31215-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SHELLYE L. STARK, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Jill S. Reuter
Attorney for Appellant

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 9166
Spokane, WA 99209
(509) 838-8585

INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

STATUTES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting the public from entering or leaving the courtroom during closing arguments.

2. The trial court erred in permitting Detective Hollenbeck to offer an opinion as to Ms. Stark's guilt or veracity, and in not striking the testimony.

3. The trial court erred in requiring Ms. Stark to undergo an evaluation for treatment for mental health as a condition of community custody.

B. ISSUES

1. Prior to closing arguments, the trial court stated "I don't really want people coming or going during closings[.]" (RP 891). The trial court did not consider the five factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Did the trial court violate Ms. Stark's constitutional public trial right?

2. During the State's rebuttal case, Detective Hollenbeck, who interrogated Ms. Stark following the incident in question, testified that "Shellye Stark told me what she wanted me to hear and then the conversation was ended." (RP 786). The trial court overruled

defense counsel's objection and declined to strike this testimony. Was Detective Hollenbeck's testimony an impermissible opinion as to Ms. Stark's guilt or veracity?

3. The trial court ordered Ms. Stark to undergo an evaluation for treatment for mental health as a condition of community custody. This condition may be imposed only if the trial court complies with specific statutory procedures, which the trial court here did not do. Did the trial court err in requiring Ms. Stark to undergo an evaluation for treatment for mental health as a condition of community custody?

C. STATEMENT OF THE CASE

Shellye Stark married Dale Stark in 1984. (RP 464, 467). The first year of their marriage was happy, and Ms. Stark described Mr. Stark as very loving and caring. (RP 467, 474). However, on the night of their first wedding anniversary, Mr. Stark asked Ms. Stark to get a job in a massage parlor. (RP 469). When Ms. Stark refused, Mr. Stark became filled with rage, hit her, threw a chair and a table at her, and wrestled her to the ground. (RP 470-471). Mr. Stark pressed his knee into Ms. Stark's neck and she became unconscious. (RP 471-473). After this first assault, Ms. Stark became very afraid. (RP 472). She felt like he could kill her at any time. (RP 474). Ms. Stark estimated Mr.

Stark attacked her in this manner another 20 to 30 times during their marriage. (RP 481). Ms. Stark was hospitalized as a result of physical abuse by Mr. Stark. (RP 487-488, 508).

Ms. Stark worked in a massage parlor, a topless dancing bar, as a prostitute, and as a phone sex operator throughout their marriage, at the request of Mr. Stark. (RP 475-479, 492, 503, 513-516). Mr. Stark controlled the family finances, so Ms. Stark gave him her earnings, which he used to gamble. (RP 468, 477). Ms. Stark tried to hide money she earned from Mr. Stark, but she was unsuccessful. (RP 492-494).

Mr. and Ms. Stark's son, Christopher, was born in 1990. (RP 496). After Christopher was born, Mr. Stark told Ms. Stark he had control over her life and her son's life. (RP 490). Ms. Stark also had two daughters, who both died. (RP 496-501). Ms. Stark believed both children died because Mr. Stark sexually abused her with a vibrator when she was pregnant. (RP 497-501). She did not tell either of her doctors about the abuse. (RP 498, 502).

After previous discussions of divorce, Mr. and Ms. Stark drafted a divorce settlement agreement in the fall of 2007. (RP 512-513, 518-520). Although Ms. Stark felt the agreement was not fair and equitable, she felt that she had no other choice but to sign it if she wanted to obtain a divorce. (RP 531-532).

Ms. Stark decided to tell Mr. Stark she was going to hire an attorney and obtain a fair divorce settlement. (RP 534). In response, Mr. Stark threatened to

kill Ms. Stark and to hurt her family if she did not abide by the terms of their previous divorce settlement agreement. (RP 535-536).

