 64)
...
Q And did you have any contact with the police that night?
A Yes.
Q Did the police ever take you to view someone?

A Yes.
Q Is that person also in the courtroom?
A Yes, the defendant.
Q And did you tell the police anything that might help further identify him?
A Yes, I said, look at his on neck, it will say Elizabeth.
(RP 70)

The facts support the conclusion of the jury even if this court were to find that challenged jury instruction was erroneous.

See also Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (even if an instruction is misleading and thus erroneous, it will not require reversal unless prejudice is shown); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (even constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error), *cert. denied*, 475 U.S. 1020 (1986); Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (error without prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects, or presumptively affects, outcome of trial).

RESPONSE TO ASSIGNMENT OF ERROR 'C' – THE STATE PROVED THE ELEMENT OF BODILY INJURY.

This court need look no further than the testimony of Victim Susan Maltos to establish that there was bodily injury and therefor this assignment of error is baseless:

Q -- what happened?
A Well, I pulled back towards me. I jerked on it.
Q And what did the defendant do?
A He punched me.
Q Did he have a free hand to punch you with?
A Yes.
Q And where did he punch you?
A Right here.
Q Did that cause any pain?
A Yes.
Q Did he have your permission to punch you?
A No.
Q And backing up for a second, when you gesture and say right here, you're pointing to an area on your forehead just above your right eye?
(RP 29-30)
...
Q Had you ever been hit before?
A Not like that.
Q Had you ever had something -- something fall and strike you in the head before?
A Yes, but not -- not to that force.
Q Not to that force. Was there a difference between the impact of your head of the defendant punching you in the face and the impact to your head when something else had hit -- and we haven't gotten into what that is, book, falling glass, whatever.
A Yes, I mean, it snapped my head.
Q It snapped your head. What do you mean by snapped your head?
A Well, you know.
Q Your head moved -- you're king of gesturing back with your head?
A Yeah.
(RP 31-2)

Q As best you could. Did you receive any kind of medical attention, first aid, anything?
A Not that night, but the next day I went to the hospital, to the emergency room.
Q Did you ever have a cold press?

A Yes, immediately they got one for me.
Q Okay. And what were you doing with the cold press?
A Holding over my head.
Q Why were you holding it over your head?
A Because my head hurt from being punched.
Q Because your head hurt from being punched.
(RP 39)

Cross of victim

Q He basically walked through what happened and asked you what happened?
A You know, I don't really remember what we talked about. I know I told him that I was stiff and a few other things but I don't remember everything we talked about.
(RP 49)

Q Okay. You went to the ER the next morning.
A Yes.
Q Told them that on a pain scale of 1 to 10, 10 being the most serious pain and 1 being an itch on your hand, this was about a 4.
A Yes.
Q Okay, full range of motion, no problems -- and he checked your neck out, right?
A Right.
Q Now you have some serious problems with your neck and back?
A Yes.
Q And you were concerned about that?
A Yes.
Q And so they told you that there was no apparent damage to the osteoarthritis in your neck or the problem in your back?
A No, it was just stiffened up more than usual.
Q And that's -- the police told you to go get checked out, though, right?
A Yes.
Q Okay.

A If I had to.
(RP 52-3)

RCW 9A.04.110(4) says "bodily injury" is "physical pain or injury." there is noting else which needs to be said. This victim stated she was in pain, that she had never been hit like that before, it snapped her head, that she put an ice pack on her head because it hurt and that she went to the hospital, albeit, later. This meets the definition as set forth in the statute and which was unrefuted at trial. While the right to remain silent is a given and the law specifically instructs that no one can infer anything from the fact that a defendant does not take the stand the cold hard fact remains in this trial that no matter what the defense tried to elicit from the victim and her husband there can be no taking away the fact that she, the victim Mrs. Maltos, stated she was in pain.

Each an every case presented has a different set of facts, so for Posey to claim there was insufficient proof of this element because the level or type of injury does not meet that set forth in some other case is as they say "beside the point." The point, the fact, the reality is that the victim got on the stand and under oath stated unrefuted facts which without citation to any case law meet the definition of bodily injury.

While the court in State v. Beals, 100 Wn. App. 189, 193-194, 997 P.2d 941 (Wash.App. Div. 1 2000) was discussing merger this analysis set forth is helpful in this case:

> The attempted robbery was complete as soon as Beals formed the requisite intent and took the hammer in hand...The attempt to commit first degree robbery required only a single substantial step, and could have been satisfied by proof of something far less than second degree assault (e.g., merely "displaying" what appears to be a deadly weapon).

State v. Saenz, 156 Wn. App. 866, 234 P.3d 336 (Wash.App. Div. 3 2010):

> The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). When an appellant asserts insufficient evidence, he or she admits the truth of the State's evidence, as well as all reasonable inferences that can be drawn from that evidence. Id. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

IV. CONCLUSION

The assignments of error raised were factual in nature, well within the trial courts discretion, or clearly controlled by settled law and the decision of the court were not an abuse of discretion.

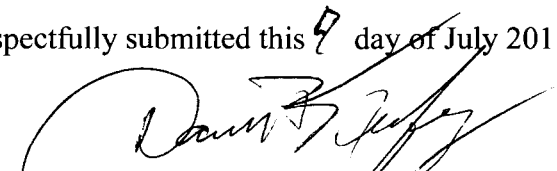
The jury was properly instructed with regard to the aggravating circumstance. The court properly imposed an exceptional sentence. Further, that sentence was not clearly excessive.

The instruction adopted by the court and given to the jury, while not direct copies of the WPIC's were proper statements of the law and did not shift not absolve the State of its burden. Further, even if this court were to determine that the instruction created by the trial court was erroneous any error was harmless given the facts of this case.

The facts presented were sufficient to meet the definitions set forth in the RCW's with regard to the nature and extent of the injuries sustained by the victim of this violent crime.

The actions of the trial court should be upheld this appeal should be dismissed.

Respectfully submitted this 7 day of July 2011



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