NO. 44952-8

**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ARNOLD BRIONES FLORES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy

No. 12-1-03352-0

# BRIEF OF RESPONDENT

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**Table of Contents**

## Table of Authorities

### State Cases

## Federal And Other Jurisdictions



## Statutes



## Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State present sufficient evidence to convince a rational finder of fact that he was guilty of kidnapping and unlawful imprisonment and that he was armed with a deadly weapon?

2. Should this case be remanded only to correct a scrivener's error contained within the judgment and sentence?

B. STATEMENT OF THE CASE.

1. Procedure

On September 4, 2012, the State charged ARNOLD BRIONES FLORES, hereinafter "defendant," with one count of assault in the second degree, and eleven counts of unlawful imprisonment. CP 1-5. The assault charge and one of the unlawful imprisonment charges were alleged to be domestic violence offenses. CP 1-5. Also, the assault charge was alleged to have occurred while defendant was armed with a deadly weapon, to-wit: a box cutter. CP 1-5.

On January 30, 2013, the State filed an amended information, alleging that Count I (assault in the second degree) was committed while defendant was armed with a deadly weapon, an act of domestic violence, and that the offense was part of an ongoing pattern of abuse, occurred

within sight or sound of the victim's or offender's minor children, or manifested deliberate cruelty, and that defendant committed multiple current offenses which would result in some current offenses going unpunished. CP 18-26. The amended information also changed Count II from unlawful imprisonment of defendant's family member to one charge of kidnapping in the first degree, with the same aggravators as alleged in Count I. CP 18-26. The amended information added a deadly weapon enhancement and multiple current offenses enhancement to Counts III through XII, unlawful imprisonment relating to various victims. CP 18-26.

Trial commenced April 4, 2013, before the Honorable John A. McCarthy. RP 1. Prior to empanelling a jury, the parties held a CrR 3.5 hearing to determine whether defendant's statements to law enforcement were admissible. RP 25. Law enforcement conducted their first interview with defendant while he was in the hospital recovering from gunshot wounds. RP 35-76. The court concluded that defendant's statements to law enforcement were admissible. RP 76. The court also determined that a prior assault by defendant against the same victim was inadmissible under ER 404(b). RP 103.

The jury began hearing testimony on April 9, 2013. RP 104. Prior to resting, the State moved to dismiss Count V, which was the unlawful imprisonment charge relating to David Ohls. RP 576. Defendant did not object and the court dismissed the charge. RP 576-77.

After the State's case-in-chief, defendant moved to dismiss Counts II through XII, as well as the aggravators alleged for Counts I and II for insufficient evidence. RP 580-86. The court denied defendant's motion to dismiss Count II, finding, in the light most favorable to the State, that there had been sufficient evidence presented to support a reasonable inference that defendant abducted Ms. Flores by using or threatening to use deadly force. RP 595-96. The court then considered all of the testimony by the witnesses and determined that defendant could not knowingly restraint individuals he did not interact with. RP 599-605. Initially, the court dismissed all of the counts of unlawful imprisonment except those relating to Kelly Flynn (Count VIII) and Alyssa Luthor (Count XII). RP 605. The State objected, arguing that defendant had knowledge of all of the people he could see within the building, not just the people he had direct interaction with. RP 607-08. The court reconsidered and reversed its ruling with regard to Counts III, IV, VI, and VII because the victims of those counts were in the same room as defendant at the beginning of the situation. RP 613-14. The court also dismissed the deadly weapon allegations for the unlawful imprisonment charges. RP 615. During the discussion of jury instructions, the State withdrew the deliberate cruelty aggravator. RP 655.

On April 16, 2013, the jury found defendant guilty as charged. RP 710-11. The jury also found that defendant and Ms. Flores were family or household members, that defendant was armed with a deadly weapon

during the commission of assault in the second degree and kidnapping in the first degree. RP 711-12.