Ms. Stark sought and obtained a temporary restraining order against Mr. Stark, on December 7, 2007. (RP 205-206, 211, 535, 537-538). Ms. Stark's sister, Karen Jacquetta, came to Spokane from northern Idaho to be with Ms. Stark. (RP 542-543). They mutually agreed that Ms. Jacquetta would bring a gun to Ms. Stark for her protection. (RP 280, 544-545). Ms. Stark also asked Ms. Jacquetta to serve Mr. Stark with the temporary restraining order, but she was unable to do so because she was involved in a car accident on her way to Spokane and was hospitalized. (RP 278-280, 542-543; 549-550). Ms. Jacquetta had two guns in her car that she was bringing to Ms. Stark. (RP 279-280). The guns were released to Ms. Jacquetta's son, Dale Johnson, at the accident scene. (RP 281, 284).

Mr. Johnson gave one of Ms. Jacquetta's guns to Ms. Stark. (RP 285). As a result of Ms. Jacquetta's hospitalization, Ms. Stark asked Mr. Johnson to serve Mr. Stark with the temporary restraining order. (RP 282-283, 285, 287, 549). Mr. Stark was out of town at the time, but he was expected to return home on the morning of December 9, 2007. (RP 288, 318, 550).

On the evening of December 8, 2007, Ms. Stark, her son, Christopher Stark, and Mr. Johnson were at Mr. and Ms. Stark's home. (RP 288, 320, 551, 553). Ms. Stark asked Mr. Johnson to serve Mr. Stark with the temporary

restraining order out in front of the house, when Mr. Stark came home. (RP 285, 549). Ms. Stark expected to see Mr. Stark's headlights or to hear the dog barking to alert them that he had arrived home, so Mr. Johnson could serve Mr. Stark before he came inside. (RP 321, 549, 554).

However, Mr. Stark arrived home and came right inside the house. (RP 292, 305, 321, 554). Mr. Johnson handed Mr. Stark the temporary restraining order. (RP 293-294, 322, 555). Mr. Stark became angry and asked Christopher Stark if he knew about this. (RP 293-294, 322, 555). Ms. Stark told everyone to leave the house, and Christopher Stark and Mr. Johnson left. (RP 294, 322-323, 555-556).

Mr. Stark was very upset and started charging at Ms. Stark. (RP 557). He told Ms. Stark he was going to kill her. (RP 557). Ms. Stark had the gun behind her back. (RP 557). Ms. Stark was afraid that Mr. Stark was going to kill her, with his hands, a knife, or her gun. (RP 561). As Mr. Stark charged her, he looked at a knife that was sitting on the counter, and Ms. Stark shot him. (RP 558-559, 598-600). Mr. Stark went to grab the knife, and Ms. Stark shot again. (RP 560, 598, 600). After three shots, Mr. Stark kneeled to the ground. (RP 560-561). Ms. Stark then tried to get past Mr. Stark in order to leave the house, but he started kicking her. (RP 561). She shot him several more times. (RP 561). Ms. Stark then called 911. (RP 564-565). Mr. Stark died, and the cause of death was determined to be multiple gunshot wounds. (RP 371).

Responding officers found the temporary restraining order near Mr. Stark's body. (RP 150). The officers also found the gun on the kitchen floor and a knife on the kitchen counter. (RP 149-151, 237-238). Ms. Stark was detained following the shooting and interrogated at the Spokane Police Department by Detective Kip Hollenbeck. (RP 79-87, 166-170).

The State charged Ms. Stark with first degree murder, with the date of the crime as December 9, 2007.[1] (CP 1-3, 42-43). The State also alleged that Ms. Stark was armed with a firearm at the time the crime was committed. (CP 1-3, 42-43).

Ms. Stark was tried and convicted in 2009, and her conviction was overturned on appeal in 2010. (CP 7-35). A second jury trial was held in September 2012. (RP 126-965). Ms. Stark testified in her own defense, consistent with the facts stated above. (RP 460-632). Ms. Stark asserted self-defense, and the trial court instructed the jury on justifiable homicide. (CP 364-367).

Detective Hollenbeck testified regarding what Ms. Stark told him during his interrogation of her on the night of the shooting. (RP 166-171, 181-182). Ms. Stark relayed the sequence of events during the shooting. (RP 166-171, 181-182).

