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STATE OF WASHINGTON

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

HOYT WILLIAM CRACE,

PETITIONER.

**AMENDED OPENING BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

Jeff Ellis #17139
Attorney for Mr. Crace

Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

A. STATUS OF PETITIONER

Hoyt William Crace (hereinafter “Crace”) challenges his Pierce County convictions for Attempted Assault in the Second Degree (along with a “deadly weapon” allegation), Criminal Trespass, and Malicious Mischief in the Second Degree (03-1-03797-6). Crace is currently serving a life without parole sentence as a result of a subsequent persistent offender finding.

B. FACTS

Procedural History

In 2003, Crace was charged with Assault in the Second Degree, Criminal Trespass in the First Degree, and Malicious Mischief. On May 14, 2004, a jury returned guilty verdicts as to the later two counts and a guilty verdict of “attempted” second-degree assault. On May 28, 2004, after defense counsel “stipulated” to Crace’s criminal history, the trial court found that he was a “persistent offender” and sentenced Crace to “life without parole” on the attempted assault conviction. Crace’s *Judgment and Sentence* is attached as Appendix A.¹

¹ Crace was sentenced a year earlier on a count of criminal trespass (King County Case No. 02-1-0084-4) to a term that was supposed to conclude with “(f)inal 3 months of sentence to be served in inpatient treatment.” Unfortunately, Crace was not transferred to treatment, but instead remained in custody. See Appendix B.

Crace appealed. On June 28, 2005, this Court affirmed Crace's conviction and sentence. *Opinion* attached as Appendix C. Crace's motion for discretionary review was denied by the Washington Supreme Court on June 5, 2007. *See* Appendix D. This Court then issued its mandate on June 19, 2007. Appendix E.

This is Crace's first collateral attack on this judgment. Crace has a separate on-going PRP attacking a separate judgment (Pierce County No. 91-1-01574-2). This Court has not assigned a number to that case as of this writing.

Facts at Trial

On direct appeal, this Court summarized the facts as follows:

On August 17, 2003, at 2:25 a.m., Pierce County Sheriff's Deputy Hardesty received a call from dispatch directing him to a possible burglary in progress at a residence in a mobile home park. As Hardesty got out of his car, a man approached him and stated that an unknown male burst into his neighbor's home and then fled. The man said that the subject ran about two blocks away to the north and that he was armed with a sword.

At that moment, Hardesty, who had a flashlight in his hand, saw a male approximately two blocks away jumping up and down in the middle of the street, yelling and screaming at the top of his lungs. The suspect was later identified as Crace.

Hardesty could see a long, chrome-like object in Crace's hand. When Crace made eye contact with Hardesty, he began running at full speed toward the officer. As Crace ran, he yelled, 'They are after me, someone help me.' 2 Report of Proceedings (RP) at 83.

As Crace drew closer, Hardesty saw a sword in his hand. Hardesty drew his weapon and directed Crace to drop the sword. Crace kept

running at Hardesty, and Hardesty kept repeating his command to drop the sword. Finally, Crace dropped the sword when he was approximately 50 feet away from the officer but continued running at Hardesty. The officer repeatedly commanded him to get on the ground, and Crace complied when he was approximately five to seven feet from the officer. Hardesty handcuffed Crace and placed him in the back of his patrol vehicle.

Once Hardesty secured Crace, he heard a female screaming from the residence identified by dispatch. There, he found an hysterical Rita Whitten. Whitten told Hardesty that as her baby slept in the bedroom and she watched television in the living room, Crace, whom she had never seen before, burst through the front door, screaming about being pursued. After rifling Whitten's kitchen cabinets and drawers, Crace ran out of her home.

As Hardesty spoke with Whitten, he heard screams from the parking lot. He ran out and saw Crace kicking wildly in the back of the patrol car; Crace broke out the left rear window. After securing Crace in four point restraints, Hardesty advised him of his constitutional rights.

Crace stated that earlier in the evening, he had been assaulted by four or five 'guys' and that he ran from them in fear. Based on his experience, Hardesty suspected that drugs affected Crace and he inquired about Crace's substance use. Crace told Hardesty that he had ingested a lot of cocaine earlier in the day.

At trial, Crace acknowledged that he had a substance abuse problem. He stated that he was repairing a friend's trailer located in the same mobile home park as Whitten's trailer. On the day of the incident, another resident of the trailer park offered Crace approximately one gram of cocaine. Crace testified that, between 10:00 a.m. and 2:00 p.m., he voluntarily consumed eight to ten alcoholic coolers, a gram of cocaine, two prescription pain medications, Dilaudid, and a quarter piece of heroin.

Crace testified that he felt very relaxed and fell asleep while watching a video. When he awoke, it was dark. Crace heard and saw things, grew terrified, and became convinced that he was going to be murdered. He ran screaming from the trailer, trying to find the home

of two elderly women who lived nearby. Instead, he entered Whitten's trailer by mistake. Crace testified that he told Whitten about his fears but when Whitten kept screaming, he quickly left. He went outside and found the elderly women's trailer but he did not stay there because he still thought that someone was trying to murder him.

Crace returned to his trailer, took the sword off the wall, and ran down the street screaming for help. When he saw Hardesty's flashlight beam, he ran toward the light, sword in hand. When Crace realized that an officer held the flashlight, he remained too frightened to drop the sword or stop.

Eventually, he dropped the sword but he did not obey the direction to lie down on the ground because he was scared and still too far away. He did not resist being handcuffed and placed in the patrol car. When his fears of being murdered persisted, he kicked out the window in the hopes that someone would return to the vehicle to help him.

Hardesty testified that he received training regarding the '21 foot rule,' the distance at which someone armed with a knife can reach an officer to inflict injury before an officer can draw his gun. 2 RP at 77. Hardesty stated that he feared for his safety as Crace ran toward him and was prepared to shoot him even after he dropped the sword. The deputy indicated that he would have shot him if Crace had come a couple of steps closer. The deputy demonstrated for the jury how Crace held the sword and how he ran toward him. The jury also saw a demonstration of the distance at which Crace dropped the sword and got on the ground.

Dr. Vincent Gollogly, a psychologist, testified for the defense. He said that Crace's voluntary intoxication led to a delusional state. Gollogly also concluded that Crace could not realize the nature of his actions due to drug ingestion. Gollogly explained that, in his opinion, Crace could not accurately appraise the situation, although he could still engage in goal-directed behavior. Gollogly believed that Crace panicked and thought unclearly at the time of the offense.

Dr. Steven Marquez, a forensic psychologist at Western State Hospital who evaluated Crace for the State, diagnosed him with an antisocial personality disorder. He found Crace manipulative, offering exaggerated psychiatric symptoms inconsistent with any known pattern or syndrome. Crace told Marquez that five people wanted to harm him on the night of the incident. Marquez saw considerable goal-directed activity in Crace's actions and opined that he could form intent.

The Court instructed the jury that, in addition to the original charged of second-degree assault, it could also consider the lesser offense of attempted second-degree assault. *See* Appendix F. Defense counsel did not seek a lesser included instruction of unlawful display of a weapon. *See* Appendix G. After deliberations, the jury left the second-degree assault verdict form blank, but convicted of the lesser “attempt.” Appendix G.

Crace has included the transcript of his trial and sentencing as Appendix H.

C. ARGUMENT

1. CRACE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL’S FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION FOR UNLAWFUL DISPLAY OF A WEAPON

Introduction

Crace was charged by Information with intentionally assaulting another with a deadly weapon. At trial, Crace claimed that he was unable to form the requisite intent. The State offered and the trial court gave a lesser included instruction of “attempted” assault. Despite the fact that offering a lesser of unlawful display of a weapon would have been

consistent with his defense and would have, if accepted by the jury, reduced Crace's sentence from "life" to one year (unlike the "attempted" lesser which resulted in *no* reduction in Crace's sentence), defense counsel did not seek such an instruction. Caselaw provides that such a failure constitutes deficient performance. The fact that Crace's jury convicted only of the lesser of attempted assault establishes the requisite prejudice. Thus, defense counsel's failure to request an instruction on unlawful display of a weapon constitutes ineffective assistance of counsel.

Unlawful Display of a Weapon Is a Lesser Included Offense

Legally speaking, it is clear that unlawful display of a weapon is a lesser included offense of a second degree assault charged under the "assaults with a deadly weapon" prong. RCW 9A.02.020 provides that "(i)t shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." To establish that an offense is a lesser included offense each element of the lesser offense must be a necessary element of the offense charged and the evidence in the case must support an inference that the lesser crime was committed. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Thus, as a matter of law, unlawful display of a weapon is a

lesser included offense of assault in the second degree. *Compare* RCW 9.41.270(1); RCW 9A.36.021.

Next, this Court must determine whether unlawful display of a weapon qualifies as a lesser included offense under the *facts* of this case. When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court views the supporting evidence in the light most favorable to the party that requested (or, as here, *should have requested*) the instruction. *See State v. Cole*, 74 Wn.App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997).

That test is also easily satisfied. There is no dispute that Crace displayed a weapon. Further, the evidence is clear that his display of the sword “warranted alarm for the safety of others.” Further, the evidence regarding Crace’s intent to assault was contested, as both the transcript and the jury’s rejection of the original assault charge both prove. Thus, the facts supported the giving of this lesser.

Trial Counsel’s Failure to Request the Instruction was Ineffective

Because this issue is raised in the context of an ineffectiveness claim, Crace must show both deficient performance and prejudice. The Court of Appeals’ decision in *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004), which held that trial counsel was ineffective for failing to

request a lesser instruction of unlawful display of a weapon in an second-degree assault case, is completely on point.

In that case, Ward was charged with two counts of second degree assault after allegedly pointing a gun at two men attempting to repossess his car. Ward testified he believed the men were trying to steal his car and that one of them came toward him with a crowbar. Both Ward and his girlfriend testified that Ward did not point his gun at the men, but rather told them he had a gun and opened his jacket to show it to them. Trial counsel did not request a lesser of unlawful imprisonment. On appeal, Ward argued his trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of unlawful display of a weapon.

In response, the State contended that counsel's failure to request the instruction was legitimate trial strategy, an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser. This Court disagreed, reversing Ward's conviction without an evidentiary hearing based on several indisputable facts.

To begin, the *Ward* Court relied heavily on the United States Supreme Court's reasoning in *Keeble v. United States*, which bears repeating here:

It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not

established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

Next, the *Ward* Court compared the penalty attached to a conviction as charged with the penalty resulting from a conviction on the lesser offense. The Court in *Ward* concluded that the significant gap between the two penalties was a salient factor in determining that counsel's failure was unreasonable. 125 Wn.App. at 249 ("First, the potential jeopardy for Ward was considerable. He faced 89 months in prison for the two assaults, including the mandatory firearm enhancements. Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail and revocation of a concealed weapons permit.").

Crace's case involves a much more significant difference between the respective penalties: life in prison *versus* a one year maximum. Further, the equation was not changed by the Court's decision to give the State's requested "attempted assault" instruction. The jury's conviction on that crime still resulted in a life sentence. Aside from a death penalty case, the "risk vs. benefit" equation here was as stark as it ever gets in the law. Thus, this factor strongly supports an ineffectiveness finding.

The second fact that this Court pointed to in *Ward* was that Ward's defenses were the same on both the greater and lesser offenses. In other words, offering the lesser would not have compromised or undercut trial strategy. This Court noted in *Ward*:

His theory at trial was lawful defense of self and property. These are complete defenses to both second degree assault and unlawful display of a weapon. RCW 9.41.270(3)(c). *An instruction on the lesser included offense was therefore at little or no cost to Ward.* If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

125 Wn. App. at 249-50 (emphasis added).

Like *Ward*, offering an unlawful display instruction in this case also would not have impeded Crace's "diminished capacity" or "intoxication" defenses. Crace could have defended in the same manner, admitting either expressly or implicitly that Crace's display of the sword caused alarm, even if Crace did not possess or could not form the intent to assault.

The third factor leading to reversal in *Ward* was the conclusion that complete acquittal was not assured. The *Ward* court noted: "Finally, self-defense as an all or nothing approach was *very risky* in these circumstances, because it relied for its success chiefly on the credibility of the accused." 125 Wn. App. at 250 (emphasis added).

It is well known that mental defenses are usually unsuccessful. *See Fradella, Henry, From Insanity to Diminished Capacity: Mental Illness and*

Criminal Excuse in the Post-Clark Era, 18 U. Fla. J.L. Pub. Policy 7

(2007). However, this Court does not need to look to empirical research to determine whether the strength of the defense in this case. Instead, this Court can look either compare closing arguments or the testimony of the experts to find proof that, while Crace's mental defense was viable, acquittal was far from assured. In fact, in the *defense case* is the most compelling proof that acquittal was not assured. Both Crace and his expert (Dr. Gollogly) testified that Crace picked up the sword and ran with it in an alarming manner in order to prevent a perceived attack, *i.e.*, as a means of protection. RP 155. In other words, the defense witnesses admitted to some level of intention, even if it was not intent to assault real people. In addition, Dr. Gollogly testified that, generally speaking, when Crace is intoxicated he is likely to act in a manner "physically intimidating to others," even if he did not have the intent to assault. RP 182.

Interestingly, Dr. Marquez (the State's expert) seized on the defense testimony that Crace was overcome by delusions and testified that this testimony did not support a finding of diminished capacity, but was more akin to insanity. RP 227.

In sum, while Crace's defense was viable and both experts agreed that Crace was not responding to reality, it was hardly a clear case of diminished capacity. Just as importantly, all of the testimony at trial supported the conclusion that Crace's actions were alarming to others. In

sum, Crace's actions most resemble the crime of unlawful display of a weapon. Thus, presenting that crime as a lesser would have increased Crace's chance of acquittal or a hung jury on the assault charges.

This is precisely why the Court in *Ward* found ineffectiveness: "Given the developments at trial, and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy." *Ward*, 125 Wn. App. at 250. That succinct statement applies with equal, if not more, force to this case.

There is an additional parallel between *Ward* and the instant case. In *Ward*, the Court of Appeals looked to the trial court's imposition of an exceptional sentence as proof that there was a reasonable probability of a different outcome if the lesser included instruction had been requested by counsel. Here, there is stronger proof of a reasonable probability that Crace's jury would have returned a verdict of unlawful display of a weapon, if offered that option: the jury rejected the original second-degree assault charge. Thus, his jury must have found that Crace did not intend to physically assault or create fear of bodily injury, *i.e.*, the relevant mental states for assault in the second degree. Instead, the jury's rejection of that charge provides the clearest proof of a reasonable probability of a different outcome (less than a 50% chance that one juror would have voted not to convict of attempted assault, but would have voted for unlawful display.)

This Court Should Reverse Outright or Remand to the Trial Court

It would be hard to find a case more on point than *Ward* is to this case. The final parallel between the two cases should be in the outcome. The Court of Appeals reversed *Ward*'s conviction. It should also reverse *Crace*'s conviction.

To the extent that any of the facts are contested, *Crace* respectfully seeks an evidentiary hearing.

2. REQUIRING CRACE TO DRESS IN ORANGE JAIL SANDALS VIOLATED HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY REVERSING THE PRESUMPTION OF INNOCENCE WHERE AT LEAST ONE JUROR ADMITTED SHE SAW HIM WEARING THE SANDALS, WHERE SHE KNEW THOSE SANDALS WERE JAIL ISSUED, AND WHERE THERE WAS NO COMPELLING STATE INTEREST IN REQUIRING CRACE TO WEAR THE JAIL SANDALS, RATHER THAN CIVILIAN SHOES. TRIAL COUNSEL'S FAILURE TO OBJECT DENIED CRACE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.
3. CRACE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WHERE A DELIBERATING JUROR SAW CRACE SHACKLED ON HIS WAY TO COURT, BUT DID NOT DISCLOSE THIS FACT DURING VOIR DIRE, WHERE THERE IS A REASONABLE PROBABILITY THAT IT CONTRIBUTED TO HER VERDICT.

Introduction

Although different legal claims, both of the two above-listed claims arise out of the same set of facts. Hence, they are grouped together.

One of Crace's jurors (identified here as "Juror 6") saw Crace in shackles prior to jury selection, a fact she first revealed after trial in an November 2005 article she wrote for the Puyallup *Herald*. See *Declaration of Juror* and attachments included as Appendix I. The juror recognized Crace in the courtroom as the prisoner she had seen earlier in shackles being escorted by jail officers because she noticed in court that he was wearing the same orange, jail-issued sandals. In her article, she notes that Crace was "(o)bviously, an accused prisoner in street clothes, sans real shoes..." She later described Crace as "Mr. Sandal Foot." Although Crace was not shackled in the courtroom, he was shackled on his way to court and was required to wear the orange sandals provided by the jail in court. See *Declaration of Crace* attached as Appendix J.

However, Juror 6 did not reveal this prior encounter when asked if she knew Crace or had heard "anything about this particular case." Voir Dire RP 6. She also did not reveal it during a short *voir dire* exchange regarding the presumption of innocence. Voir Dire RP 53. In her declaration attached to this petition, Juror 6 called it a "personal decision," not to reveal this information. Later, as recounted in her newspaper article, Juror 6 noted her "instincts" led her to believe during deliberations that Crace was a possible third strike candidate. Juror 6 states that she did not discuss this possibility with anyone else on the jury.

Jail Clothes

It is clear that a court cannot, without violating the Due Process Clause, compel an accused to wear identifiable prison clothing during his trial. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). This is because the practice furthers no essential state interest, and “the constant reminder of the accused’s condition implicit in such *distinctive, identifiable* attire may affect a juror’s judgment” and impair the presumption of innocence, which is “a basic component of a fair trial under our system of criminal justice.” *Id.* at 503, 504-05 (emphasis added).

Like the cases where jurors observe a defendant in shackles in the courtroom, the Due Process clause is violated when a defendant is forced to wear jail clothes because it injects irrelevant and prejudicial facts into consideration. *See Deck v. Missouri*, 544 U.S. 622, 630, 125 S.Ct. 2007 (2005); *Illinois v. Allen*, 397 U.S. at 344 (“Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.”); *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir.1999) (“[S]hackling, like prison clothes, is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy.”).

Here, Crace was not completely dressed in jail garb. He was permitted to wear civilian clothes in court, except for his sandals. Further,

at least one juror clearly recognized these sandals not as Crace's choice of footwear, but as issued by the jail.

There was no conceivable reason for trial counsel to fail to object. Thus, if this issue cannot be reviewed as a manifest error, Crace asserts that he was denied his Sixth Amendment right to effective assistance of counsel. *See In re Restraint of Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007) (finding deficient performance based on trial counsel's failure to object to appearance of capital defendant before jurors in shackles).

Thus, the question is whether Crace was prejudiced by the juror's view of the sandals (or by counsel's failure to object). However, before examining the prejudice on that issue, Crace discusses the issue of juror bias since the prejudice analysis for both issues dovetails.

Juror's Lack of Complete Candor

The Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial, indifferent jurors. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Where a juror deliberately conceals information during *voir dire*, a new trial is mandated where the juror failed to honestly answer a material question and where a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 555-56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). "A fair trial in a fair tribunal is a basic requirement of due process." *Id.*

The jury must be “capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982). If even a single juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990).

As the Supreme Court recognized in *McDonough*, “[v]oir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors.” *Id.* at 554. Actual bias against a defendant on a juror's part is sufficient to taint an entire trial. *See United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). Indeed, “[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.” *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000).

There are two types of bias: actual and implied. Actual bias arises from the juror's prior experiences. Implied bias arises from a juror's failure to answer questions truthfully during the *voir dire* process. Whether a juror is dishonest is a question of fact. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (*en banc*). Either type of bias may support a challenge for cause. *Gonzalez*, 214 F.3d at 1111. Crace asserts that both types of bias are present.

Focusing for the moment on implied bias, courts may presume bias based on the circumstances. *Dyer*, 151 F.3d at 982 (“[t]he individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.”). See also *McDonough*, 464 U.S. at 556-57 (Blackmun, Stevens, and O'Connor, JJ., concurring) (accepting that “in exceptional circumstances, that the facts are such that bias is to be inferred”); *id.* at 558 (Brennan and Marshall, JJ., concurring in the judgment) (agreeing that “[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law”) (alterations in original, quotations omitted); *United States v. Burr*, 25 F.Cas. 49, 50 (D.Va. 1807) (“He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.”). Nevertheless, it is an open question whether dishonesty is required before implied bias may be found. *Fields v. Woodford*, 309 F.3d 1095, 1105 (9th Cir. 2002).

