

**FILED**

JUL 28 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

322718-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

COREY DEAN FAWVER,

Defendant/Appellant.

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APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT

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APPELLANT'S BRIEF

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Respectfully submitted:



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TABLE OF CONTENTS

	Page No.
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
II. <u>STATEMENT OF THE CASE</u> .....	1-5
III. <u>ARGUMENT</u> .....	5-18
1. <u>Mr. Fawver’s trial counsel was ineffective</u> .....	5-16
A. <u>Failure to offer or request a jury instruction on voluntary intoxication</u> .....	7-12
B. <u>Failure to object to the admission of a Facebook post allegedly made by Mr. Fawver</u> .....	12-16
2. <u>The State’s evidence failed to establish each of the elements of Second Degree Assault beyond a reasonable doubt</u> .....	16-18
VI. <u>CONCLUSION</u> .....	19

## TABLE OF AUTHORITIES

### State Cases

	Page No.
<i>State v. Andrews</i> , 172 Wn.App. 703, 293 P.3d 1203 (2013).....	12
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	7
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002).....	7
<i>State v. Gabryschak</i> , 83 Wn.App. 249, 921 P.2d 549 (1996).....	8
<i>State v. Hansen</i> , 122 Wn.2d 712, 862 P.2d 117 (1993).....	16
<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	10, 11
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	6
<i>State v. Kruger</i> , 116 Wn.App. 685, 67 P.3d 1147 (2003).....	8-11
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	6
<i>State v. Mannering</i> , 150 Wn.2d 277, 75 P.3d 961 (2003).....	10, 11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998).....	6, 15
<i>State v. Sherman</i> , 98 Wn.2d 53, 653 P.2d 612 (1982).....	8
<i>State v. Side</i> , 105 Wn.App. 787, 21 P.3d 321 (2001).....	16
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	6-8
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	7, 8
<i>State v. Townsend</i> , 142 Wn.2d 838, 15 P.3d 145 (2001).....	15
<i>State v. Walters</i> , 162 Wn.App. 74, 255 P.3d 835 (2011).....	7, 9, 10

TABLE OF AUTHORITIES

Federal Cases

	Page No.
<i>Jones v. Wood</i> , 114 F.3d 1002 (9 <sup>th</sup> Cir. 1997).....	6
<i>Lorraine v. Markel American Ins. Co.</i> , 241 F.R.D. 534, 73 Fed. R. Evid. Serv. 446 (D. Md. 2007).....	12, 13
<i>United States v. Jackson</i> , 208 F.3d 633 (7 <sup>th</sup> Cir. 2000).....	13

U.S. Supreme Court Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6, 7, 15
---	----------

Constitution

Sixth Amendment, United States Constitution.....	5
Article I, Section 22, Washington State Constitution.....	5

Statutes, Rules and Instructions

RCW 9A.36.021.....	17
ER 901.....	12, 13
WPIC 18.10.....	7

## **I. ASSIGNMENTS OF ERROR**

1. Whether Mr. Fawver's trial counsel was ineffective on the following grounds:
  - A. For failure to offer or request a jury instruction on voluntary intoxication where the facts presented at trial would have supported such an instruction.
  - B. For failure to object to the admission of a Facebook post allegedly created by Mr. Fawver where the authenticity of the post was in question.
2. Whether the State's evidence failed to establish each of the elements of Second Degree Assault beyond a reasonable doubt.

## **II. STATEMENT OF THE CASE**

The Appellant, Corey Dean Fawver, was charged by original Information with one count of First Degree Burglary and one count of Second Degree Assault. (CP 1-2). Deadly weapon enhancements were also alleged on each of the two counts. (CP 1-2). The case proceeded to jury trial in January of 2014.

At trial, the State of Washington called eleven witnesses. The testimony showed that, on December 31, 2012, Christopher Pierce was hosting a New Year's Eve party at his residence. (01/14/2014 RP 235).

