NO. 45758-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RODNEY BRYSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the defendant's conviction for third degree assault because his intent to assault one officer does not transfer to an unintended second officer who was not harmed.

2. Trial counsel's failure to object when the state elicited inadmissible opinion evidence on guilt denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Under the doctrine of transferred intent, does a defendant's intent to assault one police officer transfer to another officer who was not harmed by the defendant's actions?

2. Does a trial counsel's failure to object when the state elicits inadmissible, prejudicial opinion evidence on guilt deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

Sometime around noon on July 5, 2013, Washington Department of Corrections (DOC) Officer Nicholas Kiser was walking by the parking lot to his office in Aberdeen when he saw the defendant Rodney Bryson attempting to rip off the front license plate of a DOC vehicle. RP 12-14.[1] Upon seeing this he yelled at the defendant, who stood up and walked away. RP 15. Mr. Kiser then called 911 to summon the police while he followed the defendant down the street and into a place called Mac's Tavern. RP 15-16. Mr. Kiser followed the defendant into the tavern and angrily confronted him. *Id.* According to two witnesses in the bar, the Mr. Kiser and the defendant ended up face yelling at each other. RP 26-27, 72-74. Within a few minutes a police officer walked inside, handcuffed the defendant and placed him under arrest. RP 27-28. Another officer arrived as the first officer took the defendant out of the Tavern and up to a patrol vehicle. RP 30-31. They were met by a third officer by the name of Sergeant Keith Dale. RP 61-63. Mr. Kiser followed the officers out to the area behind the patrol vehicle. RP 15-16.

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[1]The record on appeal includes one volume of verbatim reports of the jury trial and the sentencing hearings held in this case. It is referred to herein as "RP [page #]."

Once outside the first two officers faced the defendant toward and next to the patrol vehicle and began searching him incident to arrest. RP 30-31, 42-43. Sergeant Dale and Mr. Kiser stood next to each other in a position directly behind the defendant. RP 17-19, 63-65. Although the defendant was obviously upset and verbally aggressive, two of the officers noted that he was compliant with their demands and did not attempt to resist them in any way. RP 33, 48-49. At some point during this process the defendant looked backward over his shoulder three times, spitting on Mr. Kiser the third time he looked back. RP 17-19, 30-31, 63-65. Some of the spittle bounced off Mr. Kiser and hit Sergeant Dale. RP 64-65.

Procedural History

By information filed June 9, 2014, the Grays Harbor County Prosecutor charged the defendant Rodney F. Bryson with two counts of third degree assault against DOC Officer Kiser and Aberdeen Sergeant Dale. CP 1-3. The case initially came on for trial on October 8, 2013. RP 5. During *voir dire* the panel members were asked whether or not they were acquainted with the defendant. RP 5; CP 83. One panel member responded in front of the entire venire that he worked at the jail and was acquainted with the defendant, having booked him into the jail on numerous occasions. *Id.* The defense then moved for a mistrial, which the court granted. RP 5; CP 83, 88.

A little over two months later on December 17, 2013, the court again

called the case for trial before a jury. RP 109. During this second trial the state called DOC Officer Kiser, the two officers who came into the bar and arrested the defendant, as well as Sergeant Dale. RP 12, 25, 42, 61. They testified to the facts contained in the preceding factual history. *See* Factual History. The defendant then called one witness who had come out of the bar for a period but who returned while the defendant was being searched incident to arrest. RP 72. The defendant then took the stand on his own behalf and denied intentionally spitting at DOC Officer Kiser. RP 84-90. Rather, the defendant stated that he had an ill-fitting dental appliance that had slipped in his mouth while he was being searched. *Id.* When the dental appliance slipped he looked over his shoulder and some saliva did come out of his mouth, although unintentionally. *Id.*

During the direct testimony of the first officer the following exchange took place:

> Q. Now , is - are they saying anything? Without going into what - were they - were they silent or was there some sort of interaction going on ?
>
> A. There was a bit of an interaction . We kept explaining to Mr. Bryson that he was going to jail for damaging a DOC car and he still wasn't happy about that. We were still taking the stuff out of his pockets and putting them into his - into the paper bag and Mr. Bryson was in handcuffs behind his back and he kept looking behind himself. About the third time he looked behind himself he was just (making sound), he spit. It went over my shoulder. I kind of ducked to my side. I didn't want to get it on me .

At this point in I say, well, now you're – you're being charged with a felony. He spit - he spit in a - a law enforcement officer's face, that's a felony. And then I put him in the patrol car and we took him to the Aberdeen Police Department.

. . .

Q. Okay. Was there any indication from his expression this was intentional?

A. Yes .

Q. Any doubt in your mind this was intentional?

A. No .

RP 29-31.