To illustrate with caselaw: In *Dyer*, the juror on *voir dire* in a murder prosecution answered "no" to queries about whether she or any of her relatives had ever been the victim of any type of crime, and whether she or any of her relatives had ever been accused of any offense other than traffic cases. 151 F.3d at 972. The truth was that the juror's brother had been shot and killed six years earlier, and her husband was in jail. *Id.* at 972-73. The 9th Circuit concluded that the juror plainly lied, and that her

lies gave rise to an inference that she chose to conceal important facts in order to serve as a juror and pass judgment on Dyer's sentence. *Id.* at 982; *see also Green v. White*, 232 F.3d 671, 676 (9th Cir. 2000) (presuming bias when the jury foreperson in a murder trial lied about his own prior felony conviction on a written jury questionnaire and in *voir dire* because the “pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced ‘destructive uncertainties’ into the fact-finding process.” (quoting *Dyer*, 151 F.3d at 983)).

The *Dyer* court further explained:

A juror ... who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process.... [A] perjured juror is unfit to serve even in the absence of ... vindictive bias. If a juror treats with contempt the court's admonition to answer *voir dire* questions truthfully, she can be expected to treat her responsibilities as a juror-to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions-with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id. at 983.

In sum, courts have implied bias in those situations where the relationship between a prospective juror and some aspect of the litigation makes it unlikely that the average person could remain impartial in his deliberations under the circumstances, or where repeated lies in *voir dire*

imply that the juror concealed material facts in order to secure a spot on the particular jury. *Dyer*, 151 F.3d at 982. The standard is “essentially an objective one,” under which a juror may be presumed biased even though the juror himself believes or states that he can be impartial. *Dyer*, 151 F.3d at 982.

Most importantly for purposes of this case, reviewing courts have focused on whether prospective jurors are fully forthcoming, not whether an answer to a question (or a failure to answer a proposed question) is technically correct. According to *Williams v. Taylor*, 529 U.S. 420 (2000), an evidentiary hearing to determine partiality is required where even a single response to a *voir dire* query was not forthcoming or was factually misleading. In *Williams*, a habeas petitioner claimed he was entitled to an evidentiary hearing regarding juror bias because a juror failed to respond to the following question posed during *voir dire*: “Are any of you related to the following people who may be called as witnesses?” The juror’s ex-husband was among the witnesses named. The government insisted that the juror was honest because the questions were phrased in the present tense. But a unanimous Supreme Court rejected this argument, stating that “[e]ven if the juror had been correct in her technical or literal interpretation of the question relating to [her ex-husband], her silence ... could suggest to the finder of fact an unwillingness to be forthcoming ...” *Id.* The Court

held that the petitioner was entitled to an evidentiary hearing on whether the juror was biased. *Id.* at 442.

In this case, the juror failed to reveal that she had observed Crace, in shackles and escorted by jail officers only minutes earlier, when she was asked questions designed to elicit whether prospective jurors had any prior knowledge about this case which might affect their impartiality. This Court can alternately view that failure either as indicative of an interest in securing a spot on the jury or as concealing a fact (observing Crace in shackles) that the law recognizes is highly prejudicial.

Crace now turns to his joint prejudice analysis.

Prejudice

First impressions are prone to remain, and here the juror's first impression of Crace—a prisoner in shackles—was extremely prejudicial. *See United States v. Reed*, 376 F.2d 226, 229 (7th Cir. 1967) (“Mug shot” improperly introduced at start of trial made “the difference between the trial of a man presumptively innocent of any criminal wrongdoing and the trial of a known convict,” and colored the remainder of the trial.).

However, because she did not reveal the fact that she saw Crace shackled, wearing jail sandals, and escorted to court by jail officers, Crace was unable to either challenge her for cause or seek a curative instruction, in an attempt to reduce the prejudice. Instead, because neither the Court nor the

parties knew what the juror had seen, there was no perceived need for either further questioning or a curative instruction.

The lack of notice of the need to further inquire or to issue a curative instruction was exceptionally prejudicial to Crace given the issues in his trial. First, Crace was charged with a violent crime, increasing the risk that “the shackles essentially branded him as having a violent nature.” *Rhoden*, 172 F.3d at 637. Conversely, the sight of Crace in shackles served to undermine his defense. Moreover, the evidence against Crace was not overwhelming, a fact reflected in the jury's verdict on the “attempt” lesser. Because the case was close, an otherwise marginal bias created by the shackles may have played a significant role in the jury's decision. *Id.*

Moreover, the Supreme Court has recognized that “little stock need be placed in jurors' claims” that they will not be prejudiced. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). Where, as with visible shackling, a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings.... [T]herefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. *Id.* (quotation marks

omitted). The analysis thus must focus on whether the risk was there, not whether the jurors could recognize the risk.

In this case, the risk was present and was apparently realized. To illustrate, the juror noted that she had an instinct that Crace was facing a third strike. That instinct clearly could have been the result of her earlier observation of Crace in shackles—an image that she was reminded of when she saw Crace’s jail issued shoes each day in court.

In sum, these two issues, considered in concert, demonstrate that Crace’s right to a fair jury, a fair trial, or both was injured by the juror’s observations of Crace, both in and out of court, as well as her failure to disclose this information to Crace’s judge.

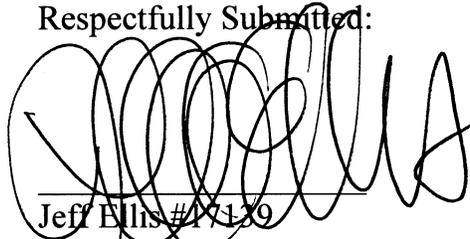
Once again, if these facts are disputed, this Court should order an evidentiary hearing. Otherwise, Crace has made showings of constitutional error.

D. CONCLUSION

Based on the above, this Court should call for a response from the State. If the State disputes any of the extra-record facts contained in this petition with competent evidence, then this Court should either remand this case to the trial court for a determination on the merits or for a reference hearing. If the State does not dispute any of the new facts, then this Court should grant Crace’s petition and remand for a new trial.

DATED this 23rd day of May, 2008.

Respectfully Submitted:



Jeff Ellis #17139
Attorney for Mr. Crace

Law Offices of Ellis, Holmes
& Witchley, PLLC
705 Second Ave., Ste. 401
Seattle, WA 98104
(206) 262-0300 (ph)
(206) 262-0335 (fax)

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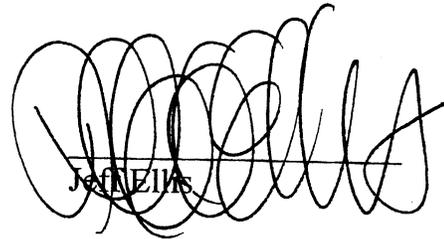
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on October 2, 2008, I served the party listed below with a copy of the attached corrected *Motion to Permit Amended Opening Brief*, *Amended Opening Brief*, and *Reply in Support of PRP* by placing a copy in the mail, postage pre-paid, addressed to:

Kathleen Proctor
Deputy Prosecuting Attorney
Pierce County Prosecuting Attorney
930 Tacoma Ave. S, Rm. 946
Tacoma, WA 98402-2171

10/2/08 Seattle, WA
Date and Place


Jeff Ellis

APPENDIX A ~
JUDGMENT AND SENTENCE

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COURT OF APPEALS
DIVISION II
09 FEB 11 PM 12:30
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 28 2004 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-03797-6

vs.

JUDGMENT AND SENTENCE (JS)

*** COUNTS I & III ONLY ***

HOYT WILLIAM CRACE

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SSOSA
- DOSA
- Breaking The Cycle (BTC)

MAY 28 2004

SID: 12197251
DOB: 02-28-1963

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the deputy prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 05-14-2004 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ATTEMPTED ASSAULT IN THE SECOND DEGREE	9A.28.020, 9A.36.021	DEADLY WEAPON (D)	08-17-2003	032290185 PCSD
III	MALICIOUS MISCHIEF IN THE SECOND DEGREE	9A.48.080	-NONE-	08-17-2003	032290185 PCSD

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Amended Information

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

04-9-06448-2

03-1-03797-6

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

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	BURG 2	[uncertain]	Pierce, WA	8-7-81	A	NV
2	ROB 1*	6-2-88	Pierce, WA	5-4-88	26/26A	V
3	ROB 1*	6-2-88	Pierce, WA	5-4-88	26/26A	V
4	ROB 2*	7-3-91	Pierce, WA	5-4-91	A	V
5	BURG 2	1-10-94	Pierce, WA	5-4-91	A	NV
6	BURG 2	11-6-95	Pierce, WA	10-7-95	A	NV
7	PSP 2	11-6-95	Pierce, WA	10-7-95	A	NV
8	BURG 2	5-13-99	Pierce, WA	3-5-99	A	NV
9	ATT ELUDE	2-25-03	King, WA	11-1-02	A	NV

* = Most Serious Offense ("M.S.O."), RCW 9.94A.030(28).

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

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAX TERM
I	Third M.S.O.	Third M.S.O.	Life without Possibility of Early Release	24 months (D) 6 MONTHS	Life without Possibility of Early Release	Life
III	9	I	22-29 Months	-0-	22-29 Months	5 Years

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

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

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

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

03-1-03797-6

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [] attached [x] as follows: No agreements.

III. JUDGMENT

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

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

IV. SENTENCE AND ORDER

IT IS ORDERED:

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

JASS CODE

RTR/RN \$ 743.72 Restitution to: PIERCE COUNTY
 \$ _____ Restitution to: _____
 (Name and Address - address may be withheld and provided confidentially to Clerk's Office).
 PCV \$ 500.00 Crime Victim assessment
 DNA \$ 100.00 DNA Database Fee
 PUB \$ 400.00 Court-Appointed Attorney Fees and Defense Costs
 FRC \$ 110.00 Criminal Filing Fee
 FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____
 \$ _____ Other Costs for: _____
 \$ 1853.72 TOTAL

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

4.2 RESTITUTION

[] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[] is scheduled for _____

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

[X] RESTITUTION. Order Attached

03-1-03797-6

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4.3 COSTS OF INCARCERATION

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

4.4 COLLECTION COSTS

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

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

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

4.7 [] HIV TESTING

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

4.8 [X] DNA TESTING

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

4.9 NO CONTACT

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

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

4.10 OTHER:

4.11 BOND IS HEREBY EXONERATED

03-1-03797-6

4.12 CONFINEMENT OVER ONE YEAR: PERSISTENT OFFENDER. The defendant was found to be a Persistent Offender.

X The court finds Count I is a most serious offense and that the defendant has been convicted on at least two separate occasions of most serious offense felonies, at least one of which occurred before the commission of the other most serious offense for which the defendant was previously convicted.

[] The court finds Count _____ is a crime listed in RCW 9.94A.030(31)(b)(i) (e.g., rape in the first degree, rape of a child in the first degree (when the offender was sixteen years of age or older when the offender committed the offense), child molestation in the first degree, rape in the second degree, rape of a child in the second degree (when the offender was eighteen years of age or older when the offender committed the offense) or indecent liberties by forcible compulsion; or any of the following offenses with a finding of sexual motivation: murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, or an attempt to commit any crime listed in RCW 9.94A.030(31)(b)(i)), and that the defendant has been convicted on at least one separate occasion, whether in this state or elsewhere, of a crime listed in RCW 9.94A.030(31)(b)(i) or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in RCW 9.94A.030(31)(b)(i).

Those prior convictions are included in the offender score as listed in Section 2.2 of this Judgment and Sentence. RCW 9.94A.030, RCW 9.94A.

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

Life without the possibility of early release on Count I _____
29 months on Count III _____
_____ months on Count _____
_____ months on Count _____

Actual number of months of total confinement ordered is: Life without the possibility of early release.

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

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

_____ The sentence herein shall run concurrently with felony sentences in other cause numbers that were imposed subsequent to the commission of the crime(s) being sentenced unless otherwise set forth here. [] The sentence herein shall run consecutively to the felony sentence in cause number(s) _____

_____ The sentence herein shall run consecutively to all previously imposed misdemeanor sentences unless otherwise set forth here: _____

_____ Confinement shall commence immediately unless otherwise set forth here: _____

4.13 OTHER: CREDIT FOR 285 DAYS SERVED

03-1-03797-6

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

6 months on Court No I _____ months on Court No _____
_____ months on Court No _____ months on Court No _____
_____ months on Court No _____ months on Court No _____

Sentence enhancements in Courts shall run
[] concurrent [] consecutive to each other.
Sentence enhancements in Courts shall be served
[x] flat time [] subject to earned good time credit

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

03-1-03797-6

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5.7 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 5/28/04

JUDGE

Print name

[Signature]
J. R. Orlando

[Signature]

Deputy Prosecuting Attorney

Print name:

WSB # 25470

[Signature]

Attorney for Defendant

Print name:

WSB # 17992

[Signature]

Defendant

Print name:

FILED
IN COUNTY CLERK'S OFFICE
A.M. MAY 28 2004 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY [Signature] DEPUTY

03-1-03797-6

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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 03-1-03797-6

I, **KEVIN STOCK**, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

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03-1-03797-6

IDENTIFICATION OF DEFENDANT

SID No. 12197251 Date of Birth 02-28-1963
(If no SID take fingerprint card for State Patrol)

FBI No. UNKNOWN Local ID No. UNKNOWN

PCN No. UNKNOWN Other

Alias name, SSN, DOB: _____

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

FINGERPRINTS

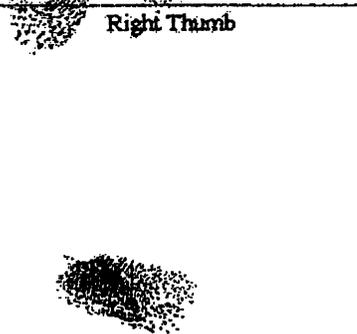
Left four fingers taken simultaneously

Left Thumb



Right Thumb

Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, _____ Dated: _____

DEFENDANT'S SIGNATURE: *[Signature]*

DEFENDANT'S ADDRESS: _____

APPENDIX B ~
CRIMINAL TRESPASS JUDGMENT

FILED
03 FEB 24 AM 9:01
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
Plaintiff,)
)
vs.)
)
Hoyt Crace)
Defendant,)

No. 02-1-10084-4 KNT
JUDGMENT AND SENTENCE,
NON-FELONY
SUSPENDED/RCW 9.92.060
Count(s) I

The Prosecuting Attorney, the above-named defendant and counsel Elmer Cromwell being present in Court, the defendant having been found guilty of the crime(s) charged in the [amended] information on 1/27/03 by plea and the defendant having been asked if there was any legal cause why judgment should not be pronounced and none being shown.

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: 1st Degree Criminal Trespass

and that the defendant be sentenced to imprisonment in the King County Jail, Department of Adult Detention, for the maximum term(s) of 365

said term(s) to run [] concurrently [] consecutively with each other.

The sentence(s) is/are hereby SUSPENDED pursuant to the provisions of RCW 9.92.060 upon the following terms and conditions:

(1) The defendant shall serve a term of 365 ~~at the King County Jail, Department of Adult Detention, with credit for~~ 365 days already served solely on this cause, with work release if eligible, to commence no later than II. This sentence shall run [] concurrent consecutively with term(s) imposed for count(s) II [] Cause # . This term shall run consecutive to any other term not specifically referenced in this order.

(2) The defendant shall be under the charge of a Community Corrections Officer employed by the Washington State Department of Corrections and comply with the standard rules and regulations promulgated by that department. Probation shall commence immediately but is tolled during any period of confinement. The defendant shall report to the Department of Corrections intake officer within 72 hours of this date or release date if in custody. The termination date of probation shall be set at 0 months from date of this order.

CERTIFIED COPY TO COUNTY JAIL FEB 24 2003

(3) Defendant shall pay to the clerk of this Court:

Restitution is not ordered.

Order of Restitution is attached as Appendix.

Restitution to be determined at a restitution hearing on _____ at _____ m. date to be set. The defendant ~~does~~ does not waive presence at restitution hearing.

(a) \$ 0, Court costs;

(b) \$ ~~50~~ imposed on Ct. II, Victim assessment, RCW 7.68.035 \$500 for gross misdemeanors and \$100 for misdemeanors.

(c) \$ 0, Recoupment for attorney's fees to King County Public Defense Programs.

(d) \$ 0, Fine;

(e) TOTAL Monetary obligations: \$0 ~~_____~~ _____;

(f) The above payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer.

(4) The defendant shall complete _____ community service hours under the supervision of the Department of Corrections at a rate to be determined by a Community Corrections Officer of not less than _____ hours per month.

(5) The defendant shall not purchase, possess, or use any alcohol controlled substance (without a lawful prescription). The defendant shall submit to urinalysis and/or breath testing as required by the Community Corrections Officer and submit to search of person, vehicle or home by a community corrections officer upon reasonable suspicion; _____

(6) The defendant shall obtain a substance abuse evaluation and follow all treatment recommendations; _____

(7) The defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program; _____

(8) The defendant shall have no contact with: Karen Kozu

(9) [] The defendant shall register as a sex offender.

(10) The defendant shall commit no criminal offenses.

(11) Additional conditions of probation are attached to and incorporated in this order; _____

~~_____~~
~~_____~~
inpatient treatment on a 1 day a day credit

(12) Additional conditions are attached to and incorporated as Appendix _____.

The Defendant is ordered to report to commence probation supervision within three working days to the Department of Corrections Intake Officer.

Date: 2-24-03



Judge, King County Superior Court

Presented by:



Deputy Prosecuting Attorney

Form Approved for Entry:

Defendant's current address:

DOC

Attorney for Defendant, WSBA # _____

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

HOYT W. CRACE

Defendant,

No. 02-1-10084-4 KNT

JUDGMENT AND SENTENCE,
(FELONY) - APPENDIX B,
CRIMINAL HISTORY

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
BURG 2	03/05/99	ADULT	991009811	PIERCE
BURG 2, PSP 2	10/07/95	ADULT	951046764	PIERCE
BURG 2	11/19/93	ADULT	931044561	PIERCE
ROBBERY 2	05/06/91	ADULT	911015742	PIERCE

The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date:

2-21-03


JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

HOYT W. CRACE

Defendant;

No. 02-1-10084-4 KNT

APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) **HIV TESTING AND COUNSELING (RCW 70.24.340):**

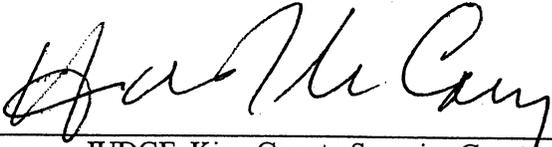
(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date:

2-21-03



JUDGE, King County Superior Court

APPENDIX C ~
DIRECT APPEAL OPINION

Westlaw.

Not Reported in P.3d

FOR EDUCATIONAL USE ONLY

Page 1

Not Reported in P.3d, 128 Wash.App. 1021, 2005 WL 1540894 (Wash.App. Div. 2)

(Cite as: Not Reported in P.3d, 2005 WL 1540894 (Wash.App. Div. 2))

State v. Crace
Wash.App. Div. 2,2005.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington, Division 2.
STATE of Washington, Respondent,
v.
Hoyt William CRACE, Appellant.
No. 31822-9-II.

June 28, 2005.

Appeal from Superior Court of Pierce County, Hon.
James R. Orlando, J.

Mary Katherine Young High, Attorney at Law, Ta-
coma, WA, for Appellant.
Kathleen Proctor, Pierce County Prosecuting Atty
Ofc, Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

HOUGHTON, J.

*1 Hoyt William Crace appeals his conviction of attempted second degree assault with a deadly weapon enhancement, arguing trial court instructional error and insufficiency of the evidence. We affirm.

FACTS

On August 17, 2003, at 2:25 a.m., Pierce County Sheriff's Deputy Hardesty received a call from dispatch directing him to a possible burglary in progress at a residence in a mobile home park. As Hardesty got out of his car, a man approached him and stated that an unknown male burst into his neighbor's home and then fled. The man said that the subject ran about two blocks away to the north and that he was armed with a sword.

At that moment, Hardesty, who had a flashlight in

his hand, saw a male approximately two blocks away jumping up and down in the middle of the street, yelling and screaming at the top of his lungs. The suspect was later identified as Crace.

Hardesty could see a long, chrome-like object in Crace's hand. When Crace made eye contact with Hardesty, he began running at full speed toward the officer. As Crace ran, he yelled, 'They are after me, someone help me.' 2 Report of Proceedings (RP) at 83.

As Crace drew closer, Hardesty saw a sword in his hand. Hardesty drew his weapon and directed Crace to drop the sword. Crace kept running at Hardesty, and Hardesty kept repeating his command to drop the sword. Finally, Crace dropped the sword when he was approximately 50 feet away from the officer but continued running at Hardesty. The officer repeatedly commanded him to get on the ground, and Crace complied when he was approximately five to seven feet from the officer. Hardesty handcuffed Crace and placed him in the back of his patrol vehicle.