The partygoers consisted mostly of Mr. Pierce's friends and family members. (01/14/2014 RP 236). Mr. Pierce had also invited Mr. Fawver and some of Mr. Fawver's friends to the party. (01/15/2014 RP 320-321, 354-357). Upon their arrival, Mr. Pierce greeted them and welcomed them inside. (01/15/2014 RP 356-357). Most of Mr. Fawver's friends left the party early, but Mr. Fawver and Christy Fair decided to stay. (01/15/2014 RP 321, 357). Shortly thereafter, Mr. Pierce's mother, Ronna Wadzuk, punched Mr. Fawver in the back of the head. (01/15/2014 RP 358-359). An altercation then ensued in which Mr. Pierce and his uncle-in-law, Mike Glenn, grabbed Mr. Fawver and pushed him out the front door face first into the snow. (01/15/2014 RP 359). Once outside they began punching Mr. Fawver. (01/14/2014 RP 261; 01/15/2014 RP 359). Ms. Fair screamed at them to stop and they eventually did. (01/15/2014 RP 359). Mr. Fawver and Ms. Fair then walked away on foot. (01/15/2014 RP 359).

Approximately two hours later, Mr. Fawver and his friends returned to the party and some of them entered the residence. (01/15/2014 RP 360-361). Mr. Fawver did not wish to return. (01/15/2014 RP 361). It is disputed as to whether Mr. Fawver actually re-entered the residence. (01/13/2014 RP 149; 01/14/2014 RP 168, 172, 183, 205, 244; 01/15/2014 RP 338, 363). One of the witnesses, Corina Moore, testified that Mr.

Fawver entered the residence with a baseball bat. (01/14/2014 RP 183, 188). Other witnesses did not see Mr. Fawver enter the residence. (01/13/2014 RP 149, 153; 01/14/2014 RP 172; 01/15/2014 RP 338, 361, 363). There was testimony that some of Mr. Fawver's friends also had baseball bats. (01/14/2014 RP 169, 227-228).

A mass fight ensued almost immediately after Mr. Fawver's friends entered the residence. (01/14/2014 RP 177-178). The fight eventually spilled out the front door and into the yard. (01/15/2014 RP 323-324). At that point, some of the windows of the residence were smashed out. (01/14/2014 RP 168, 194, 202). Mr. Pierce sustained a head injury during the fracas. (01/14/2014 RP 274). He did not know how it happened or who struck him. (01/14/2014 RP 269). Nor did any of the witnesses see how it happened. (01/14/2014 RP 178-179, 197, 230). Mr. Pierce later refused medical attention and was generally uncooperative with the police. (01/14/2014 RP 267).

Most of the people at the party were either drinking or intoxicated. (01/13/2014 RP 154; 01/14/2014 RP 169, 185, 214-215, 232, 259). Mr. Pierce had a blood alcohol level of 0.17 as shown by toxicology reports. (01/14/2014 RP 278). Mr. Fawver later admitted to police that he was "really, really drunk." (01/14/2014 RP 295). He told the police it was, "maybe as drunk as he's [Mr. Fawver] ever been." (01/14/2014 RP 295-

296). Mr. Fawver also stated, “You do stupid shit when you get drunk.” (01/14/2014 RP 295). When asked by police if it was possible that he broke the windows of Mr. Pierce’s residence and just did not remember it because of his level of intoxication, Mr. Fawver responded that, “It could be true, but [I do] not remember it.” (01/14/2014 RP 296). He admitted to only remembering pieces of the night in question. (01/14/2014 RP 296).

During the trial, the prosecutor offered a photograph during the State’s case-in-chief of a Facebook post, allegedly made by Mr. Fawver, which stated, “Wow, what a fun night. PPL [people] in DP [Deer Park] are not bad as they think they are.” (01/13/2014 RP 139-140; 01/14/2014 RP 286). Detective Drapeau testified that the date on the post “says 11 hours ago, but on this posting it was made 01/01/2013.” (01/13/2014 RP 140). The post was admitted by the Court as State’s Exhibit 1 without objection from Mr. Fawver’s trial counsel. (01/13/2014 RP 140).

Later, the prosecutor questioned one of Mr. Fawver’s witnesses about the Facebook post. (01/15/2014 RP 335). The witness could not say affirmatively whether the post was made after the incident because there was no date or time stamp on the post. (01/15/2014 RP 335). In closing argument, the prosecutor quipped, “Think about that when you look at the Cory Fawver’s Facebook page and evaluate what he wrote there. Does it seem like he’s pretty proud of what he did that night,

announcing it to everyone on Facebook?” (01/15/2014 RP 405). Mr. Fawver’s trial counsel responded with, “I don’t know what to say about the Facebook page, probably not the best comment.” (01/15/2014 RP 425).