---

[1] The State also charged Ms. Stark with one count of conspiracy to commit first degree murder. (CP 1-3, 42-43). Ms. Stark was acquitted of this charge after her second jury trial. (CP 374; RP 969).

Christopher Stark testified that Mr. and Ms. Stark argued quite frequently. (RP 314, 639). He testified that during Mr. Stark's "spells" he would instantly leave the situation, and that he did not witness Mr. Stark hit Ms. Stark. (RP 314-315, 332, 637-639). Christopher Stark stated that Mr. Stark threw things. (RP 315, 634-637, 639). He testified that "[w]henever he would get into an anger fit, I would be afraid of my father." (RP 638). He stated that he thought his father was capable of doing drastic things. (RP 320, 634). He told the court that on the night of the incident, Mr. Stark's expression changed from surprise to anger. (RP 331-332).

Licensed psychologist Dr. Paul M. Wert testified for Ms. Stark. (RP 647-663). Dr. Wert interviewed and tested Ms. Stark. (RP 649). He testified that based on the history of abuse Ms. Stark endured, she suffers from symptoms of post-traumatic stress disorder and also has symptoms compatible with battered woman's syndrome. (RP 650). Dr. Wert testified that in his opinion, as a result of these two conditions, Ms. Stark was extremely fearful of Mr. Stark. (RP 659).

During the State's rebuttal case, forensic psychologist Dr. Nathan Henry testified regarding his evaluation of Ms. Stark. (RP 711-747). He testified he also diagnosed Ms. Stark with post-traumatic stress disorder. (RP 719-720, 736). Dr. Henry testified that he did not specifically evaluate Ms. Stark for battered woman's syndrome because it is not technically a Diagnostic and Statistical Manual (DSM) diagnosis. (RP 718). He testified that in his opinion, Ms. Stark

had the capacity for premeditation and the capacity for the intent to commit the alleged crime. (RP 733-734, 743-745).

Also during the State's rebuttal case, defense counsel asked Detective Hollenbeck whether his interrogation of Ms. Stark on the night of the crime "stopped rather abruptly[.]" (RP 786). Detective Hollenbeck testified "Shellye Stark told me what she wanted me to hear and then the conversation was ended." (RP 786). Defense counsel objected, arguing the testimony was an opinion, and asked that it be stricken. (RP 786). The trial court overruled the objection and did not strike the testimony. (RP 786).

Prior to closing arguments, the trial court stated:

> I ask all the spectators, I don't really want people coming or going during closings, so if you don't think you can last the morning, you might want to rethink being in here, unless you really need to. It's just very disruptive.

(RP 891).

The jury found Ms. Stark guilty of first degree murder. (CP 372; RP 969). The jury also returned a special verdict, finding that Ms. Stark was armed with a firearm at the time the crime was committed. (CP 373; RP 969).

The trial court ordered Ms. Stark to undergo an evaluation for treatment for mental health, as a condition of community custody. (CP 469; RP 1019). Dr. Henry's report was considered by the trial court at sentencing, and made part of

the record. (CP 416-417, 445-463). The report indicates a competency evaluation of Ms. Stark was not requested. (CP 448).

Ms. Stark appealed. (CP 475-492).

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MS. STARK'S CONSTITUTIONAL PUBLIC TRIAL RIGHT BY PROHIBITING THE PUBLIC FROM ENTERING OR LEAVING THE COURTROOM DURING CLOSING ARGUMENTS, WITHOUT CONSIDERING THE FACTORS SET FORTH IN *BONE-CLUB*.

Whether a defendant's constitutional public trial right has been violated is reviewed *de novo*. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (*citing State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)). A defendant may raise the issue for the first time on appeal. *Id*.

