FILED
May 23, 2013
Court of Appeals
Division III
State of Washington

No. 30032-3-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KIMBERLY LYNN GRIJALVA,

Defendant/Appellant.

BRIEF OF APPELLANT

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1. The trial court erred in failing to dismiss the count of second degree theft as charged in the amended information for failure to charge a crime.

2. The trial court erred in entering Finding of Fact 12:

> Ms. Grijalva had knowledge that would leave [sic] a reasonable person in the same situation to know that passing the cell phone to Mr. George was against jail regulations.
>
> (CP 68).

3. The trial court erred in entering Finding of Fact 13:

> Ms. Grijalva told Corporal Rodriguez "I'm sorry I made a mistake". She told Sgt. Fernandez "I screwed up, I apologize, I wasn't thinking, I was trying to use the speaker phone." In November she told Deputy Peterschick "Oh God yes" when asked if she made a mistake in giving her cell phone to Mr. George. Therefore, Ms. Grijalva had knowledge that the cell phone was contraband and her action of giving the phone to Mr. George was prohibited.
>
> (CP 68-69).

4. The trial court erred in entering Finding of Fact 43:

> Ms. Grijalva encouraged and or aided Ms. Scribner and Ms. Scribner's boyfriends Mr. Cornell and Mr. McCord to circumvent the Yakima County Jail Phone policy resulting in a loss in excess of $750. These acts occurred in the State of Washington.
>
> (CP 73).

5. The trial court erred in entering Conclusion of Law 2:

> Objects become contraband when they are introduced into a secure facility. An object is introduced by piercing the imaginary line between interviewer and the inmate and placing the object into the inmate's possession.
>
> (CP 73).

6. The trial court erred in entering Conclusion of Law 3:

> Detention facilities are not obligated to create all inclusive lists of what items constitute contraband.
>
> (CP 73).

7. The trial court erred in entering Conclusion of Law 4:

> Cell phones are contraband if given to an inmate.
>
> (CP 73).

8. The trial court erred in entering Conclusion of Law 5:

> Attorneys can be expected to know that giving anything not allowed by the Yakima County Jail to an inmate is a violation of the law.
>
> (CP 73).

9. The trial court erred in entering Conclusion of Law 6:

> While Ms. Scribner used the free calls far more than Ms. Grijalva knew about does not avail her. Ms. Grijalva is legally responsible for all the calls as an accomplice.
>
> (CP 73).

10. The trial court erred in finding Ms. Grijalva guilty of second degree theft, where the evidence was insufficient.

11. The trial court erred in finding Ms. Grijalva guilty of third degree introducing contraband, where the evidence was insufficient.

12. The trial court erred in finding Ms. Grijalva had the means to pay the costs of incarceration and in ordering her to pay those costs as a condition of her sentence.

Issues Pertaining to the Assignments of Error

1. The State charged Ms. Grijalva with second degree theft of property. The amended information alleged that this property was "telephone services." Telephone services are not property. Was the amended information charging second degree theft constitutionally defective because it failed to charge a crime?

2. Attorneys practicing in Yakima County are entitled to set up a phone line where inmates in the Yakima County Jail can call them for free. The inmate phones at the Yakima County Jail are owned and serviced by a subcontractor. Ms. Grijalva followed the proper procedure to set up an attorney phone line for jail inmates. A person living in Ms. Grijalva's home used this phone line to receive free phone calls from inmates. Under these facts, was the evidence sufficient to support a finding that Ms. Grijalva wrongfully obtained or exerted unauthorized

control over "telephone services" belonging to Yakima County Department of Corrections, as required to find her guilty of second degree theft?

3. During a legal visit, Ms. Grijalva gave her cell phone to an inmate at the Yakima County Jail so that he could make a phone call. The Yakima County Department of Corrections policy detailing the items that professional visitors could provide to inmates did not include a prohibition on cell phones. Attorneys were routinely allowed to bring cell phones into the secure portion of the jail, as a professional courtesy. Under these facts, was the evidence sufficient to support a finding that the cell phone Ms. Grijalva gave to Mr. George was contraband, and that she acted unlawfully, as required to find her guilty of third degree introducing contraband?

4. Did the trial court abuse its discretion in finding Ms. Grijalva had the means to pay the costs of incarceration and in ordering her to pay those costs as a condition of her sentence, where there was no evidence to support that finding?