On January 15, 2014, Mr. Fawver was found guilty by jury of First Degree Burglary and Second Degree Assault, as well as the deadly weapon enhancements. (CP 73-76, 122). Mr. Fawver was subsequently sentenced to 39 months of confinement. (CP 122-135). He now appeals.

### **III. ARGUMENT**

#### **1. MR. FAWVER’S TRIAL COUNSEL WAS INEFFECTIVE.**

Mr. Fawver’s first assignment of error is that his trial counsel was ineffective on two separate grounds. First, his trial counsel did not offer or request a voluntary intoxication instruction where the facts at trial would have supported such an instruction. Second, his trial counsel failed to object to the admission of a Facebook post allegedly created by Mr. Fawver where the authenticity of the post was in question.

Both the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee an accused the right to a fair trial, which includes the right to effective assistance of counsel. Washington courts apply the two-part test first

enunciated in *Strickland*<sup>1</sup> in determining whether a defendant received constitutionally sufficient representation. Appellate courts begin with the presumption that trial counsel's representation was proper. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

To demonstrate ineffective assistance of counsel the appellant must show that his counsel's performance was both deficient and prejudicial. *State v. Saunders*, 91 Wn.App 575, 579, 958 P.2d 364 (1998). Deficient performance is defined as one which falls below an objective standard of reasonableness. *Id.* However, matters that can be shown to go to trial strategy or tactics do not constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). However, even matters that could be considered one of strategy are not immune from attack – it must be a reasonable strategy. *Jones v. Wood*, 114 F.3d 1002, 1010 (9<sup>th</sup> Cir. 1997).

Prejudice is shown where there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *Hendrickson*, 129 Wn.2d at 78. A reasonable probability is one that undermines confidence in the outcome. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). However, the accused need not show that the deficient conduct more likely than not altered the outcome. *Id.*

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A. Failure to offer or request a jury instruction on voluntary intoxication.

Failure by trial counsel to raise a defense supported by the facts has been held to satisfy both prongs of the *Strickland* test. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *See also Thomas*, 109 Wn.2d at 228-29. A defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011). An intoxication defense allows the jury to consider the effect of voluntary intoxication by drugs or alcohol on the defendant's ability to form the requisite mental state. *Tilton*, 149 Wn.2d at 784 (citing *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987)); *See also* WPIC 18.10.<sup>2</sup>

To receive an instruction on voluntary intoxication where alcohol is involved, a defendant must show, “(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected [his or her] ability to acquire the required mental state.” *Walters*, 162 Wn.App. at 82 (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)). The evidence “must reasonably and logically

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<sup>2</sup> WPIC 18.10 provides that, “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*][*or*][*failed to act*] with (fill in requisite mental state).” (emphasis and brackets in original).

connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Kruger*, 116 Wn.App 685, 691-92, 67 P.3d 1147 (2003) (citing *State v. Gabryschak*, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996)).

In *Thomas, supra*, the defendant argued on appeal that she received ineffective assistance when her trial counsel failed to present a diminished capacity defense based upon voluntary intoxication. *Thomas*, 109 Wn.2d at 226. The Washington State Supreme Court reversed her conviction and decided counsel was ineffective for failing to offer a *Sherman*<sup>3</sup> instruction. *Id.* at 228-29. Further, a reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based upon pertinent cases. *Id.* at 229.

Relying upon *Thomas*, the Washington State Supreme Court again reversed the conviction of a defendant whose counsel failed to raise a diminished capacity defense. *Tilton*, 149 Wn.2d at 784-85. The Court noted that, although the record on appeal was incomplete, it appeared that at trial evidence of the defendant's intoxication was never mentioned, despite there being evidence that he had consumed drugs before and after the alleged incident. *Id.* This was sufficient to undermine confidence in the outcome of the trial. *Id.* at 785.

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<sup>3</sup> *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982).

