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DIVISION III

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STATE OF WASHINGTON

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NO. 34556-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON V. POWELL,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for attempted first degree burglary because the state failed to present substantial evidence on this charge.

2. Trial counsel's failure to object when the state elicited inadmissible hearsay relating to intent denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

3. The trial court's admission of evidence that was both irrelevant and unfairly prejudicial denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

4. The trial court erred when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction for attempted first degree burglary when the state fails to present substantial evidence on this charge?

2. Does a trial counsel's failure to object when the state elicits inadmissible hearsay relating to intent deny a defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the jury would have acquitted but for counsel's failure to object?

3. Does a trial court's admission of evidence that is both irrelevant and unfairly prejudicial deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

4. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

Factual History

Defendant Jason Powell and Amber Williams have known each other for about three and one-half years, during which time they have had an on-again, off-again dating relationship. RP 45.¹ They have a child together named Zion. RP 48. He was born on November 27, 2004. RP 45. In October of 2005, Amber and Zion were living with Amber's parents at 2305 N.E. 54th Street in Vancouver along with Amber's 13-year-old son. RP 90. The defendant was living in Portland with a friend named Greg Kincaid. RP 119.

Late at night on October 12, 2005, the defendant called Amber wanting to come and see Zion the next day. RP 50. She told him that it wasn't a good time and they got into an argument so she hung up and turned her phone off so he could not call back. RP 50. According to Greg Kincaid, the defendant spent the early morning hours of October 13th playing video games with his friend Andrew. RP 121. Greg also stated that they used methamphetamine together that morning. RP 121. During this time the defendant said that he was mad at Amber and that he was going over to Amber's house. RP 121. He did not say that he was going to hurt her or take

¹The record in this case includes two continuously numbered verbatim reports designated herein as "RP x" with x stating the page number.

Zion from her. RP 122. Later that morning Andrew gave the defendant a ride to Amber's house in Vancouver. RP 102.

On the morning of October 13th Amber got up at about 7:30 am and went into the living room. RP 50-52. While in the living room she heard the door knob turn and asked her 13-year-old son to look out the window. RP 50-53. He looked out and saw the defendant standing on the front porch. RP 53. At this point Amber decided to call the police because she thought the defendant was trying to sneak into the house. RP 54. As she was calling the police she and her son heard the back door knob jiggle. RP 54. She then went back into the bedroom. RP 55. She denied ever hearing the doorbell or a knock. RP 54. According to the defendant, he walked up to Amber's front door and knocked. RP 135-136. When he did not receive a reply he used his cell phone and tried to call her but got no answer. RP 135-136. He denied turning the knob, going to the back door, or trying to come in uninvited. RP 135-136.

Within a couple minutes of Amber placing the call, Vancouver Police Officer James Watson drove up to the house. RP 90. Upon his arrival he saw the defendant standing at the front door, which was up a flight of about 15 steps. RP 91-92. As he got out of his patrol vehicle and started walking toward the front door the defendant noticed his presence and walked down the steps and attempted to walk away. RP 93. He ignored repeated orders to

stop so Officer Watson grabbed the defendant and pulled him down to the ground. RP 96-98. The defendant initially resisted and tried to pull free but eventually stopped. RP 96-98. However, when Officer Watson helped the defendant back up the defendant again tried to break free. RP 98. At this point the officer took the defendant over to his patrol car, bent him over the edge of the car, and put handcuffs on him. RP 98. As he was doing this he heard a metallic “clink” at the defendant’s feet and saw that a handgun had fallen out of the defendant’s waistband. RP 100. The handgun was loaded. RP 100.

At about this time Amber came back out to the living room and saw through the window that Officer Watson had arrested the defendant. RP 55. According to Amber the defendant was wearing black socks, black shoes, an oversized camouflage jacket, a black beanie, and a camouflage t-shirt. RP 56. Apart from the hat, Amber had never seen him wear any of this clothing. RP 56. According to Amber the defendant’s actions on this day scared her because of two prior incidents. RP 49-50. The first occurred on July 5th when she and the defendant were at a store together. RP 47-48. At that time the defendant twice told her that if she tried to keep Zion away from him he would kill her. RP 48. The second incident occurred at her parents house when she and the defendant were sitting in the living room talking with friends. RP 49. The defendant was playing with a handgun, cocking and

uncocking it. RP 49. While doing this he said that someone was going to die. RP 49. Amber responded that sooner or later everyone dies and the defendant said "some sooner than later." RP 49. Although everyone laughed at the comment it scared her. RP 49-50.