B. STATEMENT OF THE CASE

Kimberly Lynn Grijalva was an attorney practicing in Yakima County. (RP 597)[1]. From December 2009 through July 2010, Ms. Grijalva had a dependency contract with the Office of Public Defense (OPD). (RP 597-598). She also handled public defender cases in municipal court, juvenile court, and superior court, in addition to private criminal clients. (RP 603-607). Ms. Grijalva primarily worked from a home office, and had a business phone line there. (RP 601).

Attorneys practicing in Yakima County are entitled to set up a phone line where inmates in the Yakima County Jail can call for free, for the purpose of attorney-client conversations. (RP 117-118, 120-121). These phone calls are also unrecorded and not subject to a time limit. (RP 118). Access to this inmate attorney phone system is available to attorneys by contacting the Yakima County Department of Assigned Counsel. (RP 59, 116-120).

A company called Inmate Calling Solutions (ICS) installed the phone system at the Yakima County Jail. (RP 353-354). ICS is a subcontractor with Yakima County to provide this service. (RP 58, 64,

[1] The Report of Proceedings consists of one volume of reconstructed pretrial hearings, followed by five consecutively paginated volumes, containing the trial and sentencing. References to the RP herein refer to these five consecutively paginated volumes.

371-372). ICS owns the phones, and provides the technical support. (RP 58, 65-66, 355). None of the equipment is owned by Yakima County. (RP 65-66).

A jail inmate can make three types of call from these jail phones: a free call to their attorney, as described above; a collect call; or a prepaid call. (RP 357-361). The prepaid calls cost the recipient of the phone call $2.50 per fifteen minute call. (RP 60-62, 66, 366). ICS collects the money for prepaid phone calls. (RP 50, 58, 366-367). In accordance with their contract, ICS pays Yakima County 50 percent of the gross amount it receives for the prepaid phone calls, as a commission. (RP 50, 60, 367-368, 372).

In 2009, Ms. Grijalva sought access to the inmate attorney phone system, in order to receive free attorney calls from the Yakima County Jail. (RP 121-122, 131, 608-609). During the spring of 2010, the Yakima County Department of Assigned Counsel added Ms. Grijalva's home office number to this phone system. (RP 131-132, 609-612).

From January 2010 through July 2010, a woman named Autumn Hubbard[2] lived with Ms. Grijalva. (RP 183, 242, 600, 622-623). During this time Ms. Hubbard dated two men who were inmates in the Yakima

[2] Ms. Hubbard is also referred to in the record as Autumn Scribner. (RP 182, 600).

County Jail, Bradley McCord and Matthew Cornell. (RP 186, 191-192). Ms. Hubbard used Ms. Grijalva's home office number to receive free phone calls from both men while they were in jail. (RP 190-194, 287, 510, 536-537). Ms. Grijalva gave Ms. Hubbard a cell phone to use during this time, and some of these inmate phone calls were forwarded to Ms. Hubbard's cell phone. (RP 184, 193-196, 242, 619).

Between April 21, 2010 and June 4, 2010, there were 916 completed phone calls made from the Yakima County Jail to Ms. Grijalva's home office number. (RP 22-26, 240). Mr. McCord and Mr. Cornell made many of these phone calls. (RP 241).

On October 23, 2010, Ms. Grijalva visited Calvin George, an inmate in the Yakima County Jail, to discuss taking his case. (RP 673). Ms. Grijalva gave her cell phone to Mr. George, so he could speak to his mother about paying Ms. Grijalva. (RP 83-85, 674-675). After he finished speaking to his mother Mr. George returned the cell phone to Ms. Grijalva. (RP 90, 166, 675).

The State charged Ms. Grijalva by amended information with one count of second degree theft and one count of third degree introducing contraband. (CP 10). The one count of second degree theft was alleged as follows:

> On or about or between April 21, 2010 and June 4, 2010, in the State of Washington, acting as a principal or an accomplice, you or an accomplice wrongfully obtained and/or exerted unauthorized control over property, telephone services, of a value exceeding $750.00 but not more than $5,000.00, which was not a firearm or a motor vehicle, belonging to Yakima County Department of Corrections, with intent to deprive Yakima County Department of Corrections of that property.

(CP 10). Ms. Grijalva challenged this count of second degree theft, arguing that it should be dismissed for failure to properly charge a crime. (CP 21-22, 27; RP 445-466). The trial court declined. (RP 467-468).

