No. 47007-1-II

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JAYCEE FULLER, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE BRYAN CHUSHCOFF

THE HONORABLE RONALD CULPEPPER

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The Trial Court Erred In Admitting Irrelevant And Misleading Evidence.

B. The State Violated Mr. Fuller's Right To Keep Confidential His Privileged Work Product.

C. The Prosecutor Committed Misconduct By Making Statements In The Media Regarding The Defendant's Guilt In Direct Defiance Of The Trial Court's Order And In Violation Of The Rules of Professional Conduct.

D. The Evidence Was Insufficient To Sustain A Conviction For First Degree Felony Murder For Robbery or Attempted Robbery.

E. The Evidence Was Insufficient To Sustain A Conviction For First Degree Premeditated Murder.

Issues Pertaining To Assignment Of Errors

A. Did the trial court err in admitting evidence of indentations in mulch, which was non-probative and presented as inculpatory?

B. Did the State violate Mr. Fuller's right to keep private his privileged work product, where the jail officers opened all of his mail and on one occasion kept it for 19 hours?

C. Did the trial court err when it denied the Cr 8.3(b) motion to dismiss based on the governmental misconduct of reading Mr. Fuller's privileged communications?

D. Did the prosecutor commit misconduct by posting statements on the Pierce County Prosecutor's Twitter account in violation of a court order and RPC 3.8(f) ?

E. Was the evidence sufficient to sustain a conviction for first degree felony murder for robbery or attempted robbery ?

F. Was the evidence sufficient to sustain a conviction for first-degree meditated murder?

II. STATEMENT OF FACTS

Procedural History

On October 8, 2009, Pierce County prosecutors charged Jaycee Fuller by amended information with first-degree felony murder with a robbery predicate and first-degree premeditated murder, both with deadly enhancements, in the death of Mohamed Ahmed. (CP 1-2). Mr. Fuller was convicted on both counts after a jury trial. In a published opinion, dated August 8, 2013, the Court of Appeals reversed the conviction.

The Court held the State's use of Mr. Fuller's post arrest partial silence during his custodial interrogation, when he did not

testify and his statements showed no knowledge of the crime or circumstances of the murder required reversal. (CP 4-37;22).

The Court provided a second reason for the reversal: the trial court abused its discretion in failing to analyze admission of evidence under ER 404(b). (CP 29). It reasoned that while the "State's evidence circumstantially linked Fuller to the crime, it failed to present evidence of premeditation or of an actual robbery, even though most of the State's evidence related to felony murder based on robbery or attempted robbery." (CP 33). The Court concluded the admission of the evidence was not harmless. (CP 29).

The Court of Appeals decision became final on January 9, 2013. (CP 38). Mr. Fuller was returned to Pierce County Jail (PCJ) on February 20, 2013 for retrial. (1/23/14 RP 10).

A. Pretrial Rulings

1. Self-Representation

On June 26, 2013, after an extended colloquy, the court granted Mr. Fuller's request to represent himself and appointed Curtis Huff as standby counsel. (6/26/14 RP 16).

2. Legal Mail

On September 4, 2013, Mr. Fuller alerted the court that his mother had been assisting him with case law research and typing

his motions. She sent the legal information to him by USPS mail and marked it "legal mail." (9/4/13 RP 9). He complained to PCJ[1] that officers were opening his marked "Legal Mail". (9/4/13 RP 9). Believing the problem was resolved, however, Mr. Fuller agreed to file a written motion for the court to consider at a later hearing, if necessary. (9/4/13 RP 9-10).

On September 12, 2013, an officer took possession of his mail that contained motions, research and work product for his case. Mr. Fuller told the officer he was pro se, and the contents were from his mother. The officer grabbed the mail from his hand. When Mr. Fuller tried to speak with her to get his legal mail, she ordered him to lockdown and filed an incident report. (CP 98). Mr. Fuller submitted an affidavit signed by 13 inmates who witnessed the event, averring he had not disobeyed any direct order from the officer and that he was not disrespectful toward the officer, but was punished nevertheless. (CP 96-97). His legal materials were not returned to him for 19 hours. (CP 93).