Likewise, in *Kruger, supra*, this Court held that defense counsel's failure to propose a voluntary intoxication instruction in an assault case constituted ineffective assistance of counsel. *Kruger*, 116 Wn.App. at 694-95. Given the evidence that the defendant was intoxicated, his counsel should have proposed a voluntary intoxication instruction. *Id.* at 694. This Court further noted that, if the issue of intoxication was before the jury with respect to its effect on the defendant's mental state, the defense was impotent without the instruction, thereby resulting in prejudice. *Id.* at 694-695.

In the instant case, Mr. Fawver was charged with one count of First Degree Burglary and one count of Second Degree Assault. (CP 1-2). Each crime required the State to prove Mr. Fawver acted with intent. (CP 58, 64). This satisfies the first prong of the three-part test cited with approval by this Court in *Walters* and *Kruger*.

Further, there was ample evidence to show both that Mr. Fawver was drinking and that his drinking affected his ability to form the requisite intent. Mr. Fawver admitted to police that he was "really, really drunk." (01/14/2014 RP 295). He told the police it was, "maybe as drunk as he's [Mr. Fawver] ever been." (01/14/2014 RP 295-296). He was at a New Year's Eve party. (01/15/2014 RP 319-321). Mr. Fawver also stated, "You do stupid shit when you get drunk." (01/14/2014 RP 295). When

asked by police if it was possible that he broke the windows of Mr. Pierce's residence and just did not remember it because of his level of intoxication, Mr. Fawver responded that, "It could be true, but [I do] not remember it." (01/14/2014 RP 296). He admitted to only remembering pieces of the night in question. (01/14/2014 RP 296). These facts would satisfy the second and third prongs of the three-part test cited with approval by this Court in *Walters* and *Kruger*. Thus, a voluntary intoxication instruction may well have been warranted on these facts.

The next inquiry is whether trial counsel's failure to offer the instruction constitutes ineffective assistance. *See Kruger*, 116 Wn.App. at 691 (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct)). Counsel is not ineffective where a proposed defense would be antagonistic to the defense actually raised. *See State v. Mannering*, 150 Wn.2d 277, 286-87, 75 P.3d 961 (2003) (lack of intent and duress are inconsistent defenses); *See also State v. Harris*, 122 Wn.App. 547, 552-53, 90 P.3d 1133 (2004) (voluntary intoxication and self-defense are inconsistent defenses). In *Harris*, the defendant testified at trial that he intended to shoot his victim and had done so out of self-defense. *Id.* at 553. As such, the defendant could not also claim he lacked intent under a theory of voluntary intoxication. *Id.*

Unlike in *Mannering* and *Harris*, both *supra*, Mr. Fawver's trial counsel did not raise an affirmative defense. His counsel did not argue duress, alibi or self-defense. Per his Answer to the State's Omnibus Application, his defense was general denial, which is not antagonistic to a defense of voluntary intoxication. (CP 33). His counsel could have legitimately argued both that the State failed to meet its burden and also that Mr. Fawver's intoxication prevented him from forming intent. These are not inconsistent. Add to this the substantial testimony about Mr. Fawver's state of mind, i.e. "You do stupid shit when you get drunk," and it is apparent that defense counsel's failure to request an intoxication instruction cannot be considered legitimate trial strategy. (01/14/2014 RP 295). There was no practical reason to not offer the instruction.

The final inquiry under this assignment of error is whether Mr. Fawver was prejudiced. *Kruger*, 116 Wn.App. at 691. Had the instruction been offered, a rational juror could have concluded that Mr. Fawver's intoxication affected his ability to think and act in accord with the requisite mental states of both crimes. Mr. Fawver could only remember pieces of the night in question. (01/14/2014 RP 296). With regard to the allegation that he broke some windows, Mr. Fawver admitted it could be true, but he did not remember it. (01/14/2014 RP 296). He admitted this was maybe as drunk as he's ever been. (01/14/2014 RP 295-96). And he

essentially implied that he was guilty when he confessed, “You do stupid shit when you get drunk.” (01/14/2014 RP 295). Given these facts, it is very possible that a rational jury could have acquitted Mr. Fawver had the instruction been offered. There exists a reasonable probability that the result of the trial would have been different with the instruction. As such, Mr. Fawver requests that this Court reverse his convictions and remand for a new trial.

