

HEK 61379-1

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COA No. 61379-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TAIWANDRIC RUSSELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Deborah Fleck

REPLY BRIEF

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STATE OF WASHINGTON

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A. REPLY ARGUMENT

1. THE DEFENDANT'S CONVICTION ON COUNT 2 MUST BE REVERSED BECAUSE IT DOES NOT BEAR ADEQUATE ASSURANCES OF JURY UNANIMITY AS TO WHICH ALTERNATIVE STATUTORY MEANS OF TAMPERING WITH A WITNESS WAS COMMITTED.

Mr. Russell argues that the Respondent is incorrect that the crime of Tampering with a Witness, appearing at RCW 9A.72.120, is not an alternative means case subject to a requirement of jury unanimity. See State v. Nonog, 145 Wn. App. 802, 812-13, 187 P.3d 335 (2008), review granted, 2009 Wash. LEXIS 237 (March 3, 2009) (citing State v. Fleming, 140 Wn. App. 132, 135-37, 170 P.3d 50 (2007)). The means charged in Mr. Russell's case are too disparate to dispense with the constitutional requirement of unanimity. Schad v. Arizona, 501 U.S. 624, 632, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (state criminal statute's disparate means of committing titled offense establish potential unanimity requirement).

2. THE DEFENDANT'S CONVICTION WAS NOT SUPPORTED BY A UNANIMOUS JURY VERDICT AS TO WHAT FACTUAL INCIDENT CONSTITUTED THE COUNT OF TAMPERING.

Where the State's tampering case against Mr. Russell offered evidence of multiple telephone calls and incidents of arguable

tampering, the jury must unanimously agree on one particular incident that constituted the crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Evidence of a single victim is not enough, in itself, to demonstrate one continuing offense. Petrich, 101 Wn.2d at 571. A continuing offense for these purposes is also generally one that does not stretch beyond a short period of time. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). Here, Mr. Russell's calls occurred over a period of weeks, stretching almost to months, from October 23 to December 7, 2007. 1/28/08RP at 82-86; 1/29/08RP at 89-95.

As detailed extensively in the Appellant's Opening Brief, the State cannot contend that this was a continuing course case in order to avoid the unanimity issue on appeal.

3. MS. PHILLIPS' TWO-CENTIMETER SCALP LACERATION WAS INSUFFICIENT TO PROVE THE ESSENTIAL ELEMENT OF "SUBSTANTIAL BODILY HARM" REQUIRED FOR CONVICTION ON THE CHARGE OF SECOND DEGREE ASSAULT (COUNT 1).

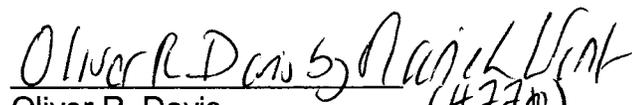
No Washington case states that a "laceration," much less a laceration of this small size, constitutes "substantial bodily harm." The injury to the complainant in this case was simply not deep enough to be a serious wound. It penetrated all layers of the skin,

but as the doctor testified, not through the "galea aponeurotica."b
1/29/08RP at 27. The laceration was not much more serious than a
deep abrasion, similar in nature to Ms. Phillips' lesser injuries, which
consisted of abrasions that were described by the medical witness
as a scrapes that are not a complete penetration to the layers of the
skin. 1/29/08RP at 26-27.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief,
Mr. Russell respectfully requests that this Court reverse his judgment
and sentence.

Respectfully submitted this 30th day of July, 2009.


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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 61379-1-I
v.)	
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TAIWANDRIC RUSSELL)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JULY, 2009.

x 

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