The defense did not object to this evidence as irrelevant as well as an improper opinion on guilt. RP 29-13. Neither did the defense object during the following exchange on the state's direct examination of Sergeant Dale:

Q. Okay. Did you - were you looking at his face when he did it?

A. Pretty much , yes.

Q. All right . Did this look like something that was intentional?

A. That's what it appeared to me .

RP 65.

Following the defendant's witnesses and very short rebuttal by the state the court instructed the jury without objection. RP 96-98, 99-108; CP 134-140. The parties then presented their closing arguments. RP 108-135. During closing the state proceeded from a theory that the defendant was

guilty of third degree assault against Sergeant Dale under the doctrine of transferred intent. RP 110-111. Specifically, the state did not allege that the defendant intentionally spit on Sergeant Dale. *Id.* Rather, the state argued that he did intentionally spit on DOC Officer Kiser, and that when some of that spit accidentally hit Sergeant Dale the transferred intent also made him guilty of third degree assault against Sergeant Dale. *Id.* The state made the following arguments on this point:

> Now, there's another instruction that I want to bring your attention to, that's Number 11. And in school they told us it's called transfer intent, I called it the bad neighbor. If the person acts with intent to assault another but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person. Okay. If somebody has a gun and they try and shoot Joe but they miss Joe and they shoot Bob, well, it's no defense that, oh, my goodness, I didn't mean to shoot Joe. I meant to shoot Bob and I got the wrong guy. That's not a defense.
>
> That's what happened in this case, the defendant spat - sounds like he spat at Officer Kiser, but some of it splattered onto Sergeant Dale. He assaulted both of them. Transferred intent, you can't say, oops, I hit the wrong guy and get away with it. That's not okay. But if you could, well, everyone would just say that. Because we don't have any mind readers on the jury. We can't, you know, read their mind and find out what they were intending. Okay. We have to infer it. We have to infer it from the facts that we've heard today. The facts from the - and the testimony of the witnesses and the video.

RP 110-111.

Following argument the jury retired for deliberation. RP 136. They later returned verdicts of "not guilty on the charge of third degree assault against DOC Officer Kiser, guilty of the lesser included charge of fourth

degree assault against Officer Kiser, and guilty of third degree assault against Sergeant Dale. CP 141-142. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 157-166; RP 147-168.

ARGUMENT

I. UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR THIRD DEGREE ASSAULT BECAUSE HIS INTENT TO ASSAULT ONE OFFICER DOES NOT TRANSFER TO AN UNINTENDED SECOND OFFICER WHO WAS NOT HARMED.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *Id.*

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16

(1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence 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." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar the state charged the defendant in Count II with Third Degree Assault against Sergeant Dale under RCW 9A.36.100(1)(c). Under this alternative a person is guilty of third degree assault if he or she "[a]ssaults a full or part-time community correction officer while the officer is performing official duties." In Washington the term "assault" is defined as "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented." *Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942); *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12

(1983). It is a specific intent crime and requires proof of an intent to assault. *State v. Walden*, 67 Wn.App. 891, 841 P.2d 81 (1992).

In the case at bar the state did not proceed on the theory that the defendant had the intent to assault Sergeant Dale. Rather, it proceeded under a theory of "transferred intent" under which the jury would be entitled to transfer the defendant's intent to assault Mr. Kiser, if the jury found it proven, to the second charge in which the state claimed Sergeant Dale was a victim.

Under the principal of "transferred intent" a defendant's intent to cause a particular harm to a particular victim may transfer to an unintended third party such that the defendant may be convicted of assaulting the unintended third party or "victim" based on *mens rea* established with regard to the intended victim. *See, e.g., State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) ("once the intent to inflict great bodily harm against an intended victim is established, ... the *mens rea* is transferred under [the first degree assault statute] to any unintended victim"); *State v. Clinton*, 25 Wn.App. 400, 606 P.2d 1240 (1980) ("the overwhelming weight of authority at common law approved the theory of transferring the intent of the defendant to harm one individual to another, but unintended, victim").

In this case the trial court provided the jury with the following instruction setting out the law on transferred intent, which was itself derived from WPIC 10.01.01.

Instruction No. 11

> If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.

CP 139.

Under the law of transferred intent, a defendant is liable if two elements are present: (1) an act done with the intent to injure a first party, (2) which act then causes an unintended "harm" or an "injury" to a second party. Under RCW 9A.04.110(4)(a) the terms "bodily injury," "physical injury," or "bodily harm" are defined as "physical pain or injury, illness, or an impairment of physical condition." Herein lies the error in the case at bar in sustaining the third degree assault conviction arising from the fact that the defendant's saliva unintentionally hit Sergeant Dale. This error lies in the fact that Sergeant Dale did not suffer "bodily injury" from the defendant's act, neither did he suffer "physical injury" or "bodily harm." In other words, the defendant's saliva that happened to hit Sergeant Dale did not cause him "physical pain or injury, illness, or an impairment of physical condition." Thus, since Sergeant Dale did not suffer a "harm" or "injury" from the defendant's acts toward Mr. Kiser, there is no evidence to support the application of a transferred intent principle. As a result, substantial evidence does not support the defendant's convictions for third degree assault against Sergeant Dale. Based upon this analysis this court should reverse the