Both the federal and Washington State constitutions provide that a defendant has a right to a public trial. *Id;* (*citing* Wash. Const. art. I, § 22; U.S. Const. amend VI). This right to a public trial is not absolute. *Id*. (*citing State v. Bone-Club*, 128 Wn.2d at 259). "In *Bone-Club*, this court enumerated five criteria that a trial court must consider on the record in order to close trial proceedings to the public." *Id.* at 10 (*citing Bone-Club*, 128 Wn.2d at 258-59). The five criteria are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

"A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public." *Wise*, 176 Wn.2d at 12 (emphasis in original); *see also State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

"[U]nless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." *Id*. at 14; *see also Paumier*, 176 Wn.2d at 35-37. A defendant is not required to prove prejudice when his constitutional public trial right is violated. *Paumier*, 176 Wn.2d at 37 (*citing Wise*, 176 Wn.2d at 14). The violation of the constitutional right to a public trial is not subject to harmless error analysis. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 316 (2009) (*quoting Easterling*, 157 Wn.2d at 181). The remedy for a

violation of the constitutional public trial right is a new trial. *Wise*, 176 Wn.2d at 15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

The trial court closed the courtroom by prohibiting the public from entering or leaving the courtroom during closing arguments. (RP 891); *see also State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (stating that closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.") (*quoting State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Although the record contains no other discussion of the courtroom closure, "[o]n appeal, a defendant claiming a violation to the public trial right is not required to prove that the trial court's order has been carried out." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (*citing In re Personal Restraint of Orange*, 152 Wn.2d 795, 813-14, 100 P.3d 291 (2004)). "[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed. *Id*. at 516. The State cannot overcome the presumption that a closure occurred here. The trial court's ruling prohibited the public from entering the courtroom once closing arguments began. (RP 891).

The trial court did not consider the *Bone-Club* factors before closing the trial to the public. *See Bone-Club*, 128 Wn.2d at 258-59. Therefore, Ms. Stark's constitutional right to a public trial was violated. *See Wise*, 176 Wn.2d at 14;

Paumier, 176 Wn.2d at 35-37. This is a structural error, and the remedy is a new trial. *See Wise*, 176 Wn.2d at 14-15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

2. DETECTIVE HOLLENBECK GAVE IMPERMISSIBLE OPINION TESTIMONY AS TO MS. STARK'S GUILT OR VERACITY DURING THE STATE'S REBUTTAL CASE.

In general, a witness may not offer opinion testimony regarding the guilt or veracity of the defendant. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *see also State v. Rafay*¸ 168 Wn. App. 734, 805, 285 P.3d 83 (2012). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *Id*. "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Id*.

"To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *Rafay*, 168 Wn. App. at 805-06 (*citing State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)). "Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928-29 (*citing State v. Demery*,

144 Wn.2d 753, 765, 30 P.3d 1270 (2001)); *see also State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). However, "testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt." *Rafay*, 168 Wn. App. at 806.

Detective Hollenbeck's testimony was an impermissible opinion regarding Ms. Stark's guilt or veracity. *See Kirkman*, 159 Wn.2d at 927; *Rafay*, 168 Wn. App. at 805. Detective Hollenbeck testified "Shellye Stark told me what she wanted me to hear and then the conversation was ended." (RP 786). Because Ms. Stark had told him the sequence of events during the shooting, Detective Hollenbeck essentially testified that Ms. Stark's self-defense claim was fabricated. (RP 166-171, 181-182). This was a direct comment on Ms. Stark's guilt or veracity. *Cf. Rafay*, 168 Wn. App. at 807-08 (comments referred to the defendants' behavior, rather than their guilt or veracity).

Improper opinions on guilt are subject to a constitutional harmless error analysis. *State v. Hudson*, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009); *see also State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (stating the constitutional harmless error analysis). Thus, the error is presumed prejudicial, and it is the State's burden to prove "beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." *Id.* at 656.

Admitting Detective Hollenbeck's improper opinion testimony was not harmless beyond a reasonable doubt. The central issue in the case was whether the jury believed Ms. Stark's rendition of the facts. *See Hudson*, 150 Wn. App. at 656 (declining to find harmless error, where the case turned on whether the jury believed the defendant or the victim). Detective Hollenbeck essentially testified that Ms. Stark's self-defense claim was fabricated, by stating that "Shellye Stark told me what she wanted me to hear . . . ." (RP 786). The error went to the heart of Ms. Stark's defense. This court should reverse Ms. Stark's conviction and remand for a new trial.