On September 24, 2013, he filed a motion for a sanction against the State because he believed the jail staff was giving the prosecutor's office access to his legal mail. (CP 90-97;10/1/13 RP

[1] Pierce County Jail

14). The court commented that Mr. Fuller's mother "is not an attorney." (10/1/13 RP 15).

Sergeant Miller from PCJ attended the hearing and told the court that officers open inmate mail and search for contraband. Mail is not copied or sent to the prosecutor unless "we find cause for inappropriate behavior." (10/1/13 RP 16). Mr. Fuller withdrew his motion after the court assured him he would not lose the right to argue it at some point in the future if necessary. (10/1/13 RP 15).

3. Media

Mr. Fuller made motions about the prosecutor's use of the media in a manner that could affect a jury panel or subject him to public condemnation. (2-13-14 RP 52-57; 3-27-14 RP 130-131; 145; 152; CP 150-183). In pretrial hearings, the court directed DPA Penner, to tell Mr. Lindquist to avoid trying the case in the media (2/13/14 RP 61) and to comply with the Rules of Professional Conduct (RPC) with respect to statements he made to the media. (3/27/14 RP 146).

At the May 1, 2014 hearing, the following exchange occurred:

> THE COURT: "I do recall at the last hearing I directed Mr. Penner to tell Mr. Lindquist that he had to comply with the Code of Professional Responsibilities. There are limitations

> or guidelines I guess, on media. I believe Mr. Penner did that."
> MR. PENNER: "I did, actually."
> THE COURT: "Mr. Lindquist made some kind of comment about it to me. Did you chide him or just remind him?"
> MR. PENNER: "I informed him."

(5/1/14 RP 174).

Later, in the same hearing, in a discussion about prosecutors interacting with the media, Mr. Penner again stated, "If Mr. Lindquist or I or anybody else from my office violates the RPCs, we'll have to deal with their licensing agency, and to the extent that that can be shown to prejudice Mr. Fuller's right to a fair trial, we may have to deal with potential dismissal of the case." (5/1/14 RP 187). The court added, "Well, I directed Lindquist before through Mr. Penner, and I understand he told him, so he has ethical obligations and has to restrict what he says." (5/1/14 RP 188-89).

On November 12, 2015, after trial had been underway for over a week, Mr. Fuller brought a copy of a Tweet that had been sent from the prosecutor's office on November 2[2]. (11/12/14 RP 5; Def. Exh. 321). The November 2nd Tweet read:

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[2] A second tweet issued on November 3 also remains on the twitter website: "Prosecutor Lindquist delivering opening statements in Jaycee Fuller murder retrial. Fuller killed taxi driver in '09."
https: twitter.com/pcprosecutor

> "**Prosecutor Mark Lindquist to deliver opening statement tomorrow in Jaycee Fuller murder trial. Fuller killed taxi driver on Tacoma's Sixth Avenue**."

Mr. Lindquist addressed the court saying:

> "Your Honor, we're a public agency. We have a public information employee whose job it is to inform the public of the work we're doing for the public, and she did her job. I don't know what else to comment on that. The Court has instructed the jury to avoid not only public media but social media."
> (11/12/14 RP 6).

Mr. Lindquist went on:

> "The public information officer seems to be doing her job here. I have two answers to that. One is that, in fact, we have charged Mr. Fuller with Murder in the First Degree and the allegation is that he killed a taxi driver on Tacoma's Sixth Avenue, so that's accurate…"
> "I misspoke. Okay. **So her mistake appears to be that she wrote 'Fuller killed taxi driver on Tacoma's Sixth Avenue' when a more accurate Tweet would have been 'Fuller killed taxi driver at the end of the fare on Tacoma's Sixth Avenue**.' That said I'm not sure exactly what the motion is."

(11/12/14 RP 7-8).