Once Hardesty secured Crace, he heard a female screaming from the residence identified by dispatch. There, he found an hysterical Rita Whitten. Whitten told Hardesty that as her baby slept in the bedroom and she watched television in the living room, Crace, whom she had never seen before, burst through the front door, screaming about being pursued. After rifling Whitten's kitchen cabinets and drawers, Crace ran out of her home.

As Hardesty spoke with Whitten, he heard screams from the parking lot. He ran out and saw Crace kicking wildly in the back of the patrol car; Crace broke out the left rear window. After securing Crace in four point restraints, Hardesty advised him of his constitutional rights.

Crace stated that earlier in the evening, he had been assaulted by four or five 'guys' and that he ran

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from them in fear. Based on his experience, Hardesty suspected that drugs affected Crace and he inquired about Crace's substance use. Crace told Hardesty that he had ingested a lot of cocaine earlier in the day.

By amended information, the State charged Crace with second degree assault, first degree criminal trespass, and second degree malicious mischief. The State also alleged that Crace was armed with a deadly weapon while committing the assault.

*2 The trial court ordered that Crace undergo an evaluation to determine his competency and the potential for defenses based on his mental condition. Later, the court found Crace competent to stand trial.

At trial, Crace acknowledged that he had a substance abuse problem. He stated that he was repairing a friend's trailer located in the same mobile home park as Whitten's trailer. On the day of the incident, another resident of the trailer park offered Crace approximately one gram of cocaine. Crace testified that, between 10:00 a.m. and 2:00 p.m., he voluntarily consumed eight to ten alcoholic coolers, a gram of cocaine, two prescription pain medications, Dilaudid, and a quarter piece of heroin.

Crace testified that he felt very relaxed and fell asleep while watching a video. When he awoke, it was dark. Crace heard and saw things, grew terrified, and became convinced that he was going to be murdered. He ran screaming from the trailer, trying to find the home of two elderly women who lived nearby. Instead, he entered Whitten's trailer by mistake. Crace testified that he told Whitten about his fears but when Whitten kept screaming, he quickly left. He went outside and found the elderly women's trailer but he did not stay there because he still thought that someone was trying to murder him.

Crace returned to his trailer, took the sword off the wall, and ran down the street screaming for help. When he saw Hardesty's flashlight beam, he ran toward the light, sword in hand. When Crace realized

that an officer held the flashlight, he remained too frightened to drop the sword or stop.

Eventually, he dropped the sword but he did not obey the direction to lie down on the ground because he was scared and still too far away. He did not resist being handcuffed and placed in the patrol car. When his fears of being murdered persisted, he kicked out the window in the hopes that someone would return to the vehicle to help him.

Hardesty testified that he received training regarding the '21 foot rule,' the distance at which someone armed with a knife can reach an officer to inflict injury before an officer can draw his gun. 2 RP at 77. Hardesty stated that he feared for his safety as Crace ran toward him and was prepared to shoot him even after he dropped the sword. The deputy indicated that he would have shot him if Crace had come a couple of steps closer. The deputy demonstrated for the jury how Crace held the sword and how he ran toward him. The jury also saw a demonstration of the distance at which Crace dropped the sword and got on the ground.

Dr. Vincent Gologly, a psychologist, testified for the defense. He said that Crace's voluntary intoxication led to a delusional state. Gologly also concluded that Crace could not realize the nature of his actions due to drug ingestion. Gologly explained that, in his opinion, Crace could not accurately appraise the situation, although he could still engage in goal-directed behavior. Gologly believed that Crace panicked and thought unclearly at the time of the offense.^{FN1}

FN1. Gologly testified that Crace told him that he was seeing demons. But he had never mentioned demons to the police or Dr. Marquez at Western State Hospital.

*3 Dr. Steven Marquez, a forensic psychologist at Western State Hospital who evaluated Crace for the State, diagnosed him with an antisocial personality disorder. He found Crace manipulative, offering exaggerated psychiatric symptoms inconsistent

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with any known pattern or syndrome. Crace told Marquez that five people wanted to harm him on the night of the incident. Marquez saw considerable goal-directed activity in Crace's actions and opined that he could form intent.

The trial court instructed the jury on the charged offenses and the lesser included offense of attempted second degree assault. The jury deadlocked on the second degree assault charge but found Crace guilty of attempted second degree assault. The jury also convicted him of the first degree criminal trespass and second degree malicious mischief. Finally, it found that Crace was armed with a deadly weapon at the time of the attempted assault.

Crace appeals.

ANALYSIS

Sufficiency of Evidence

Crace contends that insufficient evidence supports his conviction of attempted second degree assault with a deadly weapon enhancement. Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, it permits any rational fact finder to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.' *Salinas*, 119 Wn.2d at 201. We leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Attempted Second Degree Assault

Crace argues that insufficient evidence supports finding that he intended to assault Hardesty or that he took a substantial step toward the completion of the crime of second degree assault.

The State charged Crace with the second degree assault with a deadly weapon in violation of RCW 9A.36.021(1)(c) and former RCW 9.94A.125, recodified as RCW 9.94A.602 (2001). The jury found Crace guilty of attempted ^{FN2} second degree assault with a deadly weapon.

FN2. Under RCW 9A.28.020(1): 'A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.'

Under RCW 9A.36.021(1)(c), an individual commits second degree assault when he assaults another with a deadly weapon. Washington recognizes three assault definitions: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003).

Here, Crace testified that he intentionally ran toward the flashlight beam and Hardesty, sword in hand. Thus, the jury could have reasonably concluded that Crace intended to assault Hardesty.^{FN3}

FN3. Moreover, Marquez, who conducted a forensic psychological evaluation of Crace, testified that Crace could form the intent to assault Hardesty. Also, Gollogly stated that Crace could not be considered insane on the day of the incident because he voluntarily ingested the drugs. Although Gollogly testified that Crace could not accurately appraise his situation and that he panicked due to substance-induced hallucinations, he also said that Crace could engage in goal-directed action.

Also, Hardesty testified that Crace ran toward him, first ignoring repeated commands to drop the sword

and then, ignoring the commands to stop. This evidence sufficiently demonstrates a substantial step toward the completion of a second degree assault. Crace further argues that Hardesty did not suffer reasonable apprehension. Hardesty testified that Crace's actions put him in extreme fear for his safety such that he was prepared to shoot Crace. This evidence sufficiently shows Hardesty's apprehension of harm. But Crace asserts that Hardesty experienced unreasonable fear because he carried a sidearm and because Crace never got close enough with the sword to harm him. We disagree.

*4 Hardesty testified that Crace ran at him with a sword and ignored his commands to stop, drop the sword, and lay on the ground. Because for a period of time Crace refused to obey those commands, Hardesty felt that Crace's actions were not those of a reasonable person and, thus, he felt apprehension about his personal safety. That Hardesty had a weapon and could have defended himself does not mean that Hardesty could not fear for his safety.

Based on the evidence, the jury could reasonably conclude that Crace intended to hurt Hardesty or to instill fear of harm. Viewing the evidence in the light most favorable to the State, sufficient evidence showed that Crace acted with the intent to assault and took substantial step toward completing this offense.

Deadly Weapon Enhancement

Crace next argues that insufficient evidence shows that he was armed with a deadly weapon at the time of the incident.

We review whether a person is armed as a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). Crace does not dispute that he possessed a deadly weapon when he ran toward the police officer. Thus, we must determine whether the facts demonstrate, as a matter of law, that Crace was armed. We review this question de novo. *Schelin*, 147 Wn.2d at 566.

RCW 9.94A.602 provides in part:

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

In *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993), our Supreme Court articulated the test for determining when a defendant is 'armed.' In *Valdobinos*, where police discovered an unloaded .22 rifle under the defendant's bed while executing a warrant to search for evidence of illegal drug sales, the Court held that '{a} person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.' 122 Wn.2d at 282. Applying this test, the *Valdobinos* court held that evidence of an unloaded rifle under a bed "without more" insufficiently showed that a defendant is 'armed' in the sense of having a weapon accessible and readily available for offensive or defensive purposes.' 122 Wn.2d at 282.

Crace does not dispute that a sword is a deadly weapon. But he argues that at the time he possessed this weapon, he was more than 50 feet away from Hardesty, thus making it impossible to use it against Hardesty either defensively or offensively. We disagree.

*5 The direct evidence that Crace held a sword when he ran toward the police officer entitled the jury to find him armed. Furthermore, the jury was entitled to find that the weapon was easily accessible and readily available for use, either for offensive or defensive purposes at that time.

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Jury Instructions

Finally, Crace contends that the trial court erroneously instructed the jury on the alternative means of committing second degree assault because he had no physical contact with Hardesty.

Jury instructions are sufficient if they (1) permit the party to argue his or her theory of the case; (2) are not misleading; and (3) when read as a whole, correctly inform the jury of the applicable law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). The trial court has considerable discretion regarding the wording of instructions and how many instructions are necessary to present each litigant's theories fairly, and we review these matters for an abuse of discretion. *State v. Rehak*, 67 Wn.App. 157, 165, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). But we review claimed errors of law in jury instructions de novo. *Willis*, 153 Wn.2d at 370.

In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the means by which the defendant is found to have committed the crime. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. *Ortega-Martinez*, 124 Wn.2d at 707.

When the State charges one with having committed a crime by more than one method and deficient proof exists as to one or more methods, but the jury is, nevertheless, instructed as to those methods, the verdict must be set aside, unless we can ascertain that the verdict was founded on one of the methods for which substantial evidence has been introduced. *State v. Gillespie*, 41 Wn.App. 640, 645, 705 P.2d 808 (1985).

If the evidence sufficiently supports each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by

which the defendant committed the crime is unnecessary to affirm a conviction because an inference exists that the jury rested its decision on a unanimous finding as to the means. *Ortega-Martinez*, 124 Wn.2d at 707-08. On the other hand, we will not affirm the conviction if the evidence insufficiently presents a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury. *Ortega-Martinez*, 124 Wn.2d at 708.

Under RCW 9A.36.021(1), a person is guilty of second degree assault if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

*6 (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

Here, the trial court instructed the jury on only one means of committing second degree assault: assault of another with a deadly weapon. Therefore, it did not instruct the jury on the other alternative means of committing second degree assault. Thus, the jury rendered a unanimous verdict.

But the trial court also instructed the jury on the three common law definitions of 'assault':

An assault is an intentional touching or striking or

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cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person....

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Clerk's Papers at 66. Crace argues that the trial court erroneously instructed the jury on the first definition of 'assault' involving intentional touching or striking or cutting of another person because no such conduct occurred in this case.^{FN4} But in *State v. Smith*, 124 Wn.App. 417, 426-27, 102 P.3d 158 (2004), we held that the definitional instruction of assault does not create an alternative means case:

FN4. Crace also takes an issue with the two remaining definitions of assault, arguing that the State failed to prove intent to inflict bodily injury or to create in another apprehension of injury. Crace did not object to the court giving this instruction, and he cannot raise it now absent a constitutional error, which he has not demonstrated. *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994). Thus, we do not address this contention.

Smith argues that because the court gave three definitions of assault, it created an alternative means case and insufficient evidence supports Smith's convictions under the three alternatives. We disagree that this is an alternative means case.

Instruction 7 defined various ways of committing

an assault. Because definitional instructions do not create alternative means of committing the crime, necessitating jury unanimity, Smith's argument that this is an alternative means case fails.

....

Smith further contends that the trial court erred in instructing the jury on alternative means of committing assault because the evidence did not support it. Because we disagree that this is an alternative means case, we do not address this argument further.

(citations omitted; some footnotes omitted). Likewise, here, the court instructed the jury on only one means of committing second degree assault, rendering the verdict unanimous and Crace's argument fails.

*7 Affirmed.

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

We concur: MORGAN, J., and QUINN-BRINTNALL, C.J.

Wash.App. Div. 2, 2005.

State v. Crace

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APPENDIX D ~
ORDER DENYING REVIEW

Westlaw.

161 P.3d 1026 (Table)

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160 Wash.2d 1010, 161 P.3d 1026 (Table)

(Cite as: 160 Wash.2d 1010)

State v. Crace

Wash. 2007.

(The Court's decision is referenced in a Pacific Reporter table captioned "Supreme Court of Washington Table of Petitions for Review.")

Supreme Court of Washington

State

v.

Hoyt William Crace

NO. 77474-9

June 05, 2007

Appeal From: 31822-9-II

Petition For Review: Denied.

Wash. 2007.

State v. Crace

160 Wash.2d 1010, 161 P.3d 1026 (Table)

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**APPENDIX E ~
MANDATE**


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Appellate Court Case Summary

Case Number: 318229
Filing Date: 06-02-2004
Court: COA, Division II

Event Date	Event Description	Action
06-02-04	Affidavit of Service	Filed
06-02-04	Order of Indigency in Superior Court	Filed
06-02-04	Notice of Appeal	Filed
06-03-04	Case Received and Pending	Status Changed
06-17-04	Perfection Letter	Sent by Court
06-30-04	Designation of Clerks Papers	Filed
07-01-04	Statement of Arrangements	Filed
07-06-04	Clerk's Papers	Received by Court
08-25-04	Memorandum	Received by Court
08-30-04	Record Ready	Status Changed
08-30-04	Report of Proceedings	Filed
09-14-04	Report of Proceedings	Received by Court
10-14-04	Motion to Extend Time to File	Filed
10-15-04	Decision on Motions	Filed
10-18-04	Appellants brief	Due
10-22-04	Letter	Sent by Court
11-02-04	Letter	Received by Court
11-03-04	Letter	Sent by Court
11-03-04	Letter	Sent by Court
11-03-04	Memorandum	Received by Court
12-06-04	Motion to Extend Time to File	Filed
12-08-04	Motion for Supplem Report of Proceedings	Filed
12-10-04	Statement of Additional Grounds for Review	Due
12-10-04	Decision on Motions	Filed
12-13-04	Motion to Extend Time to File	Filed
12-21-04	Letter	Received by Court
01-04-05	Letter of Sanctions	Sent by Court

About Dockets

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Coa, Division II
 950 Broadway
 Ste 300, MS TB-06
 Tacoma, WA 98402-4454

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01-19-05	Respondents brief	Filed	
01-24-05	Screened	Status Changed	3) Make no representations regarding the identity of any person whose name appears on these pages; and
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03-17-05	Non-Oral Argument Setting Letter	Sent by Court	
03-25-05	Appellants brief	Received by Court	
03-25-05	Respondents brief	Received by Court	
03-28-05	Oral Argument Requested	Filed	
04-04-05	Set on a calendar	Status Changed	
05-02-05	Heard and awaiting decision	Status Changed	
05-02-05	Non-Oral Argument Hearing	Scheduled	
05-02-05	Non-Oral Argument Hearing	Scheduled	
05-02-05	Non-Oral Argument Hearing	Scheduled	
05-02-05	Non-Oral Argument Hearing	Scheduled	
06-28-05	Opinion	Filed	
06-28-05	Decision Filed	Status Changed	
07-07-05	Cost Bill	Filed	
07-22-05	Supplemental Cost Bill	Filed	
07-28-05	Petition for Review	Filed	
08-02-05	Court of Appeals case file (pouch)	Sent by Court	
08-09-05	Check case Information	Filed	
08-15-05	Check case Information	Filed	
08-15-05	Check case Information	Filed	
08-15-05	Check case Information	Filed	
08-15-05	Check case Information	Filed	
10-11-05	Other	Filed	
10-28-05	Letter	Received by Court	
11-01-05	Letter	Sent by Court	
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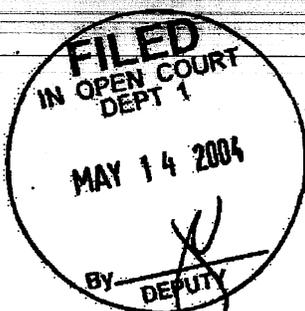
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04-23-07	Check case Information	Filed
04-23-07	Check case Information	Filed
06-04-07	Check case Information	Filed
06-04-07	Check case Information	Filed
06-04-07	Check case Information	Filed
06-04-07	Check case Information	Filed
06-04-07	Check case Information	Filed
06-05-07	Prv denied	Filed
06-05-07	Check case Information	Filed
06-19-07	Mandate	Filed
06-19-07	Disposed	Status Changed

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APPENDIX F ~
COURT'S INSTRUCTIONS TO JURY



03-1-03797-6 20909088 CTIMW 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

HOYT WILLIAM CRACE,

Defendant.

CAUSE NO. 03-1-03797-6

COURT'S INSTRUCTIONS TO THE JURY

DATED this 13 day of May, 2004.

JUDGE [Signature]

ORIGINAL

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into

account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

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

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

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

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

INSTRUCTION NO. 3

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

INSTRUCTION NO. 4

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

INSTRUCTION NO. 5

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

No. 5(a)

Evidence that the Defendant has previously been convicted of a crime is not evidence of the Defendant's guilt as to the crimes charged in this case.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 1

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

INSTRUCTION NO. 8

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form a particular mental state.

INSTRUCTION NO.

9

A person commits the crime of Assault in the Second Degree when he or she assaults another with a deadly weapon.

INSTRUCTION NO.

10

A person commits the crime of Attempted Assault in the Second Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 11

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

INSTRUCTION NO. 12

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 13

For the purposes of the crime of Assault in the Second Degree, "deadly weapon" means any weapon, device, instrument, substance or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

INSTRUCTION NO. 14

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result, which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 15

To convict the defendant of the crime of Assault in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of August, 2003, the defendant assaulted Theron Hardesty with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

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

The crime of Assault in the Second Degree necessarily includes the lesser crime of Attempted Assault in the Second Degree.

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

INSTRUCTION NO. 17

To convict the defendant of the crime of Attempted Assault in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of August, 2003, the defendant did an act which was a substantial step toward the commission of Assault in the Second Degree;
- (2) That the act was done with the intent to commit Assault in the Second Degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

A person commits the crime of Criminal Trespass in the First Degree when he or she knowingly enters or remains unlawfully in a building.

INSTRUCTION NO. 19

To convict the defendant of the crime of Criminal Trespass in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of August, 2003, the defendant knowingly entered or remained in a building;
- (2) That the defendant knew that the entry or remaining was unlawful; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 20

A person commits the crime of Malicious Mischief in the Second Degree when he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding \$250.

INSTRUCTION NO.

21

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

INSTRUCTION NO. 27

To convict the defendant of the crime of Malicious Mischief in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of August, 2003, the defendant caused physical damage to the property of another in an amount exceeding \$250;

(2) That the defendant acted knowingly and maliciously; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime alleged in Count I.

For purposes of the special verdict, a knife having a blade longer than three inches is a deadly weapon.

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

INSTRUCTION NO. 24

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

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

**APPENDIX G ~
DEFENSE PROPOSED INSTRUCTIONS
AND VERDICTS**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
Plaintiff,) NO. 03-1-03797-6
vs.)
)
HOYT WILLIAM CRACE,)
)
Defendant.)

DEFENSE'S PROPOSED INSTRUCTIONS
TO THE JURY

Before the Honorable James Orlando
Judge of the Superior Court
Department No. #1

Robert J. Depan
Department of Assigned Counsel
Attorney for Defendant

Stephen Penner
Deputy Prosecuting Attorney

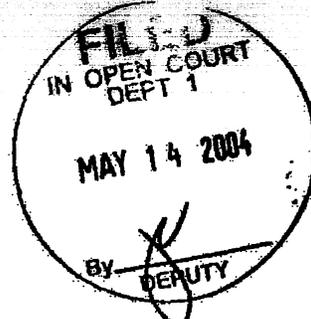
INSTRUCTION NO.

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form a particular mental state.

WPIC 18.20



03-1-03797-6 21000602 VRD 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
HOYT WILLIAM CRACE,
Defendant.

CAUSE NO. 03-1-03797-6

VERDICT FORM A-1

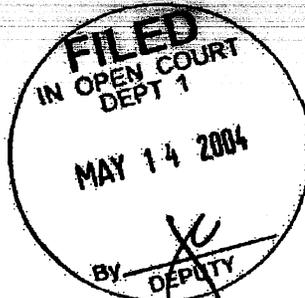
MAY 14 2004

We, the jury, find the defendant _____ (Not Guilty or Guilty) of the
crime of Assault in the Second Degree as charged in Court 1.

PRESIDING JUROR



03-1-03797-6 21000889 VRD 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
HOYT WILLIAM CRACE,
Defendant.

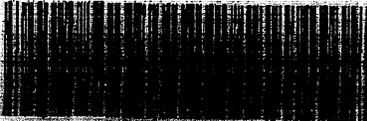
CAUSE NO. 03-1-03797-6

VERDICT FORM A-2

MAY 14 2004

We, the jury, having found the defendant not guilty of the crime of Assault in the Second Degree as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the lesser included crime of Attempted Assault in the Second Degree.

James Baldes
PRESIDING JUROR



03-1-03797-6 21000020 VRD 05-14-04

FILED
IN OPEN COURT
DEPT 1

MAY 14 2004

By [Signature]
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

HOYT WILLIAM CRACE,

Defendant.