In fact Amber described the defendant as being somewhat of a "gun nut" as he owns numerous guns and gets various gun magazines. RP 60. According to her, he had been beat up in the past and since that incident always carries a firearm everywhere he goes. RP 61. However, he had never pointed one at her and had never threatened her or anyone else with a firearm. RP 62.

Procedural History

By information filed October 19, 2005, the Clark County Prosecutor charged defendant Jason Vincent Powell with one count of attempted first degree burglary. CP 1-2. The state later filed an amended information adding a firearm enhancement. CP 4-5. The case later came on for trial with the state calling four witnesses and the defendant calling one. CP 44, 89, 118, 124, 133. Just prior to trial the state moved to be allowed to present evidence through Greg Kincaid that the defendant had used methamphetamine in the early morning hours before going over to Amber's house. RP 28-30. Following an offer of proof in which the state called Greg Kincaid to the stand the court ruled that the evidence was admissible in that

it was more probative than prejudicial although the court did not say why it was probative. RP 30-42.

During the trial the state's witnesses testified to the facts mentioned in the preceding *Factual History*. In addition, during his testimony Officer Watson stated that after arresting the defendant he saw a light blue Honda parked in the vicinity with a young man named Andrew Pearson sitting at the wheel. This testimony went as follows:

Q. And did he say whether or not he came there with the Defendant?

A. Yes, he did.

Q. What did he say?

A. He said that he had -- he had provided a ride to his friend to come and get his child.

Q. He -- for the Defendant to come get his child, or the person to get --

A. For the Defendant to come get his child.

RP 102.

The defendant's attorney raised no objection to this testimony. *Id.* In fact, in closing, the state argued that the defendant was guilty of committing attempted burglary because the evidence proved that he attempted to enter unlawfully and the crime he intended to commit was to take the child. The state argued twice on direct and once in rebuttal that the

defendant had gone to Amber's house to take his son. RP 186, 188, 204-205.

In the first instance the prosecutor argued:

You heard that Greg said that he – that the Defendant said, I'm going [to] get my kid.

RP 186, lines 5-6.

The defense did not object to this statement even though this had not been the testimony of Greg Kincaid. Rather, Mr. Kincaid said the following as his last answer on direct and his only answer on cross:

Q. Did he [the Defendant] say that he was going over to Amber's house?

A. Yes.

MS. RIDDEL: Nothing further.

THE COURT: Cross-examination.

CROSS-EXAMINATION

Q. Did Jason even say that morning that he was going over to do harm to anyone?

A. No.

CP 121, 186.

The prosecutor repeated its argument on direct that the crime the defendant intended to commit was to take his child. In this second instance the prosecutor stated:

The other thing that we have that proves that Defendant was there to commit a crime are the Defendant's own words, the things

that he said. And those things are that he told both Greg and both -- and Andrew that the reason that he was going to that house was to get his kid.

CP 188.

As was mentioned above, Greg Kincaid did not testify that the defendant claimed he was going to get his child. CP 121. In addition, the defendant's friend Andrew did not testify at the trial and did not make any statements. RP 1-205. Rather, Officer Watson testified that this was what Andrew told him, testimony to which the defendant's attorney did not raise an objection. RP 102.

The prosecutor repeated this argument in rebuttal, wherein it stated:

Plus the Defendant's words that he was going over there to get his son, that he was fed up with her, that he was tired of her.

RP 204-205.

Following deliberation in this case the jury returned a verdict of guilty along with a special verdict that the defendant had committed the offense while armed with a firearm. CP 76-77. The court later sentenced the defendant within the standard range and added a 36 month firearm enhancement. RP 80-95. Page 2 of the judgment and sentence gave the court the option of finding that the defendant was chemically dependent and that this dependency contributed to the offense. CP 81. The court did not enter this finding. *Id.* This option states:

- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

CP 81 (emphasis in original).

In spite of failing to enter this finding, the court imposed the following condition, among others, as part of the 18 to 36 months of community custody included in the sentence:

- Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a
 - substances abuse
 - mental health
 - anger managementtreatment program as established by the community corrections officer and/or the treatment facility.

CP 87.