B. Failure to object to the admission of a Facebook post allegedly made by Mr. Fawver.

Typically a document or other tangible piece of evidence will be relevant only if it is actually what it purports to be. ER 901. The proponent of the proffered evidence must provide sufficient proof for a reasonable juror to find that the evidence is what it purports to be. *State v. Andrews*, 172 Wn.App. 703, 708, 293 P.3d 1203 (2013). The requirement of authentication and identification helps insure the proffered evidence is trustworthy. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 542, 73 Fed. R. Evid. Serv. 446 (D. Md. 2007).

When electronic evidence is offered, courts will frequently accept authentication through testimony by a witness with personal knowledge. *Id.* at 545; *See also* ER 901(b)(1). To authenticate a printout from a website, the party offering the evidence must produce “some statement or

affidavit from someone with knowledge [of the website] ... for example [a] web master or someone else with personal knowledge would be sufficient.” *Id.* (brackets in original). Another method of authenticating electronic evidence is through distinctive characteristics and circumstantial evidence. *Id.* at 546; *See also* 901(b)(4). In the context of an internet website posting, the courts are concerned with the possibility that third persons other than the user or sponsor of the website may be responsible for the content of the posting. *Id.* at 555 (citing *United States v. Jackson*, 208 F.3d 633, 638 (7<sup>th</sup> Cir. 2000) (excluding evidence of website postings where proponent failed to show that the user or sponsor actually posted the statements, as opposed to a third party).

In the instant case, the prosecutor offered a photograph during the State’s case-in-chief of a Facebook post, allegedly made by Mr. Fawver, which stated, “Wow, what a fun night. PPL [people] in DP [Deer Park] are not bad as they think they are.” (01/13/2014 RP 139-140; 01/14/2014 RP 286). Detective Drapeau testified that the date on the post “says 11 hours ago, but on this posting it was made 01/01/2013.” (01/13/2014 RP 140). However, one witness could not affirmatively say whether the post was made before or after the incident because there was no date or time stamp on the post. (01/15/2014 RP 335). There was no other testimony or extrinsic evidence offered to confirm when the post was created or who

created it. Unlike e-mails, instant messaging and text messaging, all of which allow the user/owner of the account the ability to control the messages sent or received, Facebook is unique in the sense that a third party can create a message or post and then publish it on the user/owner's account. This can be done even without the user/owner's knowledge. Facebook is also unique in the ability of a third party to "tag" another person in a message or post, which then publishes the post on both parties' Facebook pages. This can also be done without the user/owner's knowledge.

Moreover, Mr. Fawver was not the only individual with knowledge of the fight. This is not the type of case involving only one alleged assailant, where the assailant would presumably have exclusive knowledge of his or her crime. Here, many individuals were involved, lending credibility to the chance that a third party, i.e. one of Mr. Fawver's friends, created the post and published it on Mr. Fawver's Facebook page, either directly or indirectly through the "tagging" process. In other words, the post contains information with which Mr. Fawver is not exclusively familiar; it could have been created by any of those involved.

Taking these things into account, Mr. Fawver's trial counsel should have objected to the admission of the Facebook post on authenticity grounds. Given the uncertainties surrounding the post and the

lack of extrinsic authentication evidence, the Court likely would have sustained such an objection. *See Saunders*, 91 Wn.App. at 578 (requiring defendant on ineffective assistance claim to show that objection to admission of evidence would have likely been sustained). Further, the defense gained absolutely no tactical advantage through the admission of the post and, as such, the failure to object cannot be characterized as legitimate trial strategy. *See State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001) (legitimate trial strategy may be demonstrated if there was some possible advantage to be gained by the failure to object). Trial counsel's performance in this regard fell below an objective standard of reasonableness.

It is not enough for Mr. Fawver to show deficient performance on the part of his trial counsel; he must also show prejudice. *Strickland*, 466 U.S. at 687. The Facebook post was a damaging piece of evidence for Mr. Fawver's case. The prosecutor relied upon it in closing arguments when he commented, "Think about that when you look at the Cory Fawver's Facebook page and evaluate what he wrote there. Does it seem like he's pretty proud of what he did that night, announcing it to everyone on Facebook?" (01/15/2014 RP 405). Mr. Fawver's trial counsel responded with, "I don't know what to say about the Facebook page, probably not the best comment." (01/15/2014 RP 425). This response illustrates just how

damaging the Facebook post was to the defense's case. The remaining evidence of guilt was not so overwhelming as to render the admission of the Facebook post harmless. The exclusion of the Facebook post may have led to a different outcome at trial. Therefore, Mr. Fawver requests that this Court reverse his convictions and remand for a new trial.