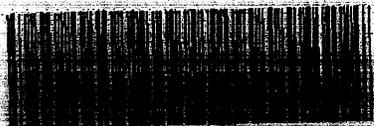
CAUSE NO. 03-1-03797-6

VERDICT FORM B

MAY 14 2004

We, the jury, find the defendant Guilty (Not Guilty or Guilty) of the
crime of Criminal Trespass in the First Degree as charged in Count II.

J. James Baldes
PRESIDING JUROR



03-1-03797-6 21000623 VRD 05-14-04

FILED
IN OPEN COURT
DEPT 1
MAY 14 2004
By XU
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
HOYT WILLIAM CRACE,
Defendant.

CAUSE NO. 03-1-03797-6

VERDICT FORM C

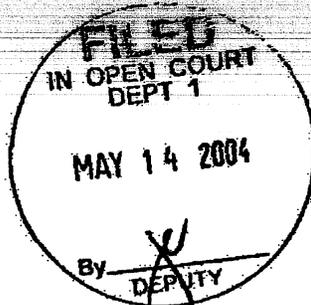
MAY 14 2004

We, the jury, find the defendant Guilty (Not Guilty or Guilty) of the
crime of Malicious Mischief in the Second Degree as charged in Count III.

J. James Balder
PRESIDING JUROR



03-1-03797-6 2100054 SWRD 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
HOYT WILLIAM CRACE,
Defendant.

CAUSE NO. 03-1-03797-6

SPECIAL VERDICT FORM MAY 14 2004

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

Was the defendant, Hoyt William Crace, armed with a deadly weapon at the time of the commission of the crime in Count 1?

ANSWER: yes (Yes or No).

James Baldes
PRESIDING JUROR

APPENDIX H ~
TRANSCRIPTS OF JURY SELECTION AND TRIAL

1 IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

2 STATE OF WASHINGTON

3
4 STATE OF WASHINGTON,)
5 Plaintiff,) NOTICE OF FILING
6 vs) VERBATIM REPORT OF PROCEEDINGS
7 HOYT WILLIAM CRACE,) Superior Court No. 03-1-03797-6
8 Defendant.) Court of Appeals No. 31822-9-II
9) Volume 1 of 1
10) Pages 1-79
11)

12 PROSECUTING ATTORNEY in and for the County of Pierce,
13 State of Washington.

14 MR. HOYT WILLIAM CRACE, defendant pro se.

15 COURT OF APPEALS, Division II, 950 Broadway, Suite
16 300, Tacoma, Washington.

17
18
19 Please be advised that the above-captioned Verbatim
20 Report of Proceedings dated May 11, 2004, was filed with the
21 Clerk of the Superior Court on the 27th day of April 2006 .

22
23
24 COA # 82104
25 Randy Kay York, CCR, RDR
930 Tacoma Avenue South
Tacoma, Washington 98402

Official Court Reporter
Dept. 1, Superior Court
(253) 798-7482

1 IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

2 STATE OF WASHINGTON

3

4 STATE OF WASHINGTON,)
)
5 Plaintiff,) VERBATIM REPORT OF PROCEEDINGS
) (Jury Voir Dire only)
6 vs) Superior Court No. 03-1-03797-6
) Court of Appeals No. 31822-9-II
7 HOYT WILLIAM CRACE,)
)
8 Defendant.) Volume 1 of 1
) Pages 1-79

9

10 APPEARANCES

11 PROSECUTING ATTORNEY in and for the County of Pierce,
12 State of Washington, by MR. STEPHEN PENNER, Deputy
13 Prosecuting Attorney, appeared on behalf of the State.

14 MR. ROBERT DEPAN, Attorney at Law, 949 Market Street,
15 Tacoma, Washington, appeared on behalf of the Defendant, who
16 was present in person.

17 BE IT REMEMBERED that on the 11th day of May 2004,
18 the above-captioned cause came on duly for hearing before
19 the HONORABLE JAMES R. ORLANDO, Judge of the Superior Court
20 in and for the County of Pierce, State of Washington; the
21 following proceedings were had, to-wit:

22

23

24 COA # 82104
25 Randy Kay York, CCR, RDR
 930 Tacoma Avenue South
 Tacoma, Washington 98402

Official Court Reporter
Dept. 1, Superior Court
(253) 798-7482

MAY 11, 2004

MORNING SESSION

(Jury present.)

THE COURT: Okay, I would ask everyone please stand and take the initial oath. All raise your right hand: Do you solemnly swear or affirm that you will truthfully answer questions as may be asked you, by or under the direction of the court, touching your qualifications to act as jurors in this case?

JURORS: I do.

THE COURT: Thank you, please be seated. Are the parties ready to proceed in the matter of State of Washington and Hoyt Crace?

MR. PENNER: State's ready.

MR. DEPAN: Defense is ready, Your Honor.

THE COURT: All right. For the benefit of the jurors, any of the remarks that I make, any of the questions that I ask, and any of the questions that I permit the attorneys to ask are directed to all of you. In order that the case be tried before an impartial jury, the lawyers and I will ask you questions not to embarrass you or to pry into your private affairs, but to determine if you are unbiased and without preconceived ideas which might affect the case.

You should not withhold information in order to be

1 seated on this particular jury. You should be
2 straightforward in your answers, rather than answering in
3 the way you feel the lawyers or I expect you to answer.

4 It is presumed that when a jury has been selected and
5 accepted by both sides, that each of you would keep an
6 open mind until the case is submitted, would accept the
7 instructions of the court, and would base any decision
8 upon the law and the facts, uninfluenced by any other
9 considerations. The purpose of the questions during voir
10 dire is to determine if you have that proper frame of
11 mind.

12 The lawyers have the right and duty to challenge any
13 jurors for cause. They may also challenge additional
14 jurors without giving any reason as a guaranty to both
15 parties they may remove some jurors, if they wish. You
16 should not take offense if you are challenged, since the
17 challenge is not exercised as a personal reflection on
18 you.

19 This is a criminal action instituted by the State of
20 Washington as plaintiff. The State is represented by
21 Mr. Steve Penner, deputy prosecuting attorney for Pierce
22 County.

23 Mr. Penner?

24 **MR. PENNER:** Good morning, every one.

25 **THE COURT:** The defendant, Hoyt Crace, is represented

1 by his attorney, Mr. Robert DePan.

2 Mr. DePan?

3 **MR. DEPAN:** Good morning.

4 **THE COURT:** Mr. Crace is charged by Information in
5 Count I with the crime of assault in the second degree;
6 Count II, criminal trespass in the first degree; and in
7 Count III, malicious mischief in the second degree. The
8 defendant has entered a plea of not guilty and that plea
9 puts in issue every element of the crimes charged.

10 The Information in this case is only an accusation
11 against defendant which informs him of the charge. You
12 are not to considering the filing of the Information or
13 contents as proof of the matters charged.

14 It is your duty to determine the facts in this case
15 from the evidence that will be produced in court. It is
16 also your duty to accept the law from the court,
17 regardless of what you personally believe the law is or
18 ought to be. You are to apply the law to the facts and
19 in this way decide the case.

20 The defendant is presumed innocent. This presumption
21 continues throughout the entire trial unless you find
22 during your deliberations that it has been overcome by
23 the evidence beyond a reasonable doubt. The State has
24 the burden of proving each element of the crimes, beyond
25 a reasonable doubt.

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

9 Those of you that have had previous jury experience
10 may have sat on a civil case, and in a civil case you may
11 recall that the burden of proof is by a preponderance of
12 the evidence or the greater weight of the evidence. In a
13 criminal case, such as this, the State must prove every
14 element of the crimes charged beyond a reasonable doubt.
15 In a civil case, the verdict need not be unanimous. But
16 in a criminal case, such as this, the law requires all
17 jurors agree in order to return a verdict.

18 I am going to ask you some questions generally, and if
19 you would answer yes or probably yes to any of the
20 questions, raise your hand so that we can note your
21 response. We are going to be referring to you by your
22 orange badge color. Those of you in the second or third
23 row may need to move around so I can see your badge
24 number or call it out when responding. It is important
25 that all of you keep jury voices up so my court reporter

1 can hear your responses. If anyone has difficulty
2 hearing anything, raise your hand so that we can note
3 that and we will make efforts to speak up and make sure
4 that you can hear clearly.

5 First off, do any of you know either of the attorneys
6 involved? Do any of you know Mr. Crace? Have any of you
7 heard anything about this particular case by potentially
8 hearing potential witnesses talk about it, or other folks
9 that may be involved in the case having any kind of
10 discussion?

11 No? Okay.

12 I am going to read you a list of potential witnesses.
13 And if their names sound familiar, raise your hand and we
14 will note that response.

15 A Steven Marquez, Ph.D.; a Vincent Gollogly, Ph.D.;
16 Pierce County Sheriff Deputy Theron Hardesty; a Rita
17 Whitten.

18 Mr. Penner, is Officer Laliberte going to testify?

19 **MR. PENNER:** I expect so, Your Honor.

20 **THE COURT:** Pierce County Sheriff Deputy Jason
21 Laliberte. A Deanna Cole.

22 Any of those names familiar to anyone?

23 Mr. DePan, did you have any additional witnesses?

24 **MR. DEPAN:** One. There's -- yes, Your Honor. I
25 thought you --

1 **THE COURT:** Kermit Haugen. Okay.

2 Was there one more?

3 **MR. DEPAN:** No, I think that's it.

4 **THE COURT:** Okay, all right. I will indicate for the
5 record that there has been no response to any of those
6 names.

7 You know very little about this case, only that there
8 are allegations involving an assault, criminal trespass,
9 and a malicious mischief. Have any of you been involved
10 in similar types of offenses either as a victim or a
11 witness or perhaps an accused at some point? Any of you
12 at all been involved in any of those related crimes?

13 Anyone been a victim of a crime? Can be a burglary,
14 car prowler -- okay, in the front row number 4, number 7,
15 11, 12, second row 13, 14, 15, 17, back row number 25,
16 28, 32, 34.

17 For those of you that have been a victim of some type
18 of a crime, is there anything about that experience that
19 you think would preclude you from being able to be a fair
20 and impartial juror in this particular case? No? Okay.

21 Do any of you have either yourselves or close friends
22 or immediate family members who are related to law
23 enforcement in any way? Either a corrections officer,
24 law enforcement officer. Okay, number 11, number 14,
25 number 17, number 19, number 2 in the front row and

1 number 18, number 31.

2 Those of you who have answered affirmative to that, is
3 there anything about that relationship that you believe
4 would preclude you from being able to serve as a juror in
5 a criminal case? Okay.

6 It is anticipated that this case will be concluded
7 this week. And we are going to make every effort to get
8 the case to you by Thursday. By to you, I mean to a
9 point where you are actually going to be able to
10 deliberate on the case. There is a possibility,
11 obviously, that you could be deliberating on Friday.
12 There's always a possibility if you don't -- if you are
13 not able to reach a verdict, you could go into early next
14 week. We don't set time limits on the amount of time you
15 need to deliberate.

16 Let me ask first: Is there anyone who could not be
17 with us through Friday of this week? Okay. Is there
18 anyone that if the case were to require deliberations on
19 Monday, would not be able to stay?

20 Okay, number 23. Tell me about that.

21 **JUROR NO. 23:** I have to go back to work.

22 **THE COURT:** Okay, where do you work.

23 **JUROR NO. 23:** I work at Mary Bridge Health Alliance.

24 I am only here for just the two weeks.

25 **THE COURT:** Okay. All right. And number 25?

1 **JUROR NO. 25:** Same thing, I have to work.

2 **THE COURT:** Okay. We will make every effort to get
3 this case concluded this week, and hopefully avoid any of
4 those potential problems.

5 Okay. I am going to allow the attorneys to start. We
6 will start first with Mr. Penner, I am going to give him
7 about 20 minutes, and then Mr. DePan about 20 minutes,
8 and then we will break for the noon recess. Mr. Penner?

9 **MR. PENNER:** Thank you, Your Honor.

10 Good morning, again, every one. This is your second
11 week, right? Who has made it this far already in another
12 case? Obviously you have made it this far here. Anybody
13 who hasn't at least -- anybody who has spent the last six
14 business days just sitting in that room? Three. Okay.

15 Has anybody made it to actually hearing evidence? Who
16 all has heard evidence? All right, and I don't want to
17 hear the verdict, but has anybody gotten to the point
18 where they actually reached a verdict and returned back
19 to the jury? All right.

20 Okay. All right, I am going to pick somebody. Three,
21 I am going to leave you out for a second, so you haven't
22 made this. Five, you said you have gotten all the way to
23 verdict, right?

24 **JUROR NO. 5:** Yes.

25 **MR. PENNER:** How was this experience? Again, don't

1 tell me the verdict, but how is it compared to what you
2 thought when you first got your jury summons, good,
3 better, worse?

4 **JUROR NO. 5:** Better. I was unsure what, you know, it
5 was all about. And then got in there and changed my
6 perspective on things of how the system works. Didn't
7 really know.

8 **MR. PENNER:** For the better, huh?

9 **JUROR NO. 5:** Yeah, for the better. I thought it was
10 really interesting. I enjoyed it.

11 **MR. PENNER:** Six, are you kind of nodding along? Have
12 you made it to a jury?

13 **JUROR NO. 6:** Yes.

14 **MR. PENNER:** How has your experience, compared to the
15 expectation when you got your jury summons?

16 **JUROR NO. 6:** I guess I would have to say procedurally
17 I had no understanding, other than jury duty meant I had
18 to come. But now that I have been through the process.
19 Wow. Constitution is cool.

20 **MR. PENNER:** All right. Good. So it has been
21 positive.

22 **JUROR NO. 6:** I think that would be a correct
23 statement.

24 **MR. PENNER:** Let's hear from somebody who hasn't made
25 it to the jury, done this a couple times. Anybody gotten

1 this far? How about 14? How is it comparing so far with
2 your expectation?

3 **JUROR NO. 14:** Well, fine. Just eye opening. It is
4 different.

5 **MR. PENNER:** Two, what are your thoughts?

6 **JUROR NO. 2:** Basically the same thing. Just sat in
7 court for a couple days doing what we are doing right now
8 until -- I was at the tail end, so didn't get that far.

9 **MR. PENNER:** Now you are up front.

10 **JUROR NO. 2:** Now I am up front.

11 **MR. PENNER:** Number 7, that happened to you? Now you
12 are up close.

13 Has anybody had the experience that this is not living
14 up to expectations? That this is not what they thought
15 and they are disappointed? All right.

16 Well, good. Okay, so talk a little bit about jury
17 experience. Does anybody else have experience with the
18 courts as say a witness? Anybody ever testify? Six?
19 Okay. What was the context that?

20 **JUROR NO. 6:** I was deposed on a class action suit for
21 the district that I teach for.

22 **MR. PENNER:** Oh, okay. Now, was that in front of a
23 jury or with a judge and attorneys?

24 **JUROR NO. 6:** Judge and attorneys.

25 **MR. PENNER:** Okay, all right. 31?

1 **JUROR NO. 31:** I was involved in a bank robbery and
2 one of the tellers that had been robbed.

3 **MR. PENNER:** So you have been a witness to a crime and
4 testified.

5 **JUROR NO. 31:** Yes.

6 **MR. PENNER:** In front of a jury and everything.

7 **JUROR NO. 31:** Yes.

8 **MR. PENNER:** Anybody else? 32?

9 **JUROR NO. 32:** I was involved in a bankruptcy
10 proceeding only with a judge and attorneys.

11 **MR. PENNER:** Okay, but you still testified under oath.

12 **JUROR NO. 32:** Yes.

13 **MR. PENNER:** All right, okay. Well good.

14 Has anybody ever been a party to a civil lawsuit,
15 either you sued somebody or you got sued, or anybody,
16 maybe a business? 34?

17 **JUROR NO. 34:** Including a class action suit?

18 **MR. PENNER:** Not if it's like you got a notice from
19 credit the card company: You are getting 20 cents on
20 your next bill.

21 **JUROR NO. 34:** Pretty much like that.

22 **MR. PENNER:** "Wow, I wish I had known about that."
23 Anybody else? 25?

24 **JUROR NO. 25:** Just got sued; settled out of court.

25 **MR. PENNER:** 26?

1 **JUROR NO. 26:** Several things that involved apartment
2 complexes.

3 **MR. PENNER:** So had something to do with your
4 business.

5 27?

6 **JUROR NO. 27:** No.

7 **MR. PENNER:** I thought I saw your hand. Anybody else?
8 All right, has anybody -- 28?

9 **JUROR NO. 28:** Yeah, sued my mortgage company.

10 **MR. PENNER:** Did you win?

11 **JUROR NO. 28:** Settled out of court; they had to pay.

12 **MR. PENNER:** Okay.

13 **JUROR NO. 28:** I didn't win anything.

14 **MR. PENNER:** All right. Anybody ever been a criminal
15 defendant whether convicted or not?

16 **JUROR NO. 12:** JAG-trained submarine officer.

17 **MR. PENNER:** You are JAG-trained submarine officer.
18 Have you been a criminal defendant?

19 **JUROR NO. 12:** Whole spectrum.

20 **MR. PENNER:** Have you seen crime --

21 **JUROR NO. 12:** Whole spectrum.

22 **MR. PENNER:** Has anybody been charged with a crime?

23 25? Okay, by the way, I am not sure if the judge
24 mentioned it. If I ask any questions or Mr. DePan asks
25 any questions you don't really want to get into, all you

1 have to say, "I am happy to answer that, but I would like
2 to do it in private."

3 Okay what was the nature of the charge?

4 **JUROR NO. 25:** Vehicle prowl.

5 **MR. PENNER:** Okay. All right. Anybody else?

6 Two?

7 **JUROR NO. 2:** DUI back in the '80s.

8 **MR. PENNER:** All right. Anyone else?

9 **JUROR NO. 11:** Same, DUI.

10 **MR. PENNER:** DUI. Anybody else? All right.

11 Anything about that experience, Number 11, that would
12 make you feel uncomfortable about sitting on a jury?

13 **JUROR NO. 11:** No, I went to deferred prosecution,
14 just did that for the two years.

15 **MR. PENNER:** All right, yeah.

16 Two, I am going to ask you the same question:
17 Anything about that that would make you feel
18 uncomfortable sitting on a criminal jury?

19 **JUROR NO. 2:** No.

20 **MR. PENNER:** 25, same question.

21 **JUROR NO. 25:** No.

22 **MR. PENNER:** All right. Shift gears a little bit
23 here. Who here doesn't drink at all right now? Never
24 drinks right now. Okay.

25 Who here has never in their life been intoxicated?

1 33, 5. Okay.

2 Five, have you been around other people who have been
3 intoxicated.

4 **JUROR NO. 5:** Yes.

5 **MR. PENNER:** 33 same question, have you been around
6 other people who have been intoxicated?

7 **JUROR NO. 33:** Yes.

8 **MR. PENNER:** Anybody here who has never been around
9 other people who have been intoxicated?

10 Is there anybody here who has ever been around
11 somebody else high on drugs, not alcohol but different
12 drugs?

13 **JUROR NO. 4:** Repeat the question.

14 **MR. PENNER:** Anybody here ever been around someone who
15 was high on drugs?

16 **JUROR NO. 4:** Has been around?

17 **MR. PENNER:** Has been around somebody who has been
18 high on drugs. Now let me reverse it around, I don't
19 have to write as in many numbers.

20 Who has not been around somebody who has been high on
21 drugs? Never been around anybody who is high on drugs.
22 All right, just keep your hands up here. 17, 31, 32, 21,
23 26, 33, 35, anyone's name I didn't call -- number I
24 didn't call? All right.

25 Who's ever gotten in a fight with somebody, I don't

1 mean just pretty heated argument, and the other person
2 was intoxicated on drugs or alcohol? Two, four, seven
3 nine -- hold on four, what was the context?

4 **JUROR NO. 4:** Oh, that's me.

5 **MR. PENNER:** Yeah, sorry.

6 **JUROR NO. 4:** Just arguments. Good friends or spouses
7 or both of you have been drinking.

8 **MR. PENNER:** Okay. Next day regret what you said?

9 **JUROR NO. 4:** Yeah.

10 **MR. PENNER:** All right. Seven what has been your
11 experience along those lines?

12 **JUROR NO. 7:** Just -- yeah, just heated argument
13 during party that you know I walked away from, didn't
14 really -- never came to blows but pretty close.

15 **MR. PENNER:** Had you not been both -- had you not both
16 been intoxicated --

17 **JUROR NO. 7:** Oh, sure, almost.

18 **MR. PENNER:** -- it would not have been as bad.

19 **JUROR NO. 7:** Yeah, yeah.

20 **MR. PENNER:** Anybody else in the front row here?