Following imposition of sentence the defendant thereafter filed timely notice of appeal. RP 98.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR ATTEMPTED FIRST DEGREE BURGLARY BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

For example, in *State v. Q.D.*, 102 Wn.2d 19, 685 P.2d 557 (1984), Defendant was convicted of criminal trespass and appealed on the basis that the state did not present substantial evidence of the crime charged. The evidence presented to the court consisted of the testimony of the principal and a custodial engineer of the school in which Defendant was alleged to have trespassed. The engineer testified that he saw Defendant, who was 11½ years old, sitting on the school grounds about 2 p.m. playing with a set of keys that looked like those belonging to the night custodian. The engineer then checked the custodian’s desk and found that the keys were missing, along with a burglar alarm key. The desk was located in an unlocked office. He

and the principal then took Defendant into the principal's office to speak with him. When Defendant arose from the chair in which he was sitting in the office, the burglar alarm key was discovered on a radiator behind the chair.

On appeal, the Washington Supreme Court reversed, stating as follows:

Recently, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), we reiterated the long-standing law in Washington that proof of possession of recently stolen property is not prima facie evidence of burglary unless accompanied by other evidence of guilt. See *State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the accused near the scene of the crime. *State v. Mace, supra*. While Q.D. was on the school grounds with the keys, the keys were not known to be missing until he was seen with them, and they had last been seen several hours before in a desk in an unlocked office. Thus, both the absence of evidence that he was near the scene at a time proximate to the disappearance of the keys, and the absence of other evidence corroborative of guilt require us to conclude that there was insufficient evidence of trespass in the first degree. We therefore reverse [Defendant's] conviction.

State v. Q.D., 102 Wn.2d at 28.

Similarly, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that

the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with one count of attempted first degree burglary under RCW 9A.52.020(1). This statute provides:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she

enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1).

Under this statute there are two alternative methods that elevate either second degree burglary or residential burglary to first degree burglary. The first is to commit the offense while armed with a deadly weapon. The second is to assault any person during the commission of the offense. In the case at bar the state charged the defendant under the first alternative only.

The amended information alleges:

That he, JASON VINCENT POWELL, in the County of Clark, State of Washington, on or about October 13, 2005, with intent to commit the crime of Burglary in the First Degree, did an act which was a substantial step toward the commission of that crime, to-wit: by attempting to enter or remain unlawfully in the building of Amber Williams, located at 2305 NE 54 Street, Vancouver, Washington, and, in entering or while in the building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a deadly weapon, a semi-automatic pistol; contrary to Revised Code of Washington 9A.52.020(1)(a) and 9A.28.020(3)(b).

CP 7.

As this information reveals, the state did not allege that the defendant intended to assault any person in the residence, which would have been an attempted first degree burglary under the (b) alternative. However, even seen in the light most favorable to the state there was not direct or circumstantial evidence that the defendant intended to commit a crime. Ambers's claim that

the defendant had turned the doorknob (although denied by the defendant) is probably substantial evidence that he attempted to enter without permission. However, there is no evidence to support a claim that he intended to commit a crime therein.

In fact, the theory of the state's case, presented repeatedly in closing, was that the defendant intended to go in to get his son. Although appellant herein does not concede that there is substantial evidence on this point, even were there such evidence it would not support a burglary conviction because there is not evidence that this would have been a crime. The evidence at trial is clear that the defendant was the father of the child. There was no evidence that a court had entered a custody order giving Amber sole custody of the child. Thus, under the facts as presented at trial, the defendant had an equal right to the present custody of the child as Amber did. Thus, in the case at bar, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for attempted first degree burglary because the state failed to present substantial evidence on this charge.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE HEARSAY RELATING TO INTENT DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel's failure to object when the state elicited inadmissible hearsay from Officer Watson that Andrew told him he had given the defendant a ride so the defendant could get his child, and when the state argued that other witnesses had testified to this fact. The following presents this argument.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). Thus, in the

case at bar, all statements Andrew Pearson allegedly made to Officer Watson on prior occasions were inadmissible hearsay and could not be admitted as substantive evidence unless some exception to the hearsay rule applies.

Evidence Rule 801(d)(1) provides an exception under which prior inconsistent statements may be admitted as substantive evidence. This rule states:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1)(i).

In order for a statement to qualify under ER 801(d)(1)(i), it must be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." In the case at bar the state did not argue that Andrew Pearson's alleged statement to Officer Watson had been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." Thus, these statements were not admissible as substantive evidence. Neither were these statements admissible for impeachment purposes because Andrew Pearson

did not testify at trial and there was no testimony of his to impeach.