Ms. Grijalva waived her right to a jury trial, and the trial court heard the case. (CP 11; RP 1-775).

Ms. Hubbard testified that Ms. Grijalva permitted her to use her home office number to receive phone calls from the jail. (RP 191, 244-245, 285-286, 289, 299). Ms. Grijalva testified in her own defense, and denied this claim. (RP 663, 665, 716-719).

Yakima County Department of Corrections Lieutenant Gordon Costello testified that the jail has policies, rules, and regulations regarding contraband. (RP 104). He told the court one place these are found is in the policy and procedure manual. (RP 104). Lieutenant Costello testified that the section of the manual defining contraband was revised to add cell phones to the definition, in response to the incident herein where Ms. Grijalva passed her cell phone to Mr. George. (RP 105-106).

Yakima County Department of Corrections Officer Theresa Schuknecht testified that the Yakima County Department of Corrections Policy in effect on October 23, 2010, stated the following:

> Professional visitors with contact room access may provide legal papers to inmates without staples or metal clips or binders. Stapled items may be left by permission of the staff on duty at the time. Professional visitors may not provide inmate with any other items, including but not limited to food, medications, books, magazines, letters from family members or witnesses, or pens or pencils except temporary use for signing documents or filling out forms.

(RP 45-46, 51-52; Def.'s Ex. 21).

Officer Schuknecht testified that the Yakima County Department of Corrections Policy, effective December 8, 2010, stated the following:

> Professional visitors with contact room access may provide legal papers to inmates without staples or metal clips or binders. Stapled items may be left by permission of the staff on duty at the time. Professional visitors may not provide inmate with any other items, including but not limited to food, medications, books, magazines, use of cell phones, letters from family members or witnesses, or pens or pencils except temporary use for signing documents or filling out forms.

(CP 44-48; RP 44-45, 51; Def.'s Ex. 2).

Officer Schuknecht testified that the only difference between the two versions of the policy was the addition of the prohibition on cell phones. (RP 52-53).

Yakima County Department of Corrections Chief Karen Kelley also testified to the revision in this Yakima County Department of Corrections Policy. (RP 314-316). Chief Kelley testified the prohibition on cell phones was added in response to the incident herein where Ms. Grijalva passed her cell phone to Mr. George. (RP 318).

Yakima County Jail Corporal Stacy Rodriguez told the court that a sign posted in the jail at the visitor's desk, "stat[es] that weapons, cell phones, lighters, purses are not allowed on the secure portion of the jail." (RP 89, 98). When asked if she has allowed professional visitors to carry a cell phone into a visiting room, Corporal Rodriguez responded:

> As far as attorneys and law enforcement - - as you know, I work the courts on occasion. Those are allowed in there as part of your job, as part of how you complete your tasks, so we don't interfere with that. And I consider that - - I consider that courtesy in addition when attorneys are visiting their clients. Some clients have more than one attorney. You may need to get a hold of a partner, you may need to get a hold of your firm.

(RP 89). Corporal Rodriguez told the court that allowing attorneys to go into the jail with their cell phones is a professional courtesy. (RP 97).

The trial court found Ms. Grijalva guilty as charged. (RP 837-854). The trial court entered findings of fact and conclusions of law on the bench trial. (CP 67-73).

As part of her sentence, the trial court found that Ms. Grijalva had the means to pay the costs of incarceration and ordered her to pay those costs. (CP 77; RP 875).

Mr. Grijalva appealed. (CP 81).

C. ARGUMENT

1. The amended information charging second degree theft was constitutionally defective because it failed to charge a crime, and must therefore be dismissed.[3]

The accused in a criminal case has a constitutional right to notice of the alleged crime the State intends to prove. Wash. Const. art. I, § 22 (stating "[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . ." ; *accord* U.S. Const. amend. VI. This notice is formally given in the information. *See* CrR 2.1(a)(1) (stating "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."). The information must allege every element of the charged offense. *State v. Vangerpen,* 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The law imposes this requirement so "that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense[.]" *State v. Leach,* 113 Wn.2d 679, 688, 782 P.2d 552

[3] Assignment of Error No. 1.

(1989). Failure to allege each element means that the information is insufficient to charge a crime, and so must be dismissed. *Vangerpen,* 125 Wn.2d at 788, 795.