21 Juror 59, what would your experience be?

22 **JUROR NO. 9:** I have at class reunion and I was trying
23 to break up a fight with people obviously had been
24 drinking, I had, too. And I got involved in altercation,
25 I should saying I got the worst of it.

1 **MR. PENNER:** High school reunion.

2 **JUROR NO. 9:** Yeah.

3 **MR. PENNER:** Where did you go to high school?

4 **JUROR NO. 9:** Franklin Pierce.

5 **MR. PENNER:** Anybody in the second row? 15.

6 **JUROR NO. 15:** I was a bartender.

7 **MR. PENNER:** Okay, so you have seen it when you were
8 sober and they were -- have you ever seen people argue
9 over stuff there is no way they would argue if they are
10 sober.

11 **JUROR NO. 15:** All the time.

12 **MR. PENNER:** Part of -- fun part of drinking. Has
13 anybody been in a situation, maybe in a relationship,
14 where the other person said something while they were
15 drunk or high that ended the relationship?

16 14? What happened?

17 **JUROR NO. 14:** My brother-in-law was under the
18 influence, said some things and didn't talk for three
19 years.

20 **MR. PENNER:** Even though he was under the influence?

21 **JUROR NO. 14:** Uh huh.

22 **MR. PENNER:** All right, was pretty bad stuff.

23 **JUROR NO. 14:** Yeah. It was.

24 **MR. PENNER:** Did you cut him some slack because he had
25 been intoxicated?

1 **JUROR NO. 14:** Yeah, I did, I really did.

2 **MR. PENNER:** If he had said something less bad, might
3 have to give in sooner?

4 **JUROR NO. 14:** Oh, yeah, probably. I mean, yeah.

5 **MR. PENNER:** Anybody else been in that kind of
6 circumstance?

7 Okay. Anybody else been in circumstance where they
8 thought about maybe breaking up with a partner over
9 something that was said while they were drunk? 25? What
10 was that?

11 **JUROR NO. 25:** Arguments with the wife.

12 **MR. PENNER:** Okay. Was it stuff she said or stuff you
13 said?

14 **JUROR NO. 25:** Both.

15 **MR. PENNER:** All right. You say some stuff you wish
16 you could take back.

17 **JUROR NO. 25:** Yeah.

18 **MR. PENNER:** Anybody else? Thought I saw a hand.

19 Got real close to breaking up: Can't believe she said
20 that; can't believe he did that. Anything like that?

21 All right. Who has been at office Christmas parties
22 where somebody gets really drunk? There we go. You
23 didn't think you were going to get to talk about fun
24 stuff like that did you?

25 34, was the boss there?

1 **JUROR NO. 34:** Yeah.

2 **MR. PENNER:** Anybody do anything really stupid in
3 front of boss?

4 **JUROR NO. 34:** No, it was the boss.

5 **MR. PENNER:** It was the boss. It was not boss it was
6 my wife's boss. All right.

7 Anybody else ever seen anybody saying something dumb
8 in front of the boss? Three what happened?

9 **JUROR NO. 3:** One gentleman was very, very, very drunk
10 and he proceeded to put down the CEO of the company.

11 **MR. PENNER:** Did that person have a job the next
12 morning?

13 **JUROR NO. 3:** Yes, he did. It was pursued, but the
14 CEO did talk to him on the side, if he ever did this
15 again he would not have a job.

16 **MR. PENNER:** Okay, all right, so there were
17 consequences even though he had been intoxicated?

18 **JUROR NO. 3:** Yes.

19 **MR. PENNER:** All right. Okay. Now we are talking
20 about alcohol and drugs. Does anybody work in that field
21 in alcohol or drug counseling, anything like that? 14?
22 What do you do for a living.

23 **JUROR NO. 14:** I am a counselor out at the woman's
24 correctional facility, so I do the whole gamut.

25 **MR. PENNER:** That come up a lot?

1 **JUROR NO. 14:** Oh, yes.

2 **MR. PENNER:** Come up even with charges that aren't
3 necessarily drug-related, not -- possession of drugs is
4 obviously drug-related charge, but --

5 **JUROR NO. 14:** Yes, yes.

6 **MR. PENNER:** Other people?

7 **JUROR NO. 6:** I'm an elementary teacher, but
8 oftentimes double digit age kids start getting involved
9 in that, so I refer them to our counselor for counseling.

10 **MR. PENNER:** Part of your job is to kind of look for
11 warning signs?

12 All right. Hard to see numbers. 18.

13 **JUROR NO. 18:** I am a security officer at Emerald
14 Queen Casino.

15 **MR. PENNER:** Okay. So you probably don't even get
16 involved until somebody's getting pretty far gone.

17 **JUROR NO. 18:** I watch the scene a lot.

18 **MR. PENNER:** Anybody else? Nobody else? Nobody? 15.

19 **JUROR NO. 15:** I'm a labor and delivery nurse and
20 sometimes people come in on drugs.

21 **MR. PENNER:** Really that's a concern, obviously, at a
22 lot of different levels. Okay.

23 All right. I think there were some people who
24 mentioned they got friends or relatives who were in law
25 enforcement. Can I see those hands again? Just kind of

1 go through. I will start here, 11. Who is that.

2 JUROR NO. 11: My cousin.

3 MR. PENNER: Who is your cousin.

4 JUROR NO. 1: Bill Budinich.

5 MR. PENNER: Who does he work for?

6 JUROR NO. 11: Tacoma Police.

7 MR. PENNER: Patrol officer?

8 JUROR NO. 11: Correct.

9 MR. PENNER: 19?

10 JUROR NO. 19: I work in the Pierce County Jail.

11 MR. PENNER: Oh, do you? You are a corrections
12 officer?

13 JUROR NO. 19: I am maintenance supervisor in there.

14 MR. PENNER: So you know the corrections officers and
15 stuff.

16 JUROR NO. 19: Yeah.

17 MR. PENNER: Anybody else on this side? 31?

18 JUROR NO. 31: My daughter's boyfriend is a Pierce
19 County deputy.

20 MR. PENNER: You don't know -- what's his name.

21 JUROR NO. 31: Jim Harai.

22 MR. PENNER: On this side, front row. Two?

23 JUROR NO. 2: My son-in-law works at Remann Hall.

24 MR. PENNER: As a probation officer or --

25 JUROR NO. 2: Corrections officer.

1 **MR. PENNER:** Corrections officer. Okay. 17.

2 **JUROR NO. 17:** My nephew is Snohomish County -- works
3 for Snohomish County sheriff's department. He's a
4 deputy.

5 **MR. PENNER:** Like patrol deputy?

6 **JUROR NO. 18:** My sister-in-law is a correctional
7 officer.

8 **MR. PENNER:** Here in Washington?

9 **JUROR NO. 18:** In Kent.

10 **MR. PENNER:** In Kent. Okay. Anybody else? On this
11 side, 14?

12 **JUROR NO. 14:** Well, I work in corrections.

13 **MR. PENNER:** Sure, do you.

14 **JUROR NO. 14:** I also work for Department of
15 Corrections.

16 **MR. PENNER:** Okay. All right. Anybody else on this
17 side? I will start with you, 14, you are last. Anything
18 about that that would make you believe a police officer
19 more than a non-police officer?

20 **JUROR NO. 14:** No.

21 **MR. PENNER:** 17, you have got Snohomish County deputy,
22 your son.

23 **JUROR NO. 17:** Nephew.

24 **MR. PENNER:** Nephew. Do you think that would make you
25 be less fair on a case where maybe the victim was a

1 police officer?

2 JUROR NO. 17: No.

3 MR. PENNER: All right. Two?

4 JUROR NO. 2: (Shook head no.)

5 MR. PENNER: Was it your son?

6 JUROR NO. 2: My son-in-law.

7 MR. PENNER: I am going to stop guessing.

8 Do you think that would affect the case where the
9 victim was alleged to be a police officer?

10 JUROR NO. 2: No.

11 MR. PENNER: On this side, 11, what are your thoughts
12 on that?

13 JUROR NO. 11: I don't know. I only see my cousin
14 probably three times in the last 20 years, so --

15 MR. PENNER: Okay, all right, that happens, too.

16 19, you work with corrections officers everyday so you
17 get to know them on a personal level. Do you think that
18 would affect your ability to sit on a jury where law
19 enforcement is the alleged victim?

20 JUROR NO. 19: If I knew the guy, might be a little
21 difficult.

22 MR. PENNER: Now, the judge read you the names of the
23 witnesses Pierce County sheriff's deputies. Do you know
24 Theron Hardesty or Jason Laliberte?

25 JUROR NO. 19: Probably not by name; maybe by face

1 but --

2 **MR. PENNER:** So possible you might know them and you
3 think that might affect your ability to sit fairly if
4 they walked in and you said, "Oh, I know that guy, he's
5 brought people here."

6 **JUROR NO. 19:** Probably would.

7 **MR. PENNER:** That's fair.

8 31? You got your son you said.

9 **JUROR NO. 31:** Daughter's boyfriend.

10 **MR. PENNER:** Anyway, but Harai, Jim Harai, right. And
11 he's with the Pierce County Sheriff's Department.

12 **JUROR NO. 31:** Yes, he is.

13 **MR. PENNER:** Witnesses are going to be from the Pierce
14 County Sheriff's Department. Do you think that will
15 affect your ability to sit and fairly --

16 **JUROR NO 31:** No.

17 **MR. PENNER:** Who's heard any time in the last --
18 recently anything on the news about officer shootings
19 where an officer shot somebody? Who as not heard about
20 that recently? You haven't heard anything about it?
21 Okay, 17.

22 Anybody have any strong thoughts about that one way or
23 the other? Sometimes they make the paper, sometimes they
24 don't. I guess I will ask the people who've got friends
25 in law enforcement where your friends, or somebody they

1 worked with, had actually shoot somebody? That situation
2 ever arose? 31?

3 **JUROR NO. 31:** No.

4 **MR. PENNER:** Okay. What are your thoughts, though?
5 You have got a daughter's boyfriend who's a detective
6 with the Pierce County sheriff. You ever talked about
7 that kind issue, officer safety issues?

8 **JUROR NO. 31:** Yeah, we do.

9 **MR. PENNER:** What are your thoughts on that?

10 **JUROR NO. 31:** I don't think it would preclude me to
11 making an unbiased decision as far as being on a jury
12 panel. I have known other police officers throughout my
13 life, so I have known some that have been good ones and
14 some that have not been so good. So just to say he's a
15 police officer does not mean that I couldn't -- that I
16 would believe him any more than anybody else.

17 **MR. PENNER:** That's fair. Generally who haven't I
18 talked to? You're one, I haven't talked to you. Any
19 thoughts on police officers? One question I ask juries
20 sometimes is, you know, list a job where part of your job
21 is to get punched.

22 **JUROR NO. 1:** Is to what?

23 **MR. PENNER:** Get punched or hit, and sometimes jurors
24 will say boxer and stunt man, sometimes jurors will say
25 police officers. Do you have a thought on part of their

1 job is to get pushed around and punched and threatened,
2 all that.

3 **JUROR NO. 1:** Part of their job. Goes with the
4 territory.

5 **MR. PENNER:** If it happens, do you think that the
6 person who did it shouldn't be held responsible because,
7 after all, it's -- they are police officers, it is part
8 of their job?

9 **JUROR NO. 1:** Who should be responsible?

10 **MR. PENNER:** If a police officer goes out to the scene
11 and maybe gets punched by a suspect, that's just part of
12 the job? Or the suspect should be held responsible?

13 **JUROR NO. 1:** Suspect should be held responsible.

14 **MR. PENNER:** Four, what do you think?

15 **JUROR NO. 4:** Definitely.

16 **MR. PENNER:** Five?

17 **JUROR NO. 5:** I think they should.

18 **MR. PENNER:** Anybody have a different thought on that?
19 Just part of the job, roll with the punches, so to speak?
20 23? What are your thoughts?

21 **JUROR NO. 23:** I think it is pretty much every time,
22 that is right.

23 **MR. DEPAN:** I am sorry, I can't hear.

24 **JUROR NO. 23:** Agree with the other ones, it pretty
25 much part of the job.

1 **MR. PENNER:** It's going to happen but that doesn't
2 mean it's excusable? Would you agree with that, what are
3 you thinking?

4 **JUROR NO. 23:** Yeah.

5 **MR. PENNER:** Yeah?

6 **JUROR NO. 23:** I am not good at being put on the spot.

7 **MR. PENNER:** I am sorry, instead of asking a specific
8 question, just generally what are your thoughts about
9 that? You know, let's back up. If you and I are walking
10 down the street talking, and somebody comes up shoved you
11 to the ground, are you going to consider that probably he
12 shouldn't have done that?

13 **JUROR NO. 23:** Yeah.

14 **MR. PENNER:** Do you see a difference if I am walking
15 down the street with a police officer and somebody shoved
16 the police officer to the ground?

17 **JUROR NO. 23:** Shouldn't be done, either.

18 **MR. PENNER:** Anybody have any problem with that?
19 25? Your thoughts.

20 **JUROR NO. 25:** I was just going to say if the police
21 officer was the one that started the aggression and then
22 self-defense comes into play, that's a different
23 situation.

24 **MR. PENNER:** Right. And I am going to agree with you
25 on that. I am trying to go to we are talking about the

1 Mariners now, they lost another game, they got to the
2 7th I think by a six run lead and he gets shoved to the
3 ground. Do you agree? Do you see that any --

4 **JUROR NO. 25:** Walking down the street together.

5 **MR. PENNER:** Yeah, just talking.

6 **JUROR NO. 25:** I wouldn't think you would want to know
7 what they were talking about, I guess.

8 **MR. PENNER:** I am telling you we are talking about the
9 Mariners.

10 **JUROR NO. 25:** Just the Mariners.

11 **MR. PENNER:** And he and I --

12 **JUROR NO. 25:** A guy comes out of nowhere. The person
13 that started the aggression would be at fault.

14 **MR. PENNER:** Just because he's got a badge on, not
15 going to be any different, right?

16 **JUROR NO. 25:** No.

17 **THE COURT:** Mr. Penner, your 20 minutes are up here.
18 We will let Mr. DePan take a shot at the group.

19 Mr. DePan?

20 **MR. DEPAN:** Thank you, Your Honor. A lot of times --
21 well, they used to give you a little bit more background
22 information on you. I am going ask some questions, have
23 to do with a little bit of your background. Juror Number
24 1, what do you or did you do for a living?

25 **JUROR NO. 1:** I am retired from Weyerhaeuser. I was

1 there for 36 years. I worked primarily in training,
2 Human Resources Department.

3 **MR. DEPAN:** Okay. And this is training in what area?

4 **JUROR NO. 1:** Human Resources, personnel.

5 **MR. DEPAN:** Okay. And Juror Number 2, what do you do
6 to --

7 **JUROR NO. 2:** Retired army. I am working at Sea-Tac
8 for DHS right now, security supervisor.

9 **MR. DEPAN:** Okay. So who is it you work for?

10 **JUROR NO. 2:** Department of Homeland Security.

11 **MR. DEPAN:** DHS, yeah, got to get used to new
12 abbreviations. And what were you doing in the army?

13 **JUROR NO. 2:** I was a scout.

14 **MR. DEPAN:** Okay.

15 **JUROR NO. 2:** I was back in -- spent three years in
16 Vietnam in the '60s and retired in the early '80s.

17 **MR. DEPAN:** You weren't like in the MPs or anything
18 like that?

19 **JUROR NO. 2:** No.

20 **MR. DEPAN:** Juror Number 3?

21 **JUROR NO. 3:** I am retired. I was an inspector,
22 production and tooling inspector, for companies of Heath
23 Tecna and Hexcel in Kent.

24 **MR. DEPAN:** You know, you just explained what you did
25 and I don't know what you said.

1 **JUROR NO. 3:** I was production inspector, and tooling
2 inspector.

3 **MR. DEPAN:** On?

4 **JUROR NO. 3:** Tools that we use to produce parts.

5 **MR. DEPAN:** So you inspect the tools, make sure the
6 tools were operating correctly, that kind of thing?

7 **JUROR NO. 3:** Yes.

8 **MR. DEPAN:** And you mentioned the companies as -- I
9 don't --

10 **JUROR NO. 3:** Heath Tecna and Hexcel Corporation.

11 **MR. DEPAN:** Thank you.

12 And Juror Number 4?

13 **JUROR NO. 4:** I am an office manager of a law firm.

14 **MR. DEPAN:** Okay. Okay, so you -- is it a local law
15 firm?

16 **JUROR NO. 4:** Yes.

17 **MR. DEPAN:** Okay. What kind of law do they do?

18 **JUROR NO. 4:** Worker's comp, Social Security, PI.

19 **MR. DEPAN:** Okay. So you know a number of lawyers.

20 **JUROR NO. 4:** I know a handful. Just people that have
21 worked there, for the most part.

22 **MR. DEPAN:** Does that affect your view? Do you have
23 any bias about lawyers, dislike lawyers?

24 **JUROR NO. 4:** No.

25 **MR. DEPAN:** Do you think lawyers are just wonderful

1 people?

2 **JUROR NO. 4:** Excuse me?

3 **MR. DEPAN:** Okay, we will leave that.

4 Juror Number 5?

5 **JUROR NO. 5:** I'm classified as a food clerk; I work
6 for Safeway. I am classified as a food clerk; I work for
7 Safeway.

8 **MR. DEPAN:** Okay. And what does a food clerk do?

9 **JUROR NO. 5:** My position, actually I work graveyard
10 which the store is closed, I stock shelves all night. I
11 have checked. I can check. I do pretty much everything
12 in the store. But my shift now primarily is when the
13 store is closed.

14 **MR. DEPAN:** Did you choose to be graveyard?

15 **JUROR NO. 5:** Yes, I did.

16 **MR. DEPAN:** Makes it a lot more peaceful, right?

17 **JUROR NO. 5:** Yeah, it's nice. My husband was on
18 nights, so I switched to it, so a little more convenient
19 for the family.

20 **MR. DEPAN:** Juror Number 6? You said you were a
21 teacher.

22 **JUROR NO. 6:** Yes.

23 **MR. DEPAN:** What school?

24 **JUROR NO. 6:** Karshner Elementary in Puyallup.

25 **MR. DEPAN:** Okay. Elementary is one through three or

1 is it one through six?

2 **JUROR NO. 6:** Depends. Our directive classifies K
3 through six as elementary. Oftentimes other districts
4 don't.

5 **MR. DEPAN:** Are you in one class, one you teach like
6 fourth grade or --

7 **JUROR NO. 6:** I teach grade five; I have 28 students.

8 **MR. DEPAN:** Are they lowering the number of the ratio?
9 Is it improving?

10 **JUROR NO. 6:** I hope so.

11 **MR. DEPAN:** How long have you been doing that?

12 **JUROR NO. 6:** Eighteen years, sir.

13 **MR. DEPAN:** Do you like doing it?

14 **JUROR NO. 6:** Absolutely.

15 **MR. DEPAN:** Do you like fifth graders?

16 **JUROR NO. 6:** I like fifth graders.

17 **MR. DEPAN:** They are about ten?

18 **JUROR NO. 6:** Depends.

19 **MR. DEPAN:** Nine or ten?

20 Juror Number 7?

21 **JUROR NO. 7:** I'm a civil engineer with Washington
22 Department of Transportation. Administer construction
23 contracts and design work. Work closely in a field
24 office on Kitsap County.

25 **MR. DEPAN:** You like design the way the road's going

1 to go or off ramp?

2 **JUROR NO. 7:** Yeah, yeah, whatever the task is,
3 basically what the traffic runs. No ferries or anything
4 like that.

5 **MR. DEPAN:** Do you like supervise the building of the
6 highway?

7 **JUROR NO. 7:** No, no, we administer a contract that a
8 contractor does. I just pay the money to them, control
9 their work, and make sure that it's built to the
10 standards that the contract states.

11 **MR. DEPAN:** Concrete inspections and stuff?

12 **JUROR NO. 7:** Yeah, yeah, all that control.

13 **MR. DEPAN:** Juror Number 8?

14 **JUROR NO. 8:** Interior designer, have interior design
15 business. I also have restaurants with my husband.

16 **MR. DEPAN:** Okay. And so you like do private
17 contracts with people to do interior design?

18 **JUROR NO. 8:** Uh huh.

19 **MR. DEPAN:** Like a business?

20 **JUROR NO. 8:** It is a business.

21 **MR. DEPAN:** And then you own some other properties.

22 **JUROR NO. 8:** We own restaurants.

23 **MR. DEPAN:** Like what?

24 **JUROR NO. 8:** Poodle Dog.

25 **MR. DEPAN:** Poodle Dog. Okay. Okay, the center of

1. Fife, right?

2. **JUROR NO. 8:** Right. Landmark.

3. **MR. DEPAN:** Juror Number 9?