In addition, the admission of Andrew Pearson's statement not only violated the hearsay rule. It also violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment as explained in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant's wife, who was present during the incident. At trial, the defendant admitted the conduct the state alleged, but argued that he acted in self defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay, and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights, because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct.

2531, 65 L.Ed.2d 597 (1980), the statements bore “adequate ‘indicia of reliability’”. The court granted the prosecutor’s motion, ruling that the statements did qualify as “statements against penal interest,” and that under *Ohio v. Roberts*, there was no confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Washington Supreme Court disagreed, and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion, the Supreme Court reversed its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a “firmly rooted hearsay exception,” or was given under circumstances showing it to be trustworthy. *Id.* at 1364, 1369. In so doing the court rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on evidence’s reliability. “It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Id.* at 1370. Thus, in *Crawford*, the court “reject[ed]” the view that the reliability-based framework of *Roberts*, or the rules of evidence, govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Crawford, 124 S.Ct. at 1374.

In *Crawford* the Supreme Court did not definitively explain the scope of what “testimonial evidence” is. *Id.* at 1374 (“we leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). However, the Court did set out a “core class of ‘testimonial’ statements,” the admission of which would violate the confrontation clause without the in court testimony of the proponent.” *Id.* at 1364. This “core class” of “testimonial statements” includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 1364.

In the case at bar the state asked Officer Watson what Andrew Pearson told him concerning the defendant’s motivation for coming to Amber’s house. The state did not call Mr. Pearson as a witness. Mr. Pearson’s alleged statements to Officer Watson were made as part of Officer Watson’s investigation of the incident to which he responded and they were made as direct answers to Officer Watson’s interrogation. Thus, these statements fell exactly within the “core class” of “testimonial statements” that *Crawford* found to violate the right to confrontation. As a result, Officer Watson’s testimony concerning what Andrew Pearson told him concerning

the defendant's statement to him were not only inadmissible hearsay, they also violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Under the fact of this case there was no possible tactical reason to allow the state to elicit Officer Watson's testimony that Andrew Pearson told him that the defendant had told him that he was there to "get his child." This was the very crime the state alleged that the defendant intended to commit when he entered the house. Indeed, this was the state's only source for this evidence, in spite of its claim in closing that Amber Williams and Greg Kincaid had testified to this fact. They had not. Similarly there was no tactical reason for the defense to fail to object to the state's improper closing argument in which it claimed this evidence existed. Trial counsel's failure to make these objections fell below the standard of a reasonably prudent attorney. Thus, the defendant had established the first prong on a claim of ineffective assistance of counsel.

In this case the evidence the state presented at trial was extremely weak on the question of the defendant's criminal intent. Although he was armed with a firearm, the state's own witness admitted that he was always armed with a firearm and had never threatened her with one or pointed one at her. In addition, the defendant had a legitimate purpose for his presence

at the house, which was to see his son. He went during daylight hours when one would expect to find people awake. He made no attempt to physically force his way into the residence. Under these facts the state had significant difficulty in presenting evidence that the defendant had the intent to commit a crime. This problem was overcome by the very evidence and argument to which the defense should have objected. Thus, had the defense objected, the result of the trial would more likely than not have been an acquittal. Thus, trial counsel's failures not only fell below the standard of a reasonably prudent attorney, but they caused prejudice. As a result, the defendant is entitled to a new trial because his was denied effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT'S ADMISSION OF EVIDENCE THAT WAS BOTH IRRELEVANT AND UNFAIRLY PREJUDICIAL DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472

(1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

Turning to the case at bar, the trial court allowed the state to elicit the claim by Greg Kincaid that sometime during the very early morning hours of October 13, 2005, he and the defendant used methamphetamine in their apartment in Portland. The state never did present any argument to the court as to how this claim made any fact at issue in the trial even slightly more or less likely. The issue at trial was whether or not at 7:30 in the morning the defendant attempted to enter Amber's residence with the intent to commit a crime therein. The police officer who arrested the defendant did not render an opinion that the defendant was under the influence of methamphetamine and the state presented no witness or evidence to suggest that the defendant's prior use of methamphetamine made it more or less likely that he committed a burglary.