Mr. Fuller pointed out the tweet should have used a word like "allegedly" rather than an opinion on guilt, which violated the RPC pertaining to prosecutors. (11/12/14 RP 7,8). The court held the tweets did not seem to violate the RPC, but again reminded Mr. Lindquist to follow rules of professional responsibility guidelines (11/12/14 RP 8).

4. Knapstad Motion And Motion For Discretionary Review.

At the March 27, 2014 hearing, Mr. Fuller presented a Knapstad motion. (3/27/14 RP 88-118). He also argued a CrR 8.3(b) motion to dismiss due to government misconduct, specifically, the issue of his legal mail and the State's comments to the media. (3/27/14 RP 122-129; CP 127-141).

Mr. Fuller contended that as a pro se, he was his own attorney, as well as the defendant: the information he sent to and received from his mother regarding his strategy, research and motions should be regarded as privileged work product. (3/27/14 RP 142). She acted as his legal assistant. (3/27/14 RP 139-140). He likened the State confiscating and reading his legal mail as akin to the deputy reading an attorney's notes at trial in *Granacki.* [3] (3/27/15 RP 140). The court questioned Mr. Fuller but reasoned that because he was not an attorney, his research and motions and strategies would not be considered privileged work product. (3/27/14 RP 141-142).

He showed the court two envelopes, which had been opened by jail staff and, despite the fact that they contained his legal work, someone had written "Not" Legal Mail on them.

[3] *State v. Granacki,* 90 Wn.App. 598, 959 P.2d 667 (1998).

(3/27/14 RP 124). He maintained the jail gave copies of his mail to the prosecutor's office. (3/27/14 RP 143).

Mr. Fuller recounted an incident that occurred during his first trial: he had written a letter to his girlfriend with less than complimentary remarks about his defense attorney. Although marked "Return to Sender" the letter was opened when returned to him in the jail. Soon after, his attorney brought a copy of it to him and was angry about the disparaging comments. Mr. Fuller concluded the attorney had received a copy of the letter from PCJ through the prosecution. (3/27/14 RP 124).

Mr. Penner, agreed that if PCJ was copying Mr. Fuller's mail which contained information about strategy, notes, research for the case, and funneling it to the prosecutor's office, it might be government misconduct. (3/27/14 RP 144). He was not aware of mail being provided to his office, but agreed to look into it[4]. (3/27/14 RP 145). The court ruled opening the mail was not misconduct, but also stated, "I know the jail officers follow the policies. I've had some questions about some jail policies involving pro ses myself." (3/27/15 RP 150). The court denied Mr. Fuller's

[4] Mr. Penner was replaced by Ms. Novavec. (8/29/14 RP 3).

motions to dismiss and/or to sanction the prosecutor's office. (3/27/14 RP 148).

On April 22, 2014, Mr. Fuller filed a motion for discretionary review with the Court of Appeals on the rulings. (CP 184-203). The Court denied the motion and specifically ruled that Fuller did not provide support for his contention that legal mail includes a pro se defendant's correspondence with non-attorneys. (CP 209).

5. Motions In Limine And Admissibility of Evidence

Over defense objection, the court ruled the following items were admissible: the newspapers found at the garbage dump; photographs of indentations in beauty bark mulch found some distance from the crime scene; testimony that Mr. Fuller had scratches on his face around the time of the crime; the Pawn-X video; the Masa video; a $1 bill and King Cab Company business card found in the cab; testimony that Mr. Fuller had worn long hair; and testimony that Mr. Fuller had told others he hated foreigners. (10/28/14 RP 131-169).

B. The Crime and Investigation

According to the taxicab GPS system, at 3:05 a.m. on the morning of March 8, 2009, Muhamed Ahmed picked up a fare in his taxi on Sixth St. near the Masa restaurant in Tacoma. (11/5/14 RP

218;221). About 5:30 a.m. that same morning, Officer Denully of the Tacoma Police Department (TPD) responded to a call for a priority backup at 3635 S. Lawrence Street. (11/3/14 RP 52;70). He observed a cab facing south on the uphill slope of the entrance to a parking lot, the motor and meter still running. (11/13/14 RP 56-57;66). The body of Mr. Ahmed was face down next to the cab, his arm tangled in the seatbelt. (11/6/14 RP 309;311).