4. **JUROR NO. 9:** I work for the postal service as a
5. maintenance mechanic on equipment.

6. **MR. DEPAN:** Okay. This is on vehicles and --

7. **JUROR NO. 9:** No, it's -- I work at the bulk mail
8. facility up in Federal Way, and conveyer systems and --

9. **MR. DEPAN:** How long have you been doing that?

10. **JUROR NO. 9:** Almost ten years now.

11. **MR. DEPAN:** Okay. Prior military experience?

12. **JUROR NO. 9:** Six years in the navy.

13. **MR. DEPAN:** Have you got any children?

14. **JUROR NO. 9:** Yes, two.

15. **MR. DEPAN:** How old are they?

16. **JUROR NO. 9:** 21 and 13.

17. **MR. DEPAN:** Had them pretty far apart. What's your 21
18. year old do?

19. **JUROR NO. 9:** He's in college.

20. **MR. DEPAN:** Juror 10?

21. **JUROR NO. 10:** I teach biology at Foss High School.

22. **MR. DEPAN:** Is that usually 10th grade?

23. **JUROR NO. 10:** I teach 9 through 12.

24. **MR. DEPAN:** So you have a lot of children that you see
25. all the time.

1 **JUROR NO. 10:** A lot. I am happy to have this break.

2 **MR. DEPAN:** You are going to do a report when you get
3 back.

4 Juror 11?

5 **JUROR NO. 11:** I am a retired construction inspector
6 with the City of Tacoma.

7 **MR. DEPAN:** How long have you been doing -- well, how
8 long did you do that?

9 **JUROR NO. 11:** I was there for 28 years, and I got out
10 on the early-out program, they give me credit for 30.

11 **MR. DEPAN:** Juror Number 12? What do you do for a
12 living, sir?

13 **JUROR NO. 12:** I am retired submarine officer,
14 JAG-trained. I worked in legal matters and engineering
15 matters.

16 **MR. DEPAN:** When you say submarine --

17 **JUROR NO. 12:** I am commissioned submarine -- I drive
18 submarines, or did at one time.

19 **MR. DEPAN:** What was your rank?

20 **JUROR NO. 12:** I started at the bottom, went up 16
21 grades.

22 **MR. DEPAN:** So you did these new --

23 **JUROR NO. 12:** Master chief petty officer W4 and went
24 up from there.

25 **MR. DEPAN:** And when you say JAG-trained, what does

1 that mean?

2 **JUROR NO. 12:** The navy sent me to school with the
3 lawyers who come from colleges with degrees, went through
4 the same course and performed the tasks that they did.
5 My experience prior to that had been in the
6 administrative process of military law.

7 **MR. DEPAN:** So your function, they wanted you trained.

8 **JUROR NO. 12:** My primary function was a navy officer.
9 When you have problems related to law, you went and took
10 care of it and they ranged from murders to thefts to
11 garden variety problems.

12 **MR. DEPAN:** Did you do something -- were you the
13 defense function?

14 **JUROR NO. 12:** I was prosecutor for about three and a
15 half years. I acted another capacity. Whatever I was
16 assigned to do by whoever.

17 **MR. DEPAN:** And this was on land, right?

18 **JUROR NO. 12:** And I was in the surface navy for a
19 number of years. I was in the aviation navy for a number
20 of years, and submarine community for about 15 years.
21 Wherever it happened was where it took place.

22 **MR. DEPAN:** So you would be on a ship trained --

23 **JUROR NO. 12:** Not necessarily.

24 **MR. DEPAN:** Possibly?

25 **JUROR NO. 12:** Majority of the time was at a shore

1 facility. That was large so you saw a little more
2 activity. My primary job was in engineering, my
3 secondary was whatever collateral duties you got.

4 **MR. DEPAN:** Does this training and your experience and
5 your interaction make you more prone to believe one side
6 or the other?

7 **JUROR NO. 12:** It causes me to pay close attention to
8 laws of evidence and things like that. Procedure. Close
9 analysis probably is the best term.

10 **MR. DEPAN:** Thank you.

11 Juror 13?

12 **JUROR NO. 13:** I am retail salesclerk.

13 **MR. DEPAN:** Positions are supposed to be turning
14 around, so --

15 Juror 14, I think -- can you tell me what your
16 occupation, again, is?

17 **JUROR NO. 14:** I am a counselor at the -- out at the
18 women's correctional facility in Gig Harbor.

19 **MR. DEPAN:** In Purdy.

20 **JUROR NO. 14:** Yes.

21 **MR. DEPAN:** Did you say you were a nurse?

22 **JUROR NO. 14:** No.

23 **MR. DEPAN:** No. I am dashing numbers while you are
24 all talking and I wrote it in. Probably 15's in your
25 column.

1 And how did you come to the counseling job?

2 **JUROR NO. 14:** Blindly. No, I started work for the
3 Department of Corrections 15 years ago as a clerk-typist
4 and worked in field, went into the prison system out at
5 McNeil Island, then decided it was time to go back to
6 college, do something with any life. Went back to
7 college, became a counselor.

8 **MR. DEPAN:** So you got a degree in social work.

9 **JUROR NO. 14:** I was doing that for what, six years
10 now.

11 **MR. DEPAN:** Do you like it?

12 **JUROR NO. 14:** I love my job.

13 **MR. DEPAN:** Do you like the people you deal with?

14 **JUROR NO. 14:** Yeah, some of them. Some very nice
15 people. No different than any other job.

16 **MR. DEPAN:** Does this job -- you are dealing with
17 guards, you are also dealing with prisoners.

18 **JUROR NO. 14:** Correctional officers.

19 **MR. DEPAN:** Correctional officers. Sorry. And you
20 are dealing with prisoners.

21 **JUROR NO. 14:** Yes.

22 **MR. DEPAN:** Does this give you any kind of
23 preconceived notions about prisoners or about
24 correctional officers or --

25 **JUROR NO. 14:** Oh, no.

1 **MR. DEPAN:** -- police officers or anything?

2 **JUROR NO. 14:** No. I think being able to work in that
3 field, to be successful you can't have preconceived
4 notions about anything, anybody, anyone.

5 **MR. DEPAN:** Juror 15, are you the orderly nurse?

6 **JUROR NO. 15:** I am the nurse, yes.

7 **MR. DEPAN:** What do you do?

8 **JUROR 15:** I am labor and delivery nurse at St. Joe's.

9 **MR. DEPAN:** So you work in the one of the happier
10 locals of the hospital, right?

11 **JUROR NO. 15:** I do.

12 **MR. DEPAN:** How long have you been doing that?

13 **JUROR NO. 15:** For 17 years.

14 **MR. DEPAN:** How do you like it?

15 **JUROR 15:** I love it.

16 **MR. DEPAN:** Anything about that that you think would
17 affect your ability to judge this case?

18 **JUROR NO. 15:** I don't think so.

19 **MR. DEPAN:** You obviously, as a nurse -- are you an
20 RN?

21 **JUROR NO. 15:** I am.

22 **MR. DEPAN:** So you have access to drugs and you deal
23 with the dispensing of drugs and medications and so
24 forth.

25 **JUROR 15:** I do.

1 **MR. DEPAN:** Have you ever worked in psychiatry, that
2 area, as an nurse, a psychiatric nurse?

3 **JUROR 15:** No. I graduated, went straight into labor
4 and delivery. That's the only thing I have ever done in
5 nursing.

6 **MR. DEPAN:** Juror 16.

7 **JUROR NO. 16:** I'm an RN retired.

8 **MR. DEPAN:** Where did you work?

9 **JUROR NO. 16:** Tacoma General.

10 **MR. DEPAN:** What did you do there?

11 **JUROR NO. 16:** I was an IV therapist.

12 **MR. DEPAN:** What's an IV therapist?

13 **JUROR NO. 16:** Start IVs all over the hospital for 22
14 years.

15 **MR. DEPAN:** So that just means you are really good at
16 finding veins without too much pain, right?

17 **JUROR NO. 16:** Try not to.

18 **MR. DEPAN:** And they send you all over the hospital to
19 start the IVs and that thing? Did you enjoy that job?

20 **JUROR NO. 16:** I loved it.

21 **MR. DEPAN:** TG, huh?

22 Juror 17?

23 **JUROR NO. 17:** I also work at Tacoma General Hospital,
24 and at the present time, I am working as a system analyst
25 supporting the clinical documentation -- electronic

1 documentation system. Computerized charging.

2 MR. DEPAN: Is this supposed to unite the whole
3 United States and our medical records?

4 JUROR NO. 17: No.

5 MR. DEPAN: Just data --

6 JUROR NO. 17: They do their charting in the computer
7 for the patient care, and they have other lab data that
8 comes in and monitor data that comes in, and combines it
9 all together electronically.

10 MR. DEPAN: So you're experiencing something similar
11 to we are experiencing, we are getting away from paper.
12 You are going to all electronics.

13 JUROR NO. 17: Trying.

14 MR. DEPAN: Are you enjoying that?

15 JUROR NO. 17: Yes.

16 MR. DEPAN: You have a nephew who is a police officer?

17 JUROR NO. 17: He works for the Snohomish County
18 Sheriff's Department.

19 MR. DEPAN: Okay. How old is he?

20 JUROR NO. 17: About 27 -- he just recently moved here
21 from South Dakota, only been out here about a year.

22 MR. DEPAN: Do you have much interaction with him?

23 JUROR NO. 17: I have seen him once since he has been
24 here.

25 MR. DEPAN: Okay. Do you talk to him at all about, on

1 that one occasion, with about what he does?

2 **JUROR NO. 17:** No.

3 **MR. DEPAN:** Do you as -- are you like the person in
4 the background, or are you an out-front nurse like the
5 front desk type? When you are doing that, are you
6 interacting with police officers that come in or
7 whatever?

8 **JUROR NO. 17:** No.

9 **MR. DEPAN:** No.

10 Okay, Juror Number 18? Sir, what do you do?

11 **JUROR NO. 18:** I'm a security officer at Emerald Queen
12 Casino.

13 **MR. DEPAN:** Okay. How long have you been doing that?

14 **JUROR NO. 18:** Almost two years now.

15 **MR. DEPAN:** Okay. What did you do before that to get
16 into the security officer area?

17 **JUROR NO. 18:** I was working in Kent, at the phone
18 company in Kent.

19 **MR. DEPAN:** Okay. When you are a security officer at
20 the Emerald Queen, I imagine you have people indulging in
21 alcoholic beverages and emotional situations where they
22 are gambling.

23 **JUROR NO. 18:** And they are drinking, oh, yes.

24 **MR. DEPAN:** Sometimes people might even have drugs
25 that they are mixing with the alcohol.

1 **JUROR NO. 18:** Could be. I am not searching anybody
2 when they come.

3 **MR. DEPAN:** Okay. There's some times, I would assume,
4 that you have to call -- you have a disruption, you have
5 to throw somebody out, you have to call the police.

6 **JUROR NO. 18:** Correct.

7 **MR. DEPAN:** Has that happened?

8 **JUROR NO. 18:** Correct.

9 **MR. DEPAN:** In those situations, do you deal with very
10 many police officers?

11 **JUROR NO. 18:** Yes.

12 **MR. DEPAN:** Do you -- is anything in that relationship
13 that would make you more or less biased or favor a police
14 officer or disfavor a police officer?

15 **JUROR NO. 18:** No.

16 **MR. DEPAN:** Have you had any bad situations by a
17 police officer while you have been doing a job at Emerald
18 Queen?

19 **JUROR NO. 18:** No.

20 **MR. DEPAN:** Juror 19, you said maintenance in the
21 jail? Okay.

22 **JUROR NO. 19:** Yes.

23 **MR. DEPAN:** You don't know any of the potential
24 witnesses by name, but you might know them by face you
25 said.

1 **JUROR NO. 19:** Possibly.

2 **MR. DEPAN:** Okay. I think Mr. Penner asked you this:
3 Is this going to make you more or less likely to believe
4 a police officer, just believe a police officer, favor in
5 any way?

6 **JUROR NO. 19:** By knowing them or by --

7 **MR. DEPAN:** By knowing them, or just believing in them
8 in general, police officers are good guys.

9 **JUROR NO. 19:** Yes, they are.

10 **MR. DEPAN:** But does this make you believe them more
11 or disbelieve them more or anything like that?

12 **JUROR NO. 19:** No, I can still be a good judge of
13 character.

14 **MR. DEPAN:** Okay. You're also doing maintenance in
15 jail. I assume interact with a number of people who are
16 prisoners in jail. Does your relationship with these
17 people or your interactions with these people, have you
18 had a bad experience or an experience that makes you more
19 or less likely to believe or disbelieve somebody who's
20 been a prisoner in the jail or someone who's accused of a
21 crime?

22 **JUROR NO. 19:** No. I mean you do see it all, you
23 know, working in the jail. And being in maintenance, we
24 are constantly fixing things that the inmates break. And
25 you can never get to the bottom of who is breaking things

1 and who is doing things. No one will ever confess they
2 are actually doing it. So, I mean, it's -- it tries your
3 patience after a while.

4 **MR. DEPAN:** Keeps you in a job that gets aggravating,
5 right?

6 **JUROR NO. 19:** Job security.

7 **THE COURT:** Mr. DePan we are going to stop there and
8 take the noon recess. We will reconvene at 1:30.

9 If you could all be over at jury administration back
10 across the hall at 1:30, Janet will come get you. Please
11 don't seek any information about any aspects of this
12 case, don't allow anyone to discuss the case in your
13 presence. We will see you back over in jury admin. at
14 1:30.

15 Thank you.

16 (Recess taken.)

17
18 AFTERNOON SESSION

19
20 (Jury present.)

21 **THE COURT:** Okay, please be seated.

22 **MR. PENNER:** I think I will start with Juror Number 9,
23 I think something came to your attention just before
24 lunch.

25 **JUROR NO. 9:** I recognized one of the bailiffs.

1 **MR. PENNER:** Okay, so Mr. Cooley sitting in the
2 corner?

3 **JUROR NO. 9:** Right.

4 **MR. PENNER:** And the fact that you know a bailiff, is
5 that going to affect your ability in this case?

6 **JUROR NO. 9:** No.

7 **MR. PENNER:** I wanted to clear that up.

8 Juror Number 4, what was it you said you did for a
9 living again?

10 **JUROR NO. 4:** Office manager in a law firm.

11 **MR. PENNER:** What's the name of the law firm?

12 **JUROR NO. 4:** David B. Vail.

13 **MR. PENNER:** You do worker's comp?

14 **JUROR NO. 4:** Workers comp, Social Security and PI.

15 **MR. PENNER:** You are representing somebody who has
16 been injured?

17 **JUROR NO. 4:** Right.

18 **MR. PENNER:** You ever deal with expert witnesses?

19 **JUROR NO. 4:** Not personally.

20 **MR. PENNER:** In your cases?

21 **JUROR NO. 4:** Yes.

22 **MR. PENNER:** What kind of doctors do you deal with?

23 **JUROR NO. 4:** Doctors, vocational counselors. Mainly
24 doctors.

25 **MR. PENNER:** Okay, and juror 15, you are a nurse,

1 right?

2 **JUROR NO. 15:** Yes.

3 **MR. PENNER:** Have you ever had a case -- you do
4 babies, right?

5 **JUROR NO. 15:** Yes.

6 **MR. PENNER:** Ever been a situation where some legal
7 stuff arose out of a birth?

8 **JUROR NO. 15:** No.

9 **MR. PENNER:** How about some of the doctors that you
10 know?

11 **JUROR NO. 15:** I am sure there has; I don't know of
12 any.

13 **MR. PENNER:** That's not ever happened to anybody you
14 know; is that right?

15 **JUROR NO. 15:** Not directly.

16 **MR. PENNER:** "Doctor So and So got sued for
17 something," or nothing like that?

18 **JUROR NO. 15:** No. There may have been; I can't
19 remember any. Nothing comes to mind right away.

20 **MR. PENNER:** Okay. So, Juror 4, the doctors that you
21 guys deal with, are these the doctors that the patients,
22 like their family doctor, they have been going to
23 forever?

24 **JUROR NO. 4:** Not necessarily. It could be the
25 doctors that the State uses as their witnesses.

1 **MR. PENNER:** Okay.

2 **JUROR NO. 4:** Psychologists. We have a set of
3 specific doctors that we use for cases.

4 **MR. PENNER:** Sometimes if you have a client come in
5 who's got a certain injury or certain condition, you guys
6 might refer the doctor, right?

7 **JUROR NO. 4:** No. We don't refer the doctors. They
8 usually are seeing the doctors that they saw when the
9 injury began.

10 **MR. PENNER:** Okay.

11 **JUROR NO. 4:** But we do send them out to our own
12 expert witnesses.

13 **MR. PENNER:** Okay. And these are doctors who are
14 looking at them with the legal stuff in mind, right?

15 **JUROR NO. 4:** Correct.

16 **MR. PENNER:** Okay, all right. You mentioned
17 vocational counselors? Do you guys do anything with like
18 emotional counseling or anything like that?

19 **JUROR NO. 4:** Well, some of our expert witnesses are
20 psychologists, they deal with their psych issues.

21 **MR. PENNER:** All right. So anybody else dealt with
22 that in a professional level? In their job they deal
23 with psychologists, that kind of stuff?

24 14? Can you just explain those circumstances?

25 **JUROR NO. 14:** Well, because we have offenders from

1 every gamut, when you deal with some who have severe
2 mental health issues, deal with -- it is a team, what we
3 call a rebit team, team of psychologists, psychiatrist,
4 mental health social workers, could be even just general
5 doctors we deal with the offender.

6 **MR. PENNER:** Depends on the individual.

7 **JUROR NO. 14:** On the individual, yes.

8 **MR. PENNER:** Okay. Juror Number 1?

9 **JUROR NO. 1:** I have a masters in psychology.

10 **MR. PENNER:** Oh, okay.

11 **JUROR NO. 1:** But it is industrial.

12 **MR. PENNER:** Well, tell me what --

13 **JUROR NO. 1:** Motivational, reward systems, that sort
14 of thing.

15 **MR. PENNER:** Not specifically workplace, just
16 anywhere?

17 **JUROR NO. 1:** Not --

18 **MR. PENNER:** When you say industrial, that doesn't
19 pertain to --

20 **JUROR NO. 1:** No.

21 **MR. PENNER:** -- heavy industry or anything.

22 **JUROR NO. 1:** But you asked psychologists.

23 **MR. PENNER:** Have you used that in your work?

24 **JUROR NO. 1:** Yes.

25 **MR. PENNER:** What capacity.

1 **JUROR NO. 1:** Motivational, reward systems, bonuses,
2 things like that.

3 **MR. PENNER:** So you use it as a manager to help
4 motivate employees.

5 **JUROR NO. 1:** As -- yes.

6 **MR. PENNER:** Okay. All right. Anybody else? All
7 right.

8 Does anybody have a friend or relative or something
9 like that who has seen a psychiatrist or psychologist for
10 mental/emotional matters? Several.

11 And again if nobody feels comfortable talking about
12 this, we would like find out a little bit.

13 33, can you tell me what that's a little bit about?

14 **JUROR NO. 33:** I saw a psychologist.

15 **MR. DEPAN:** I am sorry, I can't hear you.

16 **JUROR NO. 33:** Sorry, I saw one about five years ago.

17 **MR. PENNER:** Okay. All right. 32?

18 **JUROR NO. 32:** Yeah, my daughter has seen a
19 psychiatrist.

20 **MR. PENNER:** Anybody else? 13?

21 **JUROR NO. 13:** I saw one during biofeedback, if that
22 counts.

23 **MR. PENNER:** Part of a larger thing, kind of like 14
24 is talking about. Anybody else in that row?

25 **JUROR NO. 15:** I have had friends who have seen

1 psychiatrists.

2 MR. PENNER: For various --

3 JUROR NO. 15: For various reasons.

4 MR. PENNER: Okay. Okay. I will get there. 34?

5 JUROR NO. 34: My wife's currently seeing a counselor,
6 and she and I have seen -- have had marital counseling in
7 the past.

8 MR. PENNER: Okay. Front row? 9?

9 JUROR NO. 9: My son for mild depression, I guess.

10 MR. PENNER: Okay. 7?

11 JUROR NO. 7: Yeah, as a kid and young adult and also,
12 you know, as a married man, too.

13 MR. PENNER: Got you. Front row anybody? 6?

14 JUROR NO. 6: Yes, I'm a supporter of a friend who has
15 bipolar disorder.

16 MR. PENNER: 17?

17 JUROR NO. 17: A friend whose child had counseling.

18 MR. PENNER: Okay. Anybody else? 1?

19 JUROR NO. 1: Grief counseling, loss of a son.

20 MR. PENNER: Okay, all right. 3?

21 JUROR NO. 3: My ex-wife was mentally ill.

22 MR. PENNER: Okay. All right. Did I miss anybody?
23 Is there anybody who's the friend or the relative or
24 themselves had to see more than one doctor before they
25 found the doctor who was the right one for that person?