While there was not relevance to this evidence it did create a large amount of unfair prejudice. Specifically, it invited the jury to convict the defendant based upon the inference that people who use methamphetamine are bad and thus more likely to commit crimes such as burglary. In other words, the effect of this evidence was to prove bad character and then argue that the defendant was guilty of the crime charged because he was acting in conformity with his bad character. In admitting this evidence the trial court abused its discretion.

As was previously argued the evidence of guilt in this case was equivocal at best. In these circumstances the admission of a single piece of irrelevant, unfairly prejudicial evidence is sufficient to turn an acquittal into a conviction. The defendant argues that this is precisely what happened in this case. The evidence of the alleged methamphetamine use cast the defendant in an extremely unfavorable light and was that piece of evidence that convinced the jury to disbelieve the defendant's testimony and convict. Thus, under the facts of this case it is more likely that but for the admission of this improper evidence the jury would have acquitted. As a result, the defendant is entitled to a new trial.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that

alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant was found guilty of Attempted First Degree Burglary RCW 9A.52.020(1)(s). Under RCW 9.94A.030(48)(a)(viii) this crime, as an attempted class A felony, is defined as a "violent" offense. At sentencing the court imposed 18 to 36 months community custody. For offenders sentenced to over 12 months confinement on a violent offense RCW 9.94A.715 controls the imposition of community custody conditions. This statute states as follows in relevant part:

- (1) When a court sentences a person to the custody of the

department for . . . a violent offense . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody . . .

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(1)-(2).

As RCW 9.94A.715(2)(a) states, "the conditions of community custody shall include those provided for in RCW 9.94A.700(4)." In addition, "[t]he conditions may also include those provided for in RCW 9.94A.700(5)." Herein one finally finds the actual conditions. Subsection 4

of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

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

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition “relates to the circumstances of the crime.” *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following condition among others:

- ☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☐ anger management treatment and fully comply with all recommended treatment.

CP 87.

This condition listed above is not related to the offense the defendant

committed in any way. Indeed the court itself failed to enter any finding that the defendant had a substance abuse problem. This is found on page two of the judgment and sentence where the court failed to mark the paragraph that states:

- The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 81.

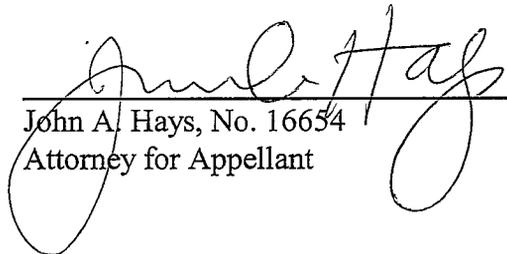
Absent entry of this finding the trial court exceeded its authority to enter the condition of community custody noted herein.

CONCLUSION

The state failed to present substantial evidence that the defendant committed the crime of attempted first degree burglary. As a result this court should reverse and remand with instructions to dismiss. In the alternative, the court should reverse and remand with instructions to grant a new trial based upon ineffective assistance of counsel as well as the admission of irrelevant, prejudicial evidence. Finally, the court should vacate the sentence and remand with instructions to strike the community custody conditions requiring the defendant to obtain substance abuse treatment.

DATED this 29th day of September, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community

placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

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

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.715

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such

time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a

date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

RCW 9A.52.020

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

(2) Burglary in the first degree is a class A felony.

ER 801

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's

agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

FILED
COURT OF APPEALS
DIVISION III

06 OCT -2 PM 12:46

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DEPUTY

DIVISION II

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 JASON V. POWELL,)
10 Appellant,)

CLARK CO. NO. 05-1-02296-1
APPEAL NO: 34556-1-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.
13)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 29TH day of
14 SEPTEMBER, 2006, affiant deposited into the mails of the United States of America, a
15 properly stamped envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

JASON V. POWELL #892412
WA STATE PENITENTIARY
P.O. BOX 520
WALLA WALLA, WA 99362

17 and that said envelope contained the following:

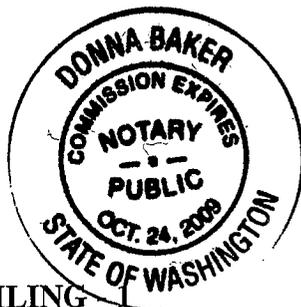
- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 29TH day of SEPTEMBER, 2006.

Cathy Russell
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 29th day of SEPTEMBER, 2006.

Donna Baker
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09



AFFIDAVIT OF MAILING

John A. Hays
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Longview, WA 98632
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