The information must allege the particular facts supporting the elements of the crime. *State v. Nonog*, 169 Wash. 2d 220, 226, 237 P.3d 250 (2010) (citing *Leach,* 113 Wn.2d at 688). "The requirement is to charge in language that will 'apprise an accused person with reasonable certainty of the nature of the accusation.'" *Id.* at 226 (quoting Leach, 113 Wn.2d at 686).

If a criminal charge is so vague as to fail to state any offense whatsoever, the charge is constitutionally defective and subject to dismissal. *In re Richard,* 75 Wn.2d 208, 211, 449 P.2d 809 (1969). The defendant may bring a constitutional challenge to the information at any time before final judgment. *City of Seattle v. Jordan,* 134 Wash. 30, 34, 235 P. 6 (1925); *accord State v. Holt,* 104 Wn.2d 315, 321, 704 P.2d 1189 (1985).

Here, the amended information charging second degree theft was constitutionally defective because it failed to charge a crime. A person is guilty of second degree theft if she commits theft of "[p]roperty or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value . . . ." RCW 9A.56.040(1)(a). The

State charged Ms. Grijalva with theft of property. (CP 10). The amended information alleged that this property was "telephone services." (CP 10). However, clearly telephone *services* are not property. Therefore, the amended information charging second degree theft failed to charge a crime.

Interestingly, the State attempted to remedy its defective information during trial. The State moved to file a second amended information, removing the word "property" from the second degree theft charge. (RP 592-594). The State withdrew the amendment, after Ms. Grijalva objected to it as untimely. (RP 592-594, 776-779). However, even if the State had been allowed this second amendment, the information would have still been defective.

Theft of services is a separate category of theft, and the term "services" is defined by statute. *See* RCW 9A.56.020(1) (defining theft); *see also* RCW 9A.56.010(15) (defining services). The definition of "services" does not include telephone services. RCW 9A.56.010(15).[4] Further, the legislature has created the separate crime of theft of

[4] RCW 9A.56.010(15) provides: "'[s]ervices' includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water[.]"

telecommunication services. *See* RCW 9A.56.262. Therefore, "telephone services" do not fall under theft of services as well as theft of property, as incorrectly charged here. (CP 10). The fact that the legislature determined that this particular service should be charged as its own offense demonstrates that it was not the intent of the legislature to define "property, or other services" as telecommunication services.

In summation, the State failed to properly charge second degree theft by alleging that "telephone services" are property. Therefore, the second degree theft count should be dismissed. *See Vangerpen*, 125 Wn.2d at 795 (setting forth this remedy).

2. The evidence was insufficient to find Ms. Grijalva guilty as charged.[5]

When the sufficiency of the evidence is challenged following a bench trial, the court reviews the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings, and whether the findings support the conclusions. *State v. Homan*, 172 Wn. App. 488, 490, 290 P.3d 1041 (2012) (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). Challenges to conclusions of law are reviewed de novo. *Id*. (citing *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008)).

[5] Assignments of Error Nos. 2-11.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

a. <u>The trial court erred in finding Ms. Grijalva guilty of second degree theft, where the evidence was insufficient</u>.

A person is guilty of second degree theft if she commits theft of "[p]roperty or services which exceed(s) seven hundred fifty dollars in

value but does not exceed five thousand dollars in value . . . ." RCW 9A.56.040(1)(a). Theft means, in relevant part, "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]" RCW 9A.56.020(1)(a).

Here, the State alleged theft of property in the form of "telephone services" from the Yakima County Department of Corrections. (CP 10). However, the State did not prove that Ms. Grijalva wrongfully obtained or exerted unauthorized control over "telephone services" belonging to Yakima County Department of Corrections. *See* RCW 9A.56.020(1)(a), RCW 9A.56.040(1)(a). Ms. Grijalva followed the proper procedure and lawfully added her home office number to the inmate attorney phone system. (RP 121-122, 131-132, 608-612). As an attorney, Ms. Grijalva was authorized to use this phone service. (RP 59, 116-121). Furthermore, the Yakima County Department of Corrections does not own or service the inmate phones at the Yakima County Jail. (RP 58, 64-66, 353-355, 371-372). ICS owns and services the phones. (RP 58, 65-66, 355). ICS also receives all payments for use of the phones. (RP 50, 58, 366-367). Thus, the "telephone services" belong to ICS, not to the Yakima County Department of Corrections. The only property belonging to the Yakima County Department of Corrections under this phone system is a 50 percent

commission earned from completed, prepaid phone calls. (RP 50, 60, 367-368, 372).