1 Anybody come across that?

2 **JUROR NO. 26:** What was the question?

3 **MR. PENNER:** Whether the person needed to see more
4 than one doctor before they found the doctor who was
5 right for them. Did that come across for anybody?

6 Your friend who is bipolar?

7 **JUROR NO. 6:** Lucky, she's very lucky.

8 **MR. PENNER:** Anybody else? All right.

9 Did you guys watch the video last week, right? They
10 don't make you watch it again this week, do they?

11 **JUROR NO. 5:** No, just once.

12 **MR. PENNER:** Good, all right. Presumption of
13 innocence. Okay? School teacher. Good we have got two
14 school teachers. Biology? What do you teach?

15 **JUROR NO. 6:** Everything.

16 **MR. PENNER:** Okay, you win.

17 Civics teachers? Presumption of innocence based on
18 your own experience, you said, "Yea constitution" and
19 that tell me what presumption of innocence is.

20 **JUROR NO. 6:** I would like to think all of my 28 kids
21 would do their homework and not give me anything, but the
22 truth, where it is, I am presuming they are all innocent
23 of any problems.

24 **MR. PENNER:** And when one of your students doesn't do
25 the homework and you have got to figure out why, where do

1 you start from?

2 **JUROR NO. 6:** I ask them.

3 **MR. PENNER:** Okay. And you are assuming at that point
4 still that --

5 **JUROR NO. 6:** I have to.

6 **MR. PENNER:** -- that they have done it but there is
7 some issue. That ever come to the situation where, after
8 you have talked to them, it turns out they just didn't do
9 it and they don't have a good excuse?

10 **JUROR NO. 6:** Sure.

11 **MR. PENNER:** All right. In the legal setting here,
12 with Mr. Crace, do you understand he's presumed innocent?

13 **JUROR NO. 6:** Yes.

14 **MR. PENNER:** What does that mean to you?

15 **JUROR NO. 6:** Means he walks in as any other person
16 would. I don't know the man; I don't know what he's
17 done; I don't know the facts.

18 **MR. PENNER:** Anybody else want to pipe in?
19 Presumption of innocence. 20, I haven't heard from you
20 at all. Presumption of innocence, what does that mean to
21 you?

22 **JUROR NO. 20:** Well, like she said, he could be
23 anybody. We haven't heard any of the details or
24 anything. Can't assume anything.

25 **MR. PENNER:** You want to hear from me and witnesses

1 what happened, right?

2 21, would you agree that you probably are wondering
3 what he did to get here? I got people -- I mean, do you
4 think that a little bit?

5 **JUROR NO. 21:** Not necessarily. I mean he --
6 wondering why -- what exactly -- we have heard the
7 charges that have been read against him and, you know,
8 what are the details surrounding it, and what would be
9 the proof or the evidence to say that he is' the one who
10 committed those acts.

11 **MR. PENNER:** Okay. But you are curious, right?

12 **JUROR NO. 21:** But of course.

13 **MR. PENNER:** And 29? I mean are you thinking, "I
14 wonder why we are all here?"

15 **JUROR NO 29:** No. I mean I know why we are here, but
16 I haven't given a thought to the fact that I guess he
17 must have been arrested for something, I don't know.

18 **MR. PENNER:** Okay, all right. 10 you are a teacher,
19 too. Biology. Would you agree the idea that not
20 everybody -- and not you, of course -- but there are some
21 people who may think: I have never been in that chair
22 because I don't do anything wrong; he's in that chair, he
23 probably did something wrong.

24 **JUROR NO. 10:** I am sure there are people who think
25 that.

1 **MR. PENNER:** Okay. And 16, would you agree there's
2 people who might think that? Yeah, you are 16, sorry.

3 **JUROR NO. 16:** Say that again.

4 **MR. PENNER:** Not you, and of course nobody in this
5 room, but that there may be some people who think, "You
6 know what? You don't just end up at a defendant's table
7 he must have done something."

8 **JUROR NO. 16:** I suppose people think that.

9 **MR. PENNER:** Juror 13, do you think that might be part
10 of the reason they make you watch a video when you first
11 get here to drill into you the idea of presumption of
12 innocence?

13 **JUROR NO. 13:** It could be.

14 **MR. PENNER:** Everybody agree with that kind of? Kind
15 of -- let's see 22, did you -- you have children?

16 **JUROR NO. 22:** Yeah.

17 **MR. PENNER:** Do you have grandchildren.

18 **JUROR NO. 22:** Yeah.

19 **MR. PENNER:** Do they break things?

20 **JUROR NO. 22:** Yeah.

21 **MR. PENNER:** Okay. Do you sometimes come home,
22 something's broken, and you have got to figure out who
23 broke it?

24 **JUROR NO. 22:** Yes.

25 **MR. PENNER:** Okay. Is it hard sometimes?

1 **JUROR NO. 22:** Try to find out who did it and then
2 from there on --

3 **MR. PENNER:** And you talk to all the kids and
4 everything.

5 **JUROR NO. 22:** Yeah.

6 **MR. PENNER:** Who else have got school age kids right
7 now? Elementary school. There, I am getting a smile,
8 too, from you. Do you have more than one kid?

9 **JUROR NO. 20:** I have.

10 **MR. PENNER:** Close in age?

11 **JUROR NO. 20:** Trying to figure out if it was one of
12 the boys or the dog.

13 **MR. PENNER:** And the dog can't defend himself.

14 **JUROR NO. 20:** No.

15 **MR. PENNER:** Are they smart enough to blame the dog
16 all the time?

17 **JUROR NO. 20:** Well, yes, they do say that he's a
18 handful.

19 **MR. PENNER:** All right. Do you have personal -- do
20 you have any problem with the idea that Mr. Crace is
21 presumed innocent right now?

22 **JUROR NO. 20:** No.

23 **MR. PENNER:** Does anybody have any problem? All
24 right, I am going put somebody on the spot now. Juror 5,
25 can you tell me how that's different from whether he's

1 actually innocent?

2 JUROR NO. 5: If he's actually innocent there's facts
3 to prove that.

4 MR. PENNER: Okay.

5 JUROR NO. 5: If he's innocent --

6 MR. PENNER: So we haven't heard any facts yet.

7 JUROR NO. 5: We haven't heard any facts, we don't
8 know nothing about this gentleman or nothing, just know
9 the charges that are against him, that's all we know,
10 that you know, the judge has spoken of. But we can't do
11 anything with that until there's facts presented in front
12 of us.

13 MR. PENNER: Okay. Juror 8, would you agree it's
14 possible that he's presumed innocent at the beginning of
15 the trial but at the conclusion of the trial could be
16 found guilty?

17 JUROR NO. 8: Yes.

18 MR. PENNER: How do you explain that difference?

19 JUROR NO. 8: Because we see the facts or each side's
20 opinion, I guess is what it is.

21 MR. PENNER: Okay. Now, if I get up and just give
22 that fantastic opening statement, convinces you, "Wow,
23 this is great," and then I don't put any witnesses on,
24 and the judge says, "Okay, go back and make a verdict,"
25 what is your verdict going to be?

1 **JUROR NO. 8:** Wouldn't. I would have to say start
2 over.

3 **MR. PENNER:** You've got to start over. You get to
4 fill out the piece of paper.

5 **JUROR NO. 8:** Not fair, I guess. I don't know how you
6 would --

7 **MR. PENNER:** You haven't heard --

8 **JUROR NO. 28:** Would be not guilty.

9 **MR. PENNER:** 17, what do you think about that?

10 **JUROR NO. 17:** Depend on his what the other side --

11 **MR. PENNER:** He didn't say anything, it's just me. He
12 listens, he goes, "Wow, he's nodding the whole time I am
13 talking," but I don't put any witnesses on. And then the
14 judge says, "Now, you have to make your decision."

15 **JUROR NO. 17:** Well, it would depend on what you had
16 to say and what you presented.

17 **MR. PENNER:** Okay. What are your thoughts on that?

18 **JUROR NO. 6:** I am thinking that could be like matrix,
19 like I am totally confused about what you are saying, and
20 I am in a different void but --

21 **MR. PENNER:** Okay. But that's all you are getting.
22 You are just getting me, no witnesses. What's your
23 verdict?

24 **JUROR NO. 6:** I am saying there's got to be a mistrial
25 because I didn't hear anything else, there is no

1 evidence.

2 **MR. PENNER:** So it is not guilty because you have got
3 to pick one side or the other, and he's presumed --

4 **JUROR NO. 6:** I refuse to answer that.

5 **MR. PENNER:** All right. You do that with your kids,
6 too, the school kids.

7 **JUROR NO. 6:** I have got to hear it, I have got to
8 know.

9 **MR. PENNER:** Why have you got to know? You -- 10,
10 let's say I put on some evidence but it's not very good
11 evidence. The guy says I was there and I saw Mr. Crace
12 but I didn't see what he did. But he was there. And you
13 are not convinced. Now, he probably did it. How are you
14 going to vote?

15 **JUROR NO. 10:** He's presumed innocent. If you don't
16 put on a good case, I have to vote not guilty.

17 **MR. PENNER:** What if I put on an okay case, and you
18 think he probably did it, but you have got some doubts,
19 and they are reasonable doubts. Are you going to be able
20 to vote not guilty, even if you think he probably did it?

21 **JUROR NO. 10:** I think I would.

22 **MR. PENNER:** Okay. Proof beyond a reasonable doubt.
23 Everybody's heard that, right? Okay, who thinks it's
24 proof beyond all doubt? Good, okay, I always ask: Can
25 you tell me what proof beyond a reasonable doubt is? And

1 somebody says, well, you have to prove it 100 percent
2 beyond any shadow of any doubt. Is there anybody who is
3 going to hold me to that? 28? What are your thoughts on
4 that?

5 **JUROR NO. 28:** Well, if there's a doubt, then say he's
6 innocent.

7 **MR. PENNER:** Okay. What if the doubt is that I didn't
8 just prove, and so it is possible, I didn't bring in
9 witnesses that it's possible Mr. Crace was
10 mind-controlled by the CIA or anything else? Would you
11 call that a reasonable doubt?

12 **JUROR NO. 28:** Yeah, I would say so.

13 **MR. PENNER:** It is or it is not reasonable?

14 **JUROR NO. 28:** It is.

15 **MR. PENNER:** It is reasonable, that the CIA may have
16 mind-controlled him?

17 **JUROR NO. 28:** Well, that he thinks it, yeah.

18 **MR. PENNER:** I am going to call on somebody else,
19 then.

20 35, that kind of a situation.

21 **JUROR NO. 35:** That's not reasonable.

22 **MR. PENNER:** Okay. So, reasonable. It can't be any
23 doubt, right? But it's got to be reasonable doubt.

24 How many witnesses does the State have to put on to
25 prove a case beyond a reasonable doubt? Juror --

1 **JUROR NO. 35:** I don't think they have got to put on
2 any.

3 **MR. PENNER:** I don't? We have to put on -- I am not a
4 witness.

5 18, how many witnesses do you want to hear from the
6 State?

7 **JUROR NO. 18:** I have no idea. I don't know how many
8 witnesses.

9 **MR. PENNER:** Okay. 15? How many do you want to hear
10 from the State?

11 **JUROR NO. 15:** Enough to prove the case.

12 **MR. PENNER:** Okay. Anybody remember those Tootsy-Pop
13 drops -- you know, where I am going with this. Okay, 34,
14 do you remember the commercial?

15 **JUROR NO. 34:** "How many licks does it good take to
16 get to the center"?

17 **MR. PENNER:** Take it to different animals, "How many
18 licks does it take to get to the Tootsy Roll," the middle
19 of the sucker. None of them could figure it out.

20 And they take it to the owl, who is wise, after three
21 he can't wait more and says, "I bite into it" and he says
22 it takes 3.

23 If the State only put one witness on, is that going to
24 be enough for you, or do you have to have more than one
25 witness?

1 **JUROR NO. 2:** Depends on the circumstances.

2 **MR. PENNER:** Okay, depends on the case?

3 **JUROR NO. 2:** The case and the depth the witness goes
4 into.

5 **MR. PENNER:** 27, can you imagine a case where there
6 might only be one witness?

7 **JUROR NO. 27:** It's possible. Have to come up with
8 more than one.

9 **MR. PENNER:** You want me to pull other people in to
10 give their names and --

11 **JUROR NO. 27:** Just one person is a not going to
12 always know. You know, one person's word against
13 another.

14 **MR. PENNER:** But would you agree it's possible?

15 **JUROR NO. 27:** I suppose it's possible.

16 **MR. PENNER:** Anybody think it's absolutely not
17 possible if the State only calls one witness to be
18 convinced beyond a reasonable doubt? Any thoughts?

19 21, what do you think?

20 **JUROR NO. 21:** I think if there's only one eyewitness
21 to an event, that's one thing. But you have to pull in
22 some other type of evidence that has to be presented by
23 other witnesses.

24 **MR. PENNER:** So you want some corroboration.

25 **JUROR NO. 21:** Exactly.

1 **MR. PENNER:** All right. I have got one more question.
2 Ultimately we are going to ask 12 of you to sit in
3 judgment of another human being. Okay? Is there
4 anybody, who for any reason, moral, philosophical,
5 religious, anything, doesn't feel comfortable doing that?

6 Okay. All right, thank you.

7 Thank you, Your Honor.

8 **THE COURT:** Mr. DePan.

9 **MR. DEPAN:** Thank you, Your Honor. I noticed a little
10 difficulty here when Mr. Penner was asking those
11 questions.

12 Can everybody just for my sake say "not guilty"?

13 **JURORS:** Not guilty.

14 **MR. DEPAN:** Thank you. So it's -- you can reach that
15 verdict, it seemed like there was almost a resistance.
16 This is voir dire where we find out, we pick you because
17 you are strangers and then we nose into your lives to try
18 to find out what you are like so we can pick a jury.

19 But once that jury is impaneled, you have got the
20 mandate that Mr. Penner stated: You have got a
21 presumption of innocence, unless overcome by proof beyond
22 a reasonable doubt.

23 Mr. Penner was citing to you variations on the theme
24 where proof wasn't shown at all, nothing was shown or a
25 little bit was shown and in that situation, where

1 Mr. Penner cited the situation where he stands up and
2 makes a long impassioned, brilliant speech for two hours
3 and sits down. You have no evidence. They give the case
4 to you, he's not guilty. Correct?

5 **JUROR NO. 5:** Correct.

6 **MR. DEPAN:** Okay. You haven't had any evidence to
7 overcome your presumption. Does anybody disagree with
8 that? Okay. There has to be some witness to give you
9 some facts that convinces you beyond a reasonable doubt.

10 At that point, when you are convinced beyond a
11 reasonable doubt, and we never know what that point would
12 be for each individual person, but if you are convinced
13 beyond a reasonable doubt, then you would find him
14 guilty. If that presumption's overcome, does everybody
15 agree with that?

16 **JURORS:** Yes.

17 **THE COURT:** He was arrested by a police officer. Does
18 that in any way influence your decision?

19 **JURORS:** No.

20 **MR. DEPAN:** He was charged by the prosecutor's office
21 with a crime, and you are going on be told what it is.
22 Does that make him guilty, innocent, more or less either
23 way? You are the people who are going to be determining
24 whether or not that presumption has been overcome.

25 I would assume in all your lives, through children,

1 teachers, through the children they teach, nurses dealing
2 with people in the hospital, be it a doctor, a patient,
3 whatever, we have all encountered a situation where you
4 have to judge credibility and people, whether this person
5 is telling the truth, whether that person's telling the
6 truth.

7 Does anybody have a difficulty doing that? Juror
8 Number 6?

9 **JUROR NO. 6:** I am just smiling because I have a
10 picture of a student in my head.

11 **MR. DEPAN:** A favorite student.

12 **JUROR NO. 6:** Yes.

13 **MR. DEPAN:** Sometimes you are looking at the
14 situation. I always think of the six blind men and the
15 elephant and they come up to an elephant and each touches
16 a different part of the elephant and they describe the
17 elephant totally differently: One, a wall; one, like a
18 spear because he touches the tusk; one like a snake,
19 because he touched the trunk, whatever.

20 There are situations where two different people can
21 perceive but neither of them is lying. Neither of them
22 is telling untruth, they are just seeing things from a
23 different perspective.

24 That's not necessarily credibility; it's understanding
25 perspective. But then there's situations where one

1 person says one thing happened and there's no way these
2 things are reconciled.

3 Can you make these judgments? Does anybody have a
4 difficulty with this sitting in judgment of a person and
5 making these judgments about truth? Anybody?

6 There is -- and sort of came up with Mr. Penner's
7 question: If he made a speech and sat down and didn't
8 put on a witness, then somebody suggested I would put on
9 a witness.

10 Of course I would be a total fool to put on a witness
11 at that point, but nonetheless someone else would put on
12 a witness because you want to find the facts, you want to
13 find out what happened. It's a natural human
14 inclination, and you have been assigned that job, for
15 you, even more so. But if I didn't put on a witness and
16 he didn't put on a witness, we have all decided that
17 Mr. Crace would be not guilty.

18 But there is a situation in our country that
19 Mr. Penner will put on some evidence; perhaps I will put
20 on some evidence, perhaps I won't, but Mr. Crace won't
21 testify.

22 In that case, you'll hear some facts about a story,
23 and then you will hear some other facts. But you won't
24 hear from the main man in the situation. Is that going
25 to affect -- because we don't have to testify in this

1 country, if we are accused of a crime.

2 Is that going to affect how you perceive him? Martha
3 Stewart didn't testify. There has been long-winded
4 debate about whether she should have or shouldn't have.
5 The jury wanted to hear from her. It's a natural
6 inclination to want to hear from her. Will you hold it
7 against Mr. Crace if he doesn't testify?

8 Not -- obviously you don't have the facts, but I am
9 just saying just the fact that he didn't tell you his
10 side of the story, would you hold that against him?
11 Would anybody? Does anybody think that that's really a
12 stupid rule, that we should hear both sides?

13 I am going to go back to where I was before with what
14 I was doing before we broke for lunch, mainly because I
15 want to nose into your lives and find out about you. But
16 I need to, so please, if I broach a subject that is
17 tender, please just notify me, I will move on. We can
18 talk, the judge can set aside time later you can talk
19 about it. Okay?

20 Juror 20, I think we stopped at you. Can you tell me
21 what you do for a --

22 **JUROR NO. 20:** I work for Wal-Mart, I am a department
23 manager.

24 **MR. DEPAN:** And what's a department manager do?

25 **JUROR NO. 20:** I basically run a department.

1 **MR. DEPAN:** Okay. You got people under you.

2 **JUROR NO. 20:** Yes.

3 **MR. DEPAN:** You keep schedules.

4 **JUROR NO. 20:** Yep. Order, price changes.

5 **MR. DEPAN:** Do price changes, clean that floor, needs
6 to be better, that kind of thing.

7 **JUROR NO. 20:** Yeah.

8 **MR. DEPAN:** And then you're ultimately responsible for
9 someone else saying you are not running a good
10 department, right?

11 **JUROR NO. 20:** Right.

12 **MR. DEPAN:** Juror 21, what do you do for a living?

13 **JUROR NO. 21:** During the tax season I am an office
14 manager for H & R Block. And when it's not tax season, I
15 am a stay-at-home mom.

16 **MR. DEPAN:** So you make all your money for about three
17 or four months.

18 **JUROR NO. 21:** Yeah, the big bucks, yeah.

19 **MR. DEPAN:** Are you a preparer or are you supervisor
20 of people who are preparers?

21 **JUROR NO. 21:** Actually, both.

22 **MR. DEPAN:** How long have you been doing that?

23 **JUROR NO. 21:** This is my first year at both.

24 **MR. DEPAN:** So you, I assume, understand all the tax
25 code.

1 **JUROR NO. 21:** If you can introduce me to one person
2 who knows the entire tax code, I will call you a liar.

3 **MR. DEPAN:** Juror 22, ma'am?

4 **JUROR NO. 22:** Yes, I am retired. And I worked as a
5 home care provider for 20 years. Senior citizen.

6 **MR. DEPAN:** I am sorry, I didn't get that last.

7 **JUROR NO. 22:** Senior citizen home care provider for
8 senior citizen.

9 **MR. DEPAN:** And juror 23?

10 **JUROR NO. 23:** I work for Mary Bridge Health Alliance.
11 I am a patient services rep. We do medical billing, talk
12 to people about their bills, help them out. Charges,
13 payments, that type of thing.

14 **MR. DEPAN:** If they have to be put on a payment plan
15 and something like that, they come in the emergency room,
16 that kind of thing.

17 **JUROR NO. 23:** It is not the emergency, it is actually
18 billing provider. It's a billing service out of the
19 hospital.