Mr. Ahmed had sustained two knife or knife-like sharp force injuries to his neck: one was a superficial injury to the front of the neck, the second was an incised wound that was deeper and damaged critical internal structures. (11/12/14 RP 143). There was a single stab wound to the abdomen on the right side and multiple sharp force injuries to the right hand. (11/12/14 RP 145).

On the cab's rear right floorboard, officers located a $1 dollar bill and a King Cab business card. (11/3/14 RP 91). Both were negative for latent fingerprints and blood. (11/3/14 RP 104;116). In the center console, officers found a wallet that did not appear to have been rifled through or disturbed. A cell phone, credit cards and personal papers were also found undisturbed in the console. (11/3/14 RP 149; 152).

Mr. Ahmed's interior right jacket pocket held $160[5] in folded cash. (11/6/14 RP 368). The cash was sliced and had blood on it. (11/6/14 RP 333-34). His left interior coat pocket contained $49. (1/6/14 RP 368). A second wallet on the right front visor contained $5. (11/3/14 RP 175). The lead detective, Gene Miller, testified the evidence did not point to a robbery and the only hint of an attempted robbery was the isolated area where the cab was found. (11/6/14 RP 363).

There were small amounts of castoff blood in the front passenger seat, and the driver's seat area, dashboard and the driver's door had blood deposits, smears, and swipes. (11/3/14 RP 148). The cloth driver's seat had soaked up blood, and some had gone underneath the seat and drained on the vinyl floorboard into the backseat. (11/3/14 RP 155). Interior and exterior areas with suspected blood were swabbed, hair and fibers collected, and fingerprint impressions lifted from all areas. (11/3/14 RP 127;129). (11/4/14 RP 7-8). No fingerprints or DNA matched Mr. Fuller. (11/6/14 RP 361-62). Mr. Fuller was excluded as a contributor to the hair found in the doorframe of the cab. (11/12/14 RP 17). The

[5] 7- $20 bills, 1-$10 bill, 2-$5 dollar bills. (11/6/14 RP 368).

DNA profile from swabs taken from the left rear door handle did not exclude one third of the U.S. population. (11/10/14 RP 80).

Indentations In Beauty Bark Mulch

Detective Reopelle testified that north and east of the cab was a sloped area covered in beauty bark mulch that ended at a ten-foot retaining wall. No shoe prints led from the crime scene to the beauty bark area. Reopelle testified it looked like someone started at the top of the slope, made deep impressions when they landed at the bottom and then jumped off the 10-foot retaining wall to a lower area with more beauty bark. (11/4/2014 RP 15). He believed the impressions were headed in a northeastern direction away from the area. (Id.). He testified that the easiest way to get to Mr. Fuller's apartment from that parking lot was to head northeast from the area. (11/4/14 RP 53).

He measured one set of the impressions at about 13 inches. He did not try to measure the indentations that were at the top of the slope because the area was so disturbed and useless for measurement. (11/4/2014 RP 16;18;49). Officers later searched Mr. Fuller's home and removed two pairs of boots: both measured thirteen and a half inches (13 ½) in length. (11/4/14 RP 24). Reopelle testified the black boots were very worn. (11/4/14 RP 25).

Reopelle testified the beauty bark did not make a good surface for impressions. Despite the fact that he was not qualified as an expert, he testified there was a "slight" heel impression, and the black boots were "consistent with" the impressions he saw in the beauty bark. (11/4/2014 RP 26;50;55). He further opined that the heel impression showed the individual was running away from the retaining wall. (11/4/14 RP 55).

Detective Miller testified there were no discernable features in the beauty bark. (11/6/14 RP 357). He also stated there was nothing linking the impressions to the crime, aside from the speculation that the impressions showed someone leaving the area. (11/6/14 RP 358).