On May 31, 2013, the parties held a sentencing hearing where defendant argued that assault in the second degree and kidnapping in the first degree encompassed the same criminal conduct. RP 3-4. The court denied defendant's request and found that the crimes did not encompass the same criminal conduct. RP 12. During his allocution with the court, defendant blamed the victim for the situation. RP 21-24. The court sentenced defendant to a mid-range sentence of 175 months on Count II, plus a 24-month deadly weapon enhancement. RP 26. The court also imposed a high-end sentence of 84 months on Count I, together with a 12-month deadly weapon enhancement, and 43 months on the remaining counts, for a total sentence of 223 months in custody. RP 26. The court also imposed standard fines and conditions of release, as well as no contact orders with all victims. RP 27. Because defendant refused to sign the advisement of rights form, the court notified defendant of his right to appeal in open court. RP 28-29.

2. Facts

On August 25, 2012, defendant arranged to meet his estranged wife, Yonhee Flores, at the Washington State Employees Credit Union in Lakewood, Washington, in order to deal with an issue with their truck's title. RP 114. Ms. Yonhee arrived at the bank first and spoke with one of the employees, Kelly Flynn. RP 115, 419-20. When defendant arrived,

Ms. Flynn advised them to speak with the Department of Licensing regarding the issue. RP 120, 423. After Ms. Flynn went back toward her desk, defendant charged Ms. Flores and pushed her against a window. RP 120-21.

Defendant held Ms. Flores against the window and held an open box cutter to her cheek. RP 121-22. Defendant used the box cutter to slice Ms. Flores' face. RP 123-24. Defendant and Ms. Flores fell to the ground, where he proceeded to choke her. RP 125. When defendant pulled Ms. Flores back to her feet, she saw he had a gun in his hand. RP 126-27. Defendant dropped the box cutter onto a chair where he and Ms. Flores had been sitting prior to his attack. RP 291; Exhibit 15.

Over the course of 20 to 30 minutes, defendant pulled Ms. Flores around the lobby of the bank while he yelled at her to "tell [him] the truth." RP 127. Washington State Employees Credit Union staff heard defendant shouting to Ms. Flores that it was "all [her] fault," and that he was going to kill himself. RP 342, 393, 470-71. Credit union customers Brielle Eldridge and Stephanie Crockett also heard defendant telling Ms. Flores that it was her fault and that she would watch defendant kill himself. RP 497, 501, 557.

Employees of the credit union called 9-1-1 to report the situation. RP 334, 358, 401, 424. When police arrived, they took up positions outside the building's front entrance, but an employee who had escaped the building was able to lead an officer in by a side door. RP 162-63; 453.

When he was inside, Officer Sivankeo heard defendant state, "they are going to have to kill me." RP 166.

Defendant eventually moved Ms. Flores to the building's vestibule. RP 129, 246, 440. Officer Osness could see defendant and Ms. Flores inside the vestibule. RP 453. He saw defendant let go of Ms. Flores' hand and raise the gun toward her. RP 458. He and Officer Kolp fired their rifles into the vestibule and both hit defendant. RP 458. When defendant fell to the ground, Ms. Flores came out of the building, screaming. RP 459.

Officer Sivankeo heard the shots fired from inside the building and moved to the lobby. RP 169. He saw defendant lying face down in the vestibule with a handgun lying a couple of feet away. RP 169. The gun appeared to be real, and it was not until much later in the investigation that Officer Sivankeo discovered it was actually a BB gun. RP 172, 182-83. The BB gun was a replica of a Colt Defender firearm. RP 294, 296.

Lakewood Police Sergeant Richard Hall interviewed defendant at the hospital on August 31, 2012. RP 218. Prior to the interview, Sergeant Hall met with defendant's surgeon, who informed him that defendant was able and willing to speak to law enforcement. RP 220. Sergeant Hall verified that defendant was lucid and able to speak by asking him basic questions which were unrelated to the case. RP 221. He also read defendant Miranda warnings and ensured defendant understood the warnings by requiring him to repeat them back in his own words. RP 222.

Defendant initially expressed his anger with the officers for the fact that they did not kill him. RP 223. He admitted he planned the incident the day before it happened. RP 226. He purchased the BB gun from a Big 5 sporting goods store and took it to the bank so the police would shoot him. RP 226. He knew what he did was wrong and that other customers and employees of the credit union would be scared when he pulled out the gun. RP 227-28. He also admitted that he pushed Ms. Flores and cut her with a box cutter. RP 225. He stated he cut Ms. Flores with the box cutter because he was frustrated and wanted her to bleed and feel the way he did. RP 225.