20 **MR. DEPAN:** But you do have people contact and that
21 kind of thing.

22 **JUROR NO. 23:** Uh huh. Patients, over the phone.

23 **MR. DEPAN:** Juror 24? Ma'am, what do you do?

24 **JUROR NO. 24:** I work at the News Tribune?

25 **MR. DEPAN:** I am sorry?

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JUROR NO. 24: News Tribune.

MR. DEPAN: You work for The News Tribune?

JUROR NO. 24: Yeah.

MR. DEPAN: What do you do for The News Tribune.

JUROR NO. 24: Deliver papers.

MR. DEPAN: Okay? How long have you been doing that?

JUROR NO. 24: Couple months.

MR. DEPAN: How long?

JUROR NO. 24: A couple months.

MR. DEPAN: Okay. Have any children?

JUROR NO. 24: Yeah.

MR. DEPAN: How many?

JUROR NO. 24: One.

MR. DEPAN: You provide care for -- you are the sole provider?

JUROR NO. 24: Yeah.

MR. DEPAN: Juror 25?

JUROR NO. 25: Yes, sir.

MR. DEPAN: What do you do?

JUROR NO. 25: I am sales rep for a big company and I also am a small business owner.

MR. DEPAN: Okay. So you're a big company owner and sells rep for a small company.

JUROR NO. 25: I wish it was that way around.

MR. DEPAN: What's the sales rep do?

1 **JUROR NO. 25:** Sales rep goes out and meets people in
2 the community, helps them with their problems by
3 providing solutions.

4 **MR. DEPAN:** What's the company?

5 **JUROR NO. 25:** Kinko's FedEx.

6 **MR. DEPAN:** So you are the person who makes the
7 copiers work, right?

8 **JUROR NO. 25:** No, I am the person that brings the big
9 print jobs to the people that can work the machines,
10 right.

11 **MR. DEPAN:** And you have your own company?

12 **JUROR NO. 25:** Yes, I am a DJ as well.

13 **MR. DEPAN:** Okay. That's a night job, I assume.

14 **JUROR NO. 25:** Night and weekends. Do weddings,
15 mostly.

16 **MR. DEPAN:** Okay. Juror 26?

17 **JUROR NO. 26:** I am retired from the restaurant and
18 apartment business.

19 **MR. DEPAN:** Do you ever get to retire from that?

20 **JUROR NO. 26:** When you sell the business.

21 **MR. DEPAN:** That is here in Tacoma?

22 **JUROR NO. 26:** Yes.

23 **MR. DEPAN:** Juror 27?

24 **JUROR NO. 27:** Yeah, I am a marine engineer, I have
25 been for 29 years.

1 **MR. DEPAN:** A horse manure engineer?

2 **JUROR NO. 27:** Merchant marine. Did you say horse
3 manure?

4 **JUROR NO. 31:** That's my job.

5 **MR. DEPAN:** What does -- are you involved in the
6 engines or in building the boats?

7 **JUROR NO. 27:** I work right down out of Commencement
8 Bay, the container ships. I sail on the ships.

9 **MR. DEPAN:** Oh, so --

10 **JUROR NO. 27:** I am a chief engineer on the Horizon
11 Anchorage.

12 **MR. DEPAN:** So you go away for about a month and you
13 come back.

14 **JUROR NO. 27:** Actually, Anchorage, Kodiak, Tacoma. I
15 do like nine day trips.

16 **MR. DEPAN:** Okay. And then you have some time off and
17 then you do it again.

18 **JUROR NO. 27:** Like I am off right now. This is
19 actually my vacation.

20 **MR. DEPAN:** But you will take the ten bucks a day.
21 Juror 28, sir?

22 **JUROR NO. 28:** Machinist, laid off.

23 **MR. DEPAN:** Machinist for who?

24 **JUROR NO. 28:** For Boeing.

25 **MR. DEPAN:** How long have you been a machinist for

1 Boeing?

2 JUROR NO. 28: 23 years.

3 MR. DEPAN: Do you like doing that?

4 JUROR: Actually a fun job.

5 MR. DEPAN: Juror 29?

6 JUROR NO 29: I am retired. I was the assistant
7 manager at New Life Fertilizers and in charge of sales.

8 JUROR NO. 27: Horse manure right there.

9 MR. DEPAN: For how many years?

10 JUROR NO 29: About 34 years.

11 MR. DEPAN: Juror 30, sir?

12 JUROR NO. 30: General labor.

13 MR. DEPAN: Okay. Like carpenter or --

14 JUROR NO. 30: Carpenter, lawn maintenance, build
15 fences.

16 MR. DEPAN: Juror 31?

17 JUROR NO. 31: I am an escrow officer for Chicago
18 Title.

19 MR. DEPAN: Juror 32?

20 JUROR NO. 32: I work for the US Department of
21 Agriculture. I am a natural resources planner and
22 supervise eight people in the Olympic Peninsula area. So
23 I have dealt with horse manure.

24 MR. DEPAN: We are getting a consensus already.

25 What does -- what do you do? Are there farms out on

1 the Olympic Peninsula.

2 **JUROR NO. 32:** Yes, there are several. We do resource
3 management with plantings, fish habitat --

4 **MR. DEPAN:** Okay.

5 **JUROR NO. 32:** -- taking care of waste, keeping it out
6 of streams, those kinds of things.

7 **MR. DEPAN:** How long have you been doing that?

8 **JUROR NO. 32:** 19 years.

9 **MR. DEPAN:** Juror 33?

10 **JUROR NO. 33:** I'm a pharmacy technician.

11 **MR. DEPAN:** Where?

12 **JUROR NO. 32:** I am not working right now.

13 **MR. DEPAN:** Okay. You are trained as a pharmacy
14 technician, though, right?

15 **JUROR NO. 33:** Yes.

16 **MR. DEPAN:** That means you will be dispensing doctor's
17 prescriptions, dispensing medication.

18 **JUROR NO. 33:** Yes.

19 **MR. DEPAN:** Currently free and available.

20 **JUROR NO. 33:** Yes.

21 **MR. DEPAN:** Juror 34?

22 **JUROR NO. 34:** I work for the State of Washington
23 disability services. I do customer software support for
24 specialized third party software.

25 **MR. DEPAN:** Can you explain a little bit what that

1 means?

2 **JUROR NO. 34:** As the department rolls in new software
3 products from the company that writes for the product
4 that we vend, I train users how to use it and keep the
5 software working.

6 **MR. DEPAN:** Okay, for disability clients.

7 **JUROR NO. 34:** For disability services.

8 **MR. DEPAN:** Disability services.

9 And Juror 35?

10 **JUROR NO. 35:** I work for Safeco Insurance Company. I
11 develop training materials for our call centers.

12 **MR. DEPAN:** Okay. Okay. Is there anybody at this
13 point that's been elicited, you know, a thought by
14 Mr. Penner or myself, who would like to address privately
15 the court? Would like to -- just has a concern or issue
16 that they would like to speak privately to the court?

17 Is there anybody who either Mr. Penner or I have asked
18 a question that wants to make a comment or has a thought?

19 Juror Number 6?

20 **JUROR NO. 6:** I was interested in your earlier
21 discourse on why previously your paperwork didn't show or
22 did show what we did for work. You said that early on
23 that before you used to have that information. Is that
24 having to do with what?

25 **MR. DEPAN:** We get a little sheet of paper as you walk

1 in that tells your names, and you checked off some boxes
2 I assume as a preliminary screening. It used to have
3 more information on it, what your occupation was and who
4 you were employed by. It doesn't have that at this
5 point.

6 **JUROR NO. 6:** Because? Oh, I am sorry, I shouldn't
7 put you on the spot.

8 **MR. DEPAN:** I take the Fifth. I don't know.

9 **JUROR NO. 6:** Okay.

10 **THE COURT:** I can tell you the answer to that I just
11 received from jury administration it says: Because the
12 jurors are choosing not to input their occupation, even
13 though space is provided for it. So it's -- that's the
14 answer I got from jury administration.

15 **JUROR NO. 6:** Thank you.

16 **JUROR NO. 35:** There you go.

17 **THE COURT:** Take you off the hook, Mr. DePan.

18 **MR. DEPAN:** Thank you, Your Honor.

19 Thank you. I have no further questions, Your Honor.

20 **THE COURT:** Okay.

21 **MR. PENNER:** I don't have any further questions of the
22 panel.

23 **THE COURT:** All right. Then could I see you at
24 side-bar been, please?

25 (Conference off-the-record.)

C E R T I F I C A T E

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STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

I, Randy Kay York, Official Shorthand Reporter in
and for the County of Pierce, State of Washington, do hereby
certify that the foregoing proceedings were reported by me
on May 11, 2004 and reduced to typewritten form.

I further certify that the foregoing transcript of
proceedings is a full, true and correct transcript of my
machine shorthand notes of the aforementioned matter.

Dated this 24th day of April 2006.

Randy Kay York
Randy Kay York, CCR, RDR
CCR # 24771

APPENDIX I ~
DECLARATION OF JUROR

DECLARATION OF LINDA HOERLING-GLENN

I, Linda Hoerling-Glenn, declare as follows:

1. I served as a juror in *State of Washington v. Hoyt Crace*.
2. After the trial, I wrote an account of my jury service that was published in the Puyallup *Herald*.
3. I have attached a copy of that story, which is true and correct.
4. I was recently contacted by Mr. Crace's current counsel who asked me two questions regarding my article.
5. Mr. Ellis asked why I did not report to the court that I had observed Mr. Crace outside of the courtroom prior to trial. I told him that it was a personal decision.
6. Mr. Ellis asked how I came to consider the possibility that Mr. Crace was facing a third strike. I told him that, prior to my jury duty I had read about the law and understood the process. I thought about this possibility during trial, but did not discuss it with anyone else.

I declare under the penalty of perjury of the laws of the State of Washington that the above is true and correct.

Date and Place

Linda Hoerling-Glenn

Qwest Mail

by  Windows Live**RE: Article on jury service**From: **Jeff Ellis** (ellis_jeff@hotmail.com)

Sent: Mon 3/10/08 11:42 AM

To: Linda Hoerling-Glenn (lhoerling@puyallup.k12.wa.us)

With your permission, I will indicate on the document your email approval.

Jeff Ellis

Law Offices of Ellis, Holmes & Witchley

705 Second Ave.--Suite 401

Seattle, WA 98104

(206) 262-0300

(206) 218-7076 (cell)

(206) 262-0335 (fx)

> Date: Mon, 10 Mar 2008 08:18:34 -0700
 > From: LHoerling@puyallup.k12.wa.us
 > To: ellis_jeff@hotmail.com
 > CC: skeeter.glenn@boeing.com
 > Subject: RE: Article on jury service
 >
 > Do I official sign or can my response to this E-mail in the affirmative
 > enough?
 > LHG
 >
 > >>> Jeff Ellis <ellis_jeff@hotmail.com> 3/6/2008 10:10 AM >>>
 > Thanks for your responses.
 >
 > Based on our "conversations" and your previous article, I have drafted
 > a declaration for your review. I would like to file the declaration
 > along with your article so that the court has a complete record on this
 > issue. Please make any changes that you feel are appropriate. Please
 > contact me if you have any questions.
 >
 > I appreciate your time and assistance.
 > Jeff Ellis
 > Law Offices of Ellis, Holmes & Witchley
 > 705 Second Ave.--Suite 401
 > Seattle, WA 98104
 > (206) 262-0300
 > (206) 218-7076 (cell)
 > (206) 262-0335 (fx)
 >
 > > Date: Mon, 3 Mar 2008 15:57:52 -0800> From:
 > LHoerling@puyallup.k12.wa.us> To: ellis_jeff@hotmail.com> CC:
 > skeeter.glenn@boeing.com>> Subject: RE: Article on jury service> > See
 > Italicized below :)> >>>> Jeff Ellis <ellis_jeff@hotmail.com>
 > 2/28/2008 4:25 PM >>>> After playing "phone tag" and failing (thanks
 > very much for your return> calls), I thought I'd just write out my
 > questions and then follow up> with a phone call. My questions both
 > relate to the "jury duty" article> that you wrote for the Puyallup

West Mail Print Message

> Herald. > > 1. Why did you decide not to report the fact that you had
> earlier seen> Mr. Crace in the hallway (escorted by jail guards, in
> cuffs and the> sandals) to the court--either during jury selection or
> after it you had> been picked for the jury?> It was a personal
> decision.> > > 2. What led you to "consider the possibility" that Mr.
> Crace was> facing a third strike? > I have read and understood about the
> process. Little sleep, and> thinking too hard allowed me to come to this
> conclusion on my own. It> was not discussed with anyone, rather like my
> answer to question #1.> > Thanks very much. > Jeff Ellis > Law Offices
> of Ellis, Holmes & Witchley> 705 Second Ave.--Suite 401 > Seattle, WA
> 98104> (206) 262-0300> (206) 218-7076 (cell)> (206) 262-0335 (fx)> > >
> From: ellis_jeff@hotmail.comTo: lhoerling@puyallup.k12.wa.usSubject:>
> Article on jury serviceDate: Tue, 12 Feb 2008 10:42:00 -0800> > > Ms.
> Hoerling: I am an attorney (much to the disappointment of my> parents
> who were both teachers), currently working on Hoyt Crace's case.> I
> recently read your article describing your experience on the jury in>
> that case. I have a few questions that I'd like to ask, either over the>
> phone or by email. Is that ok with you? > Jeff Ellis > Law Offices of
> Ellis, Holmes & Witchley> 705 Second Ave.--Suite 401 > Seattle, WA
> 98104> (206) 262-0300> (206) 218-7076 (cell)> (206) 262-0335 (fx)

Juror learns about mental health during Pierce Co



Jury Duty

Linda Hoerling

Group 20 was not to report until Tuesday morning. He gave me Monday at work to swear repeatedly that my jury duty really involved little of the suggested relax and read a book and that I had indeed been lectured for a jury.

Many people wanted to know what type of case and some of the details. I spoke generally as some of it really did not seem respectful to identify the "winners" or "losers" by name, but took the opportunity to confirm that the constitutional guarantee of the right to a fair trial by peers appeared to intact and working well.

Although, after observing the possible case load of the judges I attorneys first hand, I was so convinced of the adjective ready.

Tuesday morning, Rose and Janet us with sincere smiles and asked us in. We were instructed to be nearby I watch for the flashing amber it that would indicate that a judge had requested a pool. I had up of coffee at the nearby block, I sat down to take a few notes future articles in the hub of on.

Drinking warm caffeine, I consulted the issue of clothing as shined everyone working in the my city building. Beyond a colorful Coldwater ek outfit or a new pair of Dock- my teacher clothes often bear on simply functional.

the plinthe crowd, shiny pastel pumps to compliment spring suits, the heavy dark black sturdy gym like shoes of security, or deputy sheriffs, and plastic orange sandals with socks.

Sandals? It wasn't that warm yet. I looked up the sandaled feet to the man attached. He was handcuffed and being escorted by two rather large, (formerly known as bury) men in uniform. Obviously, an accused prisoner in street clothes, sans real shoes, in route to his trial; was definitely not in Kansas anymore.

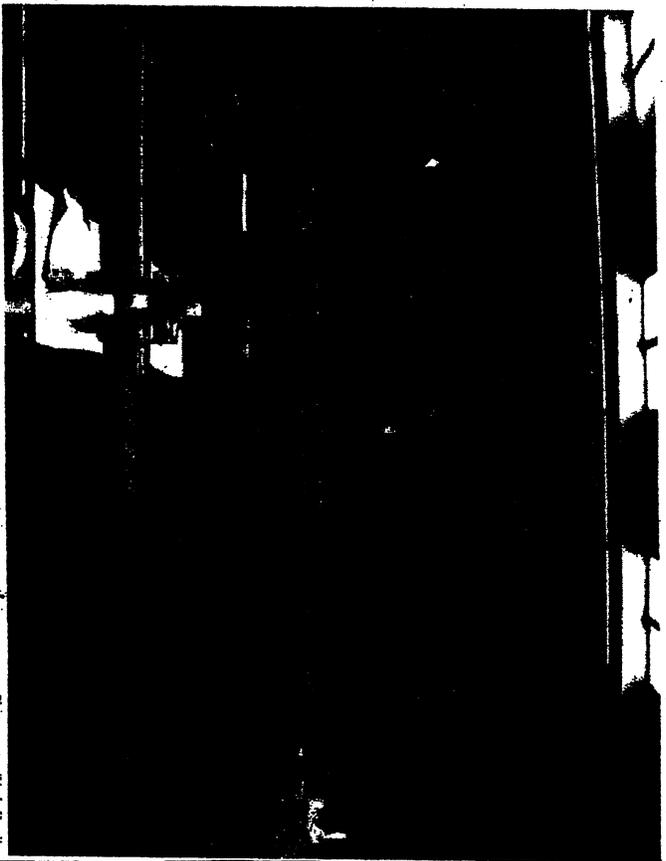
Before I could put more thought into the scene before me, the flashing amber light intruded with a visual distraction. It was time for my version of a line up.

It was like old home week and a reunion to see two former co-jurors of the previous week, Judy and Larry. We caught up a bit, and talked about our previous jury group and whom had been assigned to which judges and what type of cases.

Brandt, too, had been assigned another pool and it felt odd not to be able to visit more with the people I had grown so fond of in such a short time.

After our brief gathering, I was once again requested in the hallway. This time, lined up in number order by a pumpkin colored tag, and the encouraging Rose smile. There were no stairs to ascend this trip, since we were headed right across the hall to Judge Orlando's superior criminal court.

We were again welcomed by a variety of people standing silently and observing the attorneys, Jan Costant and the judicial assistant to Judge Orlando, Randy York the court reporter, two sheriff deputies, and the accused man. Judge Orlando was announced by Jan Costant. He entered, and



The jury box Linda Hoerling would be spending time in while serving on jury.

sandalized, and escorted.

The 21 Pierce County superior court judges rotate through blocks of criminal cases, which protected approximately 10 percent chance of being tagged for this particular man's jury pool. I felt as if I had somehow violated some vague acquaintance, or knowing the defendant rule. But, this new revelation justified no action on my part.

Besides, out of the 40 people waiting in this particular pool, it would seem unlikely to be selected for his trial.

Guess who statistically lost or won depending on your perspective?

Photo courtesy/Linda Hoerling

fully slow recounting of current occupation, or what type of jobs the jury pool had previously held. This seemed redundant to me, and when the defense attorney, Mr. Depan apologized for the slow going, explaining "previously, the potential juror list contained more information," I felt my patience of meter gauge dip dangerously low.

The judicial system was already overburdened, and this glitch only amplified the lack of time issues. When I had the opportunity to ask Mr. Depan directly, he did not know why the jury lists were information deficient.

tion survey that accompanies a jury summons completely which produces scanty information from which the attorneys work their craft.

After an hour of discussion, the jury was announced.

My pea-brain was trying to calculate the odds of not only making it on yet another jury, but specifically, that of Mr. Sordal Foot's trial. As the mother of my godchild, and survivor of cancer told me, it does not matter if you are in the less than one percent category; it is your personal 100 percent. Tucking my Toro-sized reading desires aside, a true story of

defense attorney.

Mr. Penner was a bit man with the classic suit, which deftly aug prosecutor look. The tomy, Mr. Depan returned college professor were occupation gray being sworn in, I und vital nature of the pro it related to the defen.

The accused man with the crimes of As Second Degree or Assault in the Second Degree, and Walkout the Second Degree.

I earnestly embraced of the situation when fence and the prospect agreed on the sequen during one August evening 2003. Few, if any, were called. This idea in but was a puzzle. A bit witness?

As a juror, we were the responsibility of the inherent of actions, the evidence present application of the law were to consider sub induced personally diminished capacity of the events.

Beyond a made for or Arn Rule book, the virtual terms used to phrase. I sincerely hope guidance and instruction these phrases, and the ton.

Between testimony psychologists, and references to the DSM-1 and Statistical Manual Disorders-5), I learned week about the topic health, than I would need to know in a lifetime. I clicked my heels at the truly red slipper's working properly.

APPENDIX J ~
DECLARATION OF CRACE

DECLARATION OF HOYT WILLIAM CRACE

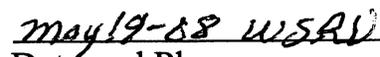
I, Hoyt Crace, declare:

1. I am the petitioner in this Personal Restraint Petition.
2. During my trial, I was in custody. I was brought to trial by jail officers. During my transport from the jail to the courtroom, I was forced to wear shackles on my legs and ankles. The jail officers told me that I also had to wear the jail-issue, orange sandals. When I got to court each day, they took that shackles off my legs and ankles, but the sandals remained.
3. It was only after trial that I learned a juror had seen me outside the courtroom with the jail officers and then saw the jail sandals on my feet.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.



Hoyt Crace



Date and Place