2. THE STATE'S EVIDENCE FAILED TO ESTABLISH EACH OF THE ELEMENTS OF SECOND DEGREE ASSAULT BEYOND A REASONABLE DOUBT.

Mr. Fawver's second assignment of error is that the State failed to prove each element of Second Degree Assault beyond a reasonable doubt. The State was required to prove that Mr. Fawver or an accomplice intentionally assaulted Mr. Pierce with a deadly weapon, to-wit, a baseball bat. The State failed to prove Mr. Pierce was in fact assaulted with a baseball bat.

A challenge to the sufficiency of the State's evidence admits the truth of the evidence and all reasonable inferences therefrom. *State v. Side*, 105 Wn.App. 787, 790, 21 P.3d 321 (2001). The standard is whether, viewed in a light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *Id.* (citing *State v. Hansen*, 122 Wn.2d 712, 718, 862 P.2d 117 (1993)).

The crime of Second Degree Assault, as charged in this case, required that Mr. Fawver or an accomplice intentionally assault Mr. Pierce with a deadly weapon, to-wit, a baseball bat. (CP 1-2). The State did not charge any alternative means. It is important to note that the State curiously elected not to prosecute Mr. Fawver or his accomplices under the substantial bodily harm prong of Second Degree Assault.<sup>4</sup> The record is clear that Mr. Pierce suffered a substantial head injury while he was outside his residence. (01/14/2014 RP 237). The record is not so clear as to how it happened or who caused it. Mr. Pierce did not know how it happened. (01/14/2014 RP 269). Nor did any of the witnesses see how it happened. (01/14/2014 RP 178-179, 197, 230). In fact, Mr. Pierce did not remember fighting with anyone outside the residence and did not recall seeing Mr. Fawver outside. (01/14/2014 RP 265). Mr. Fawver denied hitting anyone in the head with a weapon. (01/14/2014 RP 292).

There was no testimony from any of the witnesses that Mr. Pierce had in fact been struck with a baseball bat, either inside the residence or outside. This is a critical omission, because absent evidence of Mr. Pierce being struck *with a baseball bat*, the State has failed to meet its burden of proving each element of Second Degree Assault as it was charged in the

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<sup>4</sup> RCW 9A.36.021(1)(a); (CP 1-2). Although the State did originally proffer a jury instruction on substantial bodily injury, the Court correctly removed the instruction, noting that the substantial bodily harm alternative was not charged by the State in the Information. (01/15/2014 RP 382).

Information. In using the “to-wit” language in the charging document, the State was responsible for proving an assault with a baseball bat. It is not enough for the State to simply prove that Mr. Pierce was assaulted and that Mr. Fawver and/or some of his accomplices were in possession of baseball bats at the time of the assault. The State was required to affirmatively prove beyond a reasonable doubt that Mr. Pierce was in fact assaulted *with a baseball bat*. Yet all the State could prove was that an assault occurred and that some of the individuals had baseball bats.

Further, the State called a medical doctor to testify, yet the medical doctor not once testified that Mr. Pierce’s head injury was consistent with being struck in the head with a baseball bat. (01/14/2014 RP 271-279). The doctor testified that some sort of blunt force trauma could cause a head injury of this nature. (01/14/2014 RP 274). There was no testimony as to what particular objects could cause blunt force trauma. The prosecutor never asked if the injury was consistent with being struck by a baseball bat. The prosecutor instead asked if a head-butt, or even alcohol, could cause an injury of this nature. (01/14/2014 RP 277, 279). Absent more definite medical testimony and perhaps an eyewitness to an assault with a baseball bat, the State has failed to prove a Second Degree Assault. As such, Mr. Fawver requests that this Court dismiss that offense and vacate the related deadly weapon enhancement.

**IV. CONCLUSION**

Based upon the foregoing, Mr. Fawver respectfully asks that this Court grant him the requested relief.

DATED: July 28, 2014.

Respectfully submitted:

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