Defendant testified on his own behalf. RP 617. According to defendant, he remembered nothing about the incident. RP 617-18. Later, defendant admitted purchasing the gun and his intent that people believe it was a real gun, but claimed not to remember when he purchased it. RP 620, 624. Defendant initially testified that his purpose to going to the bank was to have the encounter end with him being shot by the police, but later testified that his purpose was to resolve an issue with the title of the truck. RP 623, 626-27. Defendant claimed that it "became apparent" during the incident that his intent was to be shot by police. RP 627. Defendant could not decide whether he planned the incident or not. RP 627. Defendant also had no recollection of speaking to the officers at the hospital. RP 632. Defendant did conclude that the entire incident was Ms. Flores' fault. RP 633.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO CONVINCE A RATIONAL FACT FINDER THAT DEFENDANT WAS GUILTY OF KIDNAPPING AND UNLAWFUL IMPRISIONMENT AND THAT DEFENDANT WAS ARMED WITH A DEADLY WEAPON DURING THE KIDNAPPING.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing* ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing* ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

***State v. Cord***, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Unchallenged findings of fact are verities on appeal. ***State v. Ross***, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016, 41 P.3d 483 (2002).

a. The State presented sufficient evidence to convince a rational fact finder that defendant was guilty of kidnapping in the first degree.

To convict defendant of kidnapping in the first degree, the State was required to prove, beyond a reasonable doubt:

1) That on or about August 25, 2012, the defendant intentionally abducted Yonhee Flores,

2) That the defendant abducted that person with intent
a) to hold the person as a shield or hostage, or
b) to inflict extreme mental distress on that person; and

3) That any of these acts occurred in the State of Washington.

CP 55-88 (Jury Instruction 14); RCW 9A.40.020. "Abduct" means to restrain a person by using or threatening to use deadly force. CP 55-88 (Jury Instruction 13). "Restraint" or "restrain" means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty. CP 55-88 (Jury Instruction 13). A threat to use deadly force which is disbelieved by the intended victim is still a threat within the meaning of RCW 9A.40.020. ***State v. Majors***, 82 Wn. App. 843, 847, 919 P.2d 1258 (1996).

Here, elements one and three are not in dispute. Defendant claims that there is no evidence that defendant abducted Ms. Flores because there was no threat to use deadly force against her. Appellant's Brief at 15. However, during the course of the kidnapping, defendant had had ready access to the box cutter even after he dropped it onto a nearby chair, he

choked Ms. Flores, and he displayed an exact replica of a functional firearm. RP 123-24, 125, 126-27, 291, 294, 296. The jury could reasonably infer that defendant restrained Ms. Flores by threatening to use deadly force.

Moreover, defendant's argument that defendant did not threaten Ms. Flores with deadly force because she did not believe he intended to kill her is not only irrelevant, but misconstrues the evidence. It is irrelevant because the victim need not believe the threat. It misconstrues the evidence because, while Ms. Flores eventually concluded that defendant did not want to kill her, at the beginning of the incident she testified that she was in shock and had never seen such an "evil" look on defendant's face before. RP 122, 144. She understood that defendant's goal was suicide only when he told her he was going to see her dead father. RP 147. It was not until mid-way through the incident that she understood that defendant was not going to kill her. RP 149. Hence, it was reasonable to infer that, when defendant abducted her, Ms. Flores did not know that defendant was not going to kill her.

b. The State presented sufficient evidence to convince a rational fact finder that defendant was guilty of unlawful imprisonment where he knowingly restrained people within the bank.

A person is guilty of unlawful imprisonment if he or she knowingly restrains another person. RCW 9A.40.040(1). To convict defendant of unlawful imprisonment, the State was required to prove:

1) That on or about August 25, 2012, the defendant restrained the movements of [victim] in a manner that substantially interfered with her liberty;

2) That such restraint was
a) without [victim]'s consent or
b) accomplished by physical force, intimidation, or deception; and

3) That such restraint was without legal authority;

4) That, with regard to elements (1), (2), and (3), the defendant acted knowingly; and

5) That any of these acts occurred in the State of Washington.

CP 55-88 (Jury Instruction 20, 21, 22, 23, 24, 25).

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 55-88 (Jury Instruction 8); *see also* RCW 9A.08.010(1)(b).