Forensic specialist, Audrey Askins, videotaped the area. (11/3/14 RP 71). Included in the video were photos of the mulch that was near the parking lot on the north end. She guessed the indentations in the bark were "shoe indentations." (11/3/14 RP 75; 82;87). She did not make a plaster of the indentations because they were so distorted and had no detail. (11/3/14 82-83).

The court denied Mr. Fuller's motion to strike the beauty bark indentation testimony for being speculative and irrelevant, but

noted, "We haven't been given too much about the science of shoe print in bark impressions." (11/6/14 RP 387-88).

Keg Hat

At the north end of the parking lot, officers found a "beanie" cap on the ground. (11/4/14 RP 14). The cap had the "Keg Steakhouse" logo on the front and a white strip around the bottom portion. (11/4/14 RP 19). The recovered hat had two coarse body hairs, five fine body hairs, and five human hair fragments. (11/10/14 RP 20). Of the recovered hairs, only one coarse body hair was suitable for nuclear DNA analysis, however it was never tested. (11/10/14 RP 20;33). One loose strand of hair, 10 ½ to 11 inches in length, was collected from the inside of the hat. (11/6/14 RP 331-32). The hair was suitable for mitochondrial DNA analysis (11/5/14 RP 151-52).

The Keg hats had been given out as a present to Keg employees. (11/4/14 RP 20). Mr. Fuller worked at the Keg the year the hats were given as gifts, but testified that he, like many other employees, had left his hat at the party. (11/5/14 RP 128-29; 11/24/14 RP 28-29). Two of his acquaintances testified Fuller told him he lost his hat jumping out of a window, but could not

remember when that conversation happened. (11/12/14 RP 68;118).

Various witnesses testified they had seen Mr. Fuller wear a Keg beanie hat, and an equal number testified they had no recollection of ever seeing him wear such a hat. (11/5/14 RP 268; 280; 287; 11/12/14 RP 40; 165;11/19/14 RP 21). Pre-crime video surveillance of Mr. Fuller collected and reviewed by officers had no images of him wearing a Keg hat. (11/6/14 RP 377-379).

The forensic analyst testified mitochondrial DNA analysis of hair from the beanie and hair later removed from Mr. Fuller's apartment and a bag of hair[6], removed from a garbage dump that included Fuller's trash, by 2009 standards shared the same mitochondrial profile as 2 out of 1,674 people in the database.[7] (11/12/14 RP 21). In 2014, the sequences were interpreted under a different standard and the new interpretation was 0 out of 1674. (11/12/14 RP 20-21). She concluded all three samples could not be excluded as originating from the same maternal lineage(11/12/14 RP 28). The analysis does not point to a unique

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[6] Fuller testified that on March 5th or 6th 2009, he cut his hair because he needed to find a job. (11/24/14 RP 78).

[7] Mitochondrial DNA analysis uses a database of 4,839 unrelated individuals which is searched to see how many times a particular profile is seen within that database.

individual, but rather relationships by maternal lineage. (11/12/14 RP 27-29; 11/5/14 RP 163-66).

The outside of the cap had blood on it as well as quite a bit of debris. (11/6/14 RP 331; 11/10/14 RP 18). The DNA on the outside of the cap indicated a mixture from more than one person. The majority profile was that of Mr. Ahmed. The minor profile *excluded* Mr. Fuller and Mr. Ahmed. (11/1014 RP 66). A scraping from the inside of the hat yielded a DNA profile that was a statistical match for Mr. Fuller. (11/10/14 RP 70).

Fingernail Clippings

Two witnesses testified Mr. Fuller had a couple of small healing scratches on his face shortly after the crime. (11/12/14 RP 162;11/19/14 RP 25-26). Fingernail clippings from Mr. Ahmed's hands were tested. (11/10/14 RP 75). There was no tissue under the fingernails. (11/10/14 RP 64). The clippings tested positive for blood, and fiber. (11/10/14 RP 28). The fibers were not tested because the analyst determined they were unrelated to the Keg hat. (11/10/14 RP 29). No further analysis was done on the blood. (11/10/14 RP 64).