defendant's conviction for third degree assault and remand the case for dismissal of this charge.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE OPINION EVIDENCE ON GUILT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in

the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel's failure to object when the state elicited inadmissible, prejudicial opinion evidence of guilt from two police officers. Specifically, the defendant argues that (1) no reasonably prudent attorney under the facts of this case would have failed to object to this evidence, (2) that the trial court would have sustained a timely objection, and (3) that the jury would probably have acquitted the defendant but for the admission of this evidence. The following sets out these arguments.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's

guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> To the expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the

bench). The Court of Appeals agreed, noting that "[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

In the case at bar the state presented similar improper evidence when it elicited testimony from two police officers that in their opinions the defendant intentionally spit on the DOC officer. The first witness testified as follows on this issue:

> Q. Now , is - are they saying anything? Without going into what - were they - were they silent or was there some sort of interaction going on ?
>
> A. There was a bit of an interaction . We kept explaining to Mr. Bryson that he was going to jail for damaging a DOC car and he still wasn't happy about that. We were still taking the stuff out of his pockets and putting them into his - into the paper bag and Mr. Bryson was in handcuffs behind his back and he kept looking behind himself. About the third time he looked behind himself he was just (making sound), he spit. It went over my shoulder. I kind of ducked to my side. I didn't want to get it on me .
>
> ***At this point in I say, well, now you're – you're being charged with a felony. He spit - he spit in a - a law enforcement officer's face, that's a felony. And then I put him in the patrol car and we took him to the Aberdeen Police Department.***
>
> . . .
>
> ***Q. Okay. Was there any indication from his expression this was intentional?***
>
> ***A. Yes .***

Q. Any doubt in your mind this was intentional?

A. No .

RP 29-31 (emphasis added).

The first half of this testimony was not objectionable as it was simply a factual rendition of what the officer says he saw and heard. However, the second half was a bald opinion that the defendant not only acted intentionally but that he was guilty of the crimes charged. As such, its admission violated the defendant's constitutional right to have the jury determine all of the facts relevant at the trial.

This objectionable evidence was repeated during the direct examination of Sergeant Dale during the following exchange:

Q. Okay. Did you - were you looking at his face when he did it?

A. Pretty much , yes.

Q. All right . Did this look like something that was intentional?

A. That's what it appeared to me .

RP 65 (emphasis added).

In the case at bar the state's theory of the case was that the defendant turned his head around and intentionally spit on the DOC officer and that some of his spit unintentionally hit Sergeant Dale. The defendant's theory of the case, as presented through the defendant's own testimony, was that he did not intentionally spit on anyone, although spit did come out of his mouth as

he dealt with an ill-fitting dental appliance. Thus, the critical fact for the jury to determine was whether or not the defendant intended to spit on the DOC officer. Given the critical nature of this one fact at issue, there was no possible tactical reason for the defendant's attorney to refrain from vigorously objecting to both of the exchanges just noted. Not only was the evidence objectionable but it was highly prejudicial. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney.

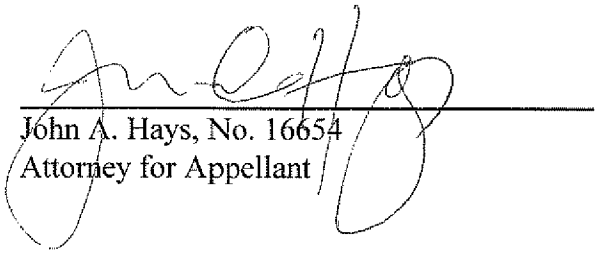
In addition, given the critical nature of this testimony in relation to the one fact that was at issue in the case, there is a reasonable probability that (1) had counsel raised a proper objection to this evidence the court would have sustained the objection, and (2) that had the objection been sustained the jury would have returned a verdict of acquittal. Thus, in this case trial counsel's failure to object denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's convictions and remand for a new trial.

CONCLUSION

Substantial evidence does not support the defendant's conviction for third degree assault. As a result this court should vacate that conviction and remand with instructions to dismiss with prejudice. In the alternative, this court should reverse both of the defendant's convictions and remand for a new trial based upon ineffective assistance of counsel.

DATED this 2nd day of July, 2014.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.04.110(4)

In this title unless a different meaning plainly is required:

. . .

(4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

(c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **RODNEY BRYSON,** **Appellant.**	**NO. 45758-0-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 2nd day of July, 2014, at Longview, Washington.

Donna Baker

HAYS LAW OFFICE

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