Here, defendant claims that the State did not provide sufficient evidence to prove that defendant knowingly restrained any person in the bank other than Ms. Flores. *See* Opening Brief of Appellant at 17-20.

Yet, taken in the light most favorable to the State, the evidence provides a reasonable inference that defendant was aware of the people in the bank, and that a reasonable person would have known that those people would not have felt free to leave when he started waving a gun.

According to the testimony of Anne Jones, a customer at the bank, when defendant pulled out a gun, he yelled, "you need to call the police." RP 194. Ms. Jones also testified that defendant was looking at her and the bank tellers when he was yelling. RP 195. Ms. Jones quickly left the bank, but on her way out, she saw other bank employees at their desks. RP 195. Ms. Jones' testimony is sufficient for the jury to conclude that defendant knew that the bank tellers were present.

Alyssa Luthor testified that she was with Hope Figueroa when Ms. Figueroa confronted defendant after his initial attack on Ms. Flores. RP 373, 375. Ms. Luthor testified that defendant told her to call the police and pointed the gun at her to indicate that he was talking to her. RP 375, 377. When defendant turned back to Ms. Flores, Ms. Luthor heard him say, "everybody get down." RP 380. Ms. Luthor's testimony supports a reasonable inference that defendant was aware of her presence, as well as the presence of other people when he said "everybody." Moreover, defendant's order for everybody to get down, while brandishing what appeared to be a firearm, certainly supports a reasonable inference that defendant was restraining "everybody" through intimidation.

Kelly Flynn was the bank employee who assisted defendant prior to the assault. RP 423. Despite her later movement to the bank's vault, defendant was aware of Ms. Flynn's presence within the bank prior to his display of the gun. It was reasonable to infer that defendant knew she was in the bank and that his actions would make her believe she was not free to leave.

Finally, defendant admitted setting up the meeting with Ms. Flores at the bank and that he went to the bank with what he intended everyone to believe was a gun. RP 619, 624. While he attempted to downplay his knowledge, he admitted that he intended for the police to kill him by the end of the encounter. RP 623, 627. It is reasonable to infer that defendant chose to go to a bank during normal business hours because he knew that bank employees and customers would be present and that the police would take his threats seriously.

Defendant went to a bank during normal business hours and was aware of the presence of bank employees and customers. He also intended for every person in the bank to believe he had a firearm. A reasonable person in defendant's position would have known that the bank's employees and customers would not have felt free to leave when an angry man began waving a gun around and ordered them to call the police.

c. The State presented sufficient evidence for the jury to conclude that Ms. Flynn was under restraint.

In order for restraint to be substantial, there must be a real or material interference with another's liberty, not merely a petty annoyance, a slight inconvenience, or an imaginary conflict. ***State v. Robinson***, 20 Wn. App. 882, 884, 582 P.2d 580 (1978) (finding that grabbing a girl by the arm and attempting to pull her into a car was sufficient restraint to constitute unlawful imprisonment), aff'd, 92 Wn.2d 357 (1979). The presence of a means of escape may help to defeat a prosecution for unlawful imprisonment unless "the known means of escape ... present[s] a danger or more than a mere inconvenience." ***State v. Kinchen***, 92 Wn. App. 442, 452 n. 16, 963 P.2d 928 (1998).

In ***Kinchen***, the court found that two children were not under restraint despite being left alone in an apartment where the boys could and did get out. 92 Wn. App. at 451-52. Conversely, the court has upheld an unlawful imprisonment conviction where the victim could move about an apartment but could not leave or get help because the defendant physically threatened the victim and her mother. ***State v. Davis***, 133 Wn. App. 415, 425, 138 P.3d 132 (2006), *rev'd on other grounds*, 163 Wn.2d 606, 184 P.3d 639 (2008).

Here, defendant claims that Kelly Flynn was not restrained because she had a means of escape. However, Ms. Flynn testified that she did not use the back door out of the bank because the door makes a sound as it opens and she did not want to draw attention. RP 426-27. That one of her coworkers decided to take the risk associated with drawing the attention of an armed assailant does not negate the danger. Ms. Flynn's testimony was sufficient for the jury to find that she was under restraint.

d. The State presented sufficient evidence for the jury to conclude that defendant was armed with a deadly weapon during the kidnapping of Ms. Flores.