Accordingly, at most, the State proved that Ms. Grijalva, as an accomplice, deprived the Yakima County Department of Corrections of commission money it would have received from inmate calls that should not have gone through the inmate attorney phone system. However, this is property in the form of U.S. currency, not property in the form of "telephone services" as alleged by the State. (CP 10).

Since there was insufficient evidence of second degree theft of "telephone services" from Yakima County Department of Corrections, the conviction should be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505.

b. <u>The trial court erred in finding Ms. Grijalva guilty of third degree introducing contraband, where the evidence was insufficient</u>.

A person is guilty of third degree introducing contraband if she "knowingly and unlawfully provides contraband to any person confined in a detention facility." RCW 9A.76.160(1). "Contraband" is defined as "any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation, or order of a court[.]" RCW 9A.76.010(1).

Here, Ms. Grijalva gave her cell phone to Yakima County Jail inmate Mr. George, on October 23, 2010. (RP 83-85, 673-675). However, on this date, a cell phone did not meet the statutory definition of contraband, as there was no rule expressly prohibiting obtaining or possessing a cell phone. *See* RCW 9A.76.010(1) (defining contraband). Attorneys were routinely allowed to bring cell phones into the secure portion of the jail, as a professional courtesy. (RP 89, 97-98). The Yakima County Department of Corrections policy detailing the items that professional visitors could provide to inmates did not include a prohibition on cell phones. (RP 45-46, 51-52; Def.'s Ex. 21). This policy was changed, effective December 8, 2010, to include a prohibition on cell phones. (CP 44-48, RP 44-45, 51; Def.'s Ex. 2). This change was made in response to Ms. Grijalva's actions, demonstrating the County's need to create a rule to address this issue. (RP 105-106, 318).

In addition to failing to meet the definition of contraband, there was also insufficient evidence that Ms. Grijalva acted unlawfully on the date in question. See RCW 9A.76.160(1) (defining third degree introducing contraband). Because there was no rule expressly prohibiting an inmate from obtaining or possessing a cell phone, Mr. Grijalva did not act unlawfully in allowing Mr. George to use her cell phone.

In summation, there was insufficient evidence of third degree introducing contraband, as charged here. There was insufficient evidence that a cell phone was contraband, and that Ms. Grijalva acted unlawfully. Therefore, this conviction should also be reversed and the charge dismissed with prejudice. *See Smith*, 155 Wn.2d at 505.

3. The trial court abused its discretion in finding Ms. Grijalva had the means to pay the costs of incarceration and in ordering her to pay those costs as a condition of her sentence, where there was no evidence to support that finding.[6]

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). The imposition of court costs is reviewed for an abuse of discretion. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ryan v. State*, 112 Wn.App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

[6] Assignment of Error No. 12.

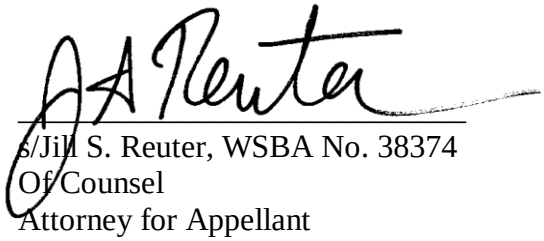
RCW 9.94A.760(2) authorizes the imposition of the costs of incarceration at the actual cost of incarceration per day, if incarcerated in a county jail. To impose such costs, the trial court must determine that the offender, at the time of sentencing, has the means to pay for the cost of incarceration. RCW 9.94A.760(2).

Here, this determination is preprinted in the judgment and sentence, as the trial court's finding and court-ordered sentencing condition. (CP 77). However, the trial court did not make any specific finding that Ms. Grijalva had the means to pay for the cost of incarceration, nor was there any evidence presented to support this fact. (RP 875). Because there was no evidence to support the general boilerplate finding and order in the judgment and sentence, both the finding and the order are based on untenable grounds. *See Ryan*, 112 Wn.App. at 899 (citing *Junker*, 79 Wn.2d at 26). Therefore, the Court abused its discretion and the sentencing condition should be stricken.

D. CONCLUSION

For the reasons stated, the convictions should be reversed and dismissed with prejudice, or in the alternative, the second degree theft count should be dismissed because the amended information was constitutionally defective. The sentencing condition imposing the cost of incarceration should also be stricken.

Respectfully submitted on May 23, 2013,



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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 23, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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