3. THE TRIAL COURT ERRED IN REQUIRING MS. STARK TO UNDERGO AN EVALUATION FOR TREATMENT FOR MENTAL HEALTH AS A CONDITION OF COMMUNITY CUSTODY.

The trial court ordered Ms. Stark to undergo an evaluation for treatment for mental health, as a condition of community custody. (CP 469; RP 1019). 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)). Whether the trial court exceeded its statutory authority in imposing a community custody condition is subject to *de novo* review. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Former RCW 9.94A.505(9) (2002), recodified as RCW 9.94B.080, allows a trial court to order mental health treatment as a condition of community custody if the court complies with specific statutory procedures. *See* former RCW 9.94A.505(9) (2002), RCW 9.94B.080; *see also State v. Brooks*, 142 Wn. App. 842, 849-852, 176 P.3d 549 (2008). Under this statute:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

Former RCW 9.94A.505(9) (2002); *see also* RCW 9.94B.080 (stating the same).

Thus, for a trial court to order mental health treatment as a condition of community custody, the court must find, "based on a presentence report and any applicable mental status evaluation, that the offender suffers from a mental illness which influenced the crime." *State v. Jones*, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

Here, the trial court did not obtain or consider a presentence report at sentencing, nor did it consider any applicable mental status evaluations. (RP 979-1022). Although Dr. Henry's report was considered by the trial court at

sentencing and made part of the record, the report indicates a competency evaluation of Ms. Stark was not requested. (CP 416-417, 445-463). The trial court also did not make the statutorily mandated finding that Ms. Stark was a "mentally ill person" as defined by RCW 71.24.025, and that this mental illness influenced the crime for which she was convicted. *See* former RCW 9.94A.505(9) (2002), RCW 9.94B.080.

Because it did not follow the specific statutory procedures, the trial court did not have the authority to order that Ms. Stark undergo an evaluation for treatment for mental health, as a condition of community custody. *See Jones*, 118 Wn. App. at 202, 208-09; *Brooks*, 142 Wn. App. at 849-852. This court should remand this case with an order that the trial court strike the offending community custody condition. *See State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

E. CONCLUSION

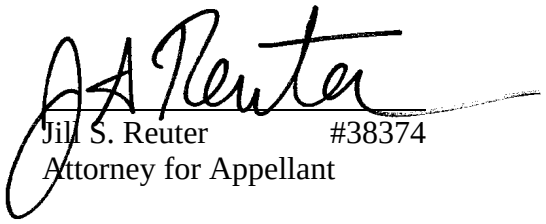
The case should be reversed and remanded for a new trial, because the trial court violated Ms. Stark's constitutional public trial right by prohibiting the public from entering the courtroom during closing arguments, without considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d at 258-59.

The case should also be reversed and remanded for a new trial because of the impermissible opinion testimony of Detective Hollenbeck regarding Ms. Stark's guilt or veracity.

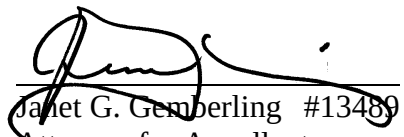
Finally, the trial court should remand this case with an order to strike the community custody condition requiring that Ms. Stark undergo an evaluation for treatment for mental health.

Dated this 17th day of June, 2013.

JANET GEMBERLING, P.S.



Jill S. Reuter #38374
Attorney for Appellant



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31215-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
SHELLYE L. STARK,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on June 17, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
kowens@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on June 17, 2013, I mailed a copy of the Appellant's Brief in this matter to:

Shellye L. Stark
#330491
Washington Correction Center for Women
9601 Bujacich Rd NW
Gig Harbor WA 98332

Signed at Spokane, Washington on June 17, 2013.

Jill Reuter
Attorney at Law