For the purposes of a special verdict, 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." RCW 9.94A.825; *see also* CP 55-88 (Jury Instruction 28). "Relevant to this determination are the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied and the injuries inflicted." ***State v. Zumwalt***, 79 Wn. App. 124, 130, 901 P.2d 319 (1995), *overruled in part on other grounds by* ***State v. Bisson***, 156 Wn.2d 507, 130 P.3d 820 (2006); *see also* CP 55-88 (Jury Instruction 28). Additionally, there must be a nexus between the weapon and the defendant, and between the weapon and the crime. ***State v. Schelin***, 147 Wn.2d 562, 568, 55 P.3d 632 (2002).

Here, defendant had the present ability to use the box cutter during the course of the kidnapping. Defendant had already used the weapon during his assault of Ms. Flores when he held it to her neck and cut her. Despite dropping the box cutter in favor of the gun, defendant still had ready access to the weapon as it sat on a nearby chair. Defendant had already shown not only a willingness to use it but also how it could be used if Ms. Flores was uncooperative. This evidence established a nexus between defendant and the weapon, and also between the weapon and the crime.

Despite defendant's assertion that he was not armed with the box cutter, he cannot cite to any authority that a person is no longer armed with a deadly weapon merely because he puts the weapon down during the course of a crime. The evidence here was sufficient for the jury to find that defendant was armed with a deadly weapon during the commission of kidnapping.

2. AS THERE WAS NO EVIDENCE PRESENTED THAT DEFENDANT COMMITTED ANY OF HIS CRIMES AGAINST A MINOR, THE CASE SHOULD BE REMANDED TO CORRECT A SCRIVENER'S ERROR ON THE JUDGMENT AND SENTENCE BUT REMAND FOR ENTRY OF A WRITTEN ORDER DOCUMENTING THE DISMISSAL OF SOME CHARGES IS UNWARRANTED BECAUSE A WRITTEN ORDER IS NOT REQUIRED.

A defendant may challenge an erroneous sentence for the first time on appeal. ***State v. Bahl***, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

a. Defendant is entitled to remand for correction of a scrivener's error on the judgment and sentence.

The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. *See* ***State v. Naillieux***, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010); CrR 7.8(a).

Here, the court checked a box on the judgment and sentence stating that the case involved a kidnapping or unlawful imprisonment where the victim was a minor. CP 132-146 There is no evidence in the record indicating that any minor was present. The case should be remanded to correct the judgment and sentence by striking the checkmark.

b. Because the judgment and sentence accurately reflects the jury's verdicts, remand for entry of written orders of dismissal is not necessary.

A trial court is not obliged to issue a written order when it orally dismisses one count in a multi-count information that results in conviction. *See* ***State v. Davis***, 176 Wn. App. 849, 18-19, 315 P.3d 1105 (2013).

Defendant's judgment accurately reflected the outcome of his trial by showing the convictions and imposing sentence on Counts I, II, III, IV, VI, VII, IX, and XII. CP 132-146; *see* ***Davis***, 176 Wn. App. at 18-19. Remand for the requested entry of a written notation in the judgment to document the oral dismissal of Count III is unwarranted. Moreover, although not required by law, a written record of that judicial act may be found in the verbatim report of proceedings. *See* RP 605, 613-14, 615.

Defendant's reliance on ***State v. Moten***, 95 Wn. App. 927, 976 P.2d 1286 (1999), to support his request for remand is misplaced as that case addressed a scrivener's error. Defendant cites no relevant authority to support his contention that a court must enter a written order reflecting the dismissal of charges. *See* ***Davis***, 176 Wn. App. at 18-19 (Appellate courts ordinarily do not address assertions unsupported by authority) (*citing* ***State v. Young***, 90 Wn.2d 613, 625, 574 P.2d 1171 (1978); ***State v. Selander***, 65 Wn. App. 134, 136, 827 P.2d 1090 (1992); ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); RAP 10.3(a)(6)).

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's convictions, but remand for correction of a scrivener's error on the judgment and sentence.

DATED: February 27, 2014.

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-28-14 Theresa Kai
Date Signature

# PIERCE COUNTY PROSECUTOR

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