Newspapers

Mr. Fuller was unemployed and subsequently evicted from his apartment at the El Popo apartments in March 2009. (11-12-14 RP 37). In late March the apartment maintenance man placed Mr. Fuller's papers, clothing, and household trash into plastic bags and put them in the dumpster. (11/12/14 RP 38). He stored some of the personal belongings in boxes. (11/12/14 RP 38).

The following day, police arrived with a warrant to search the apartment and removed the boxes. (11/12/14 RP 38). Realizing the garbage had been taken, they obtained a warrant for the Tacoma landfill dump on April 2, 2009. (11/4/2014 RP 107; 109). The solid waste collection supervisor testified the dumpster at the El Popo, was the first customer pick up of the day, and the garbage would have been in the back of the truck. (11/10/14 p.m. RP 52). As garbage was dumped into the truck, it got pushed and mixed with other trash. (11/10/14 p.m. RP 53-54).

With 1/3 of the truck emptied at the dump, officers searched the mound of trash. (11/4/2014 RP 107; 11/24/14 RP 57). They located mail with Mr. Fuller's name on it, a plastic bag containing hair, and some clothing, including a black beanie style hat. (11/10/14 a.m. RP 43-46; 11/6/14 RP 381). The black beanie contained interwoven hair, suggesting it had been worn for some

time, but was never tested for any hair comparison. (11/10/14 a.m. RP 30). The clothing was tested for blood and the results were negative. (11/10/14 p.m. RP 46).

In a pile of trash two to three feet away from the items associated with Mr. Fuller, officers saw Tacoma News Tribune newspapers dated March 9 and March 10, 2009. (11/4/2014 RP 108; 11/10/14 RP 53). The papers were folded and did not appear to have been opened; "like if it was going to be thrown on your front steps as far as not really appearing to have been majorly disturbed,.." (11/6/14 RP 382; 11/10/14 RP 53-54). Nothing identified the papers as belonging to anyone, and no finger prints were recovered. (11/4/2014 RP 109). The front page story for each day was about Mr. Ahmed's death. (11/4/2014 RP 108). Prosecutors later argued the papers belonged to Mr. Fuller because they were found in the trash several feet away from his bagged belongings and evidence guilt. (11/25/14 RP 20; 29).

Masa Video

Detective Pavey spliced together various surveillance videos from the Masa Restaurant, Anthony's trucking, and a liquor store that he had obtained as part of the investigation. (11/4/2014 RP 68-69). Of the five or six videos obtained from various The hair

was suitable for mitochondrial DNA analysis (11/5/14 RP 151-52).businesses on Sixth near the Masa, the only video that showed the individual police viewed as a suspect was a video from the Masa Restaurant. The video was described as "looking through a door that's being pushed open by patrons through a small window that's used for lattes, handing lattes through. It's not like it's a camera on the street." (11/4/2014 RP 106).

The recording ran from midnight to 3:15 am on the morning of March 8, 2009. (11/4/2014 RP 66;72). At 1:40 a.m., an individual taking one to two steps in an easterly direction at 1:40 a.m. passed the front of the Masa restaurant. (11/4/2014 RP 72; 11/19/14 RP 63; 106). To the east of Masa was a connected parking lot and alleyway next to a liquor store. (11/19/14 RP 66). That individual did not appear in the liquor store video. (11/19/14 RP 66).

At 3:01[8] am, the video showed two off duty policemen who worked security at the Masa, leave the restaurant and head east. (11/4/2014 RP 105). At 3:04:14 a.m. they are seen driving their patrol car headed westbound on Sixth Ave. (11/4/2014 RP 107).

[8] The time was adjusted for daylight savings.

At 3:04 am, 25 minutes after the alleged suspect walked past the restaurant, a second clip depicted a cab going eastbound on Sixth Ave. (11/19/14 RP 38). A video from the liquor store showed a cab passing eastbound and then making a u-turn to head westbound. (11/19/14 RP 39). One minute later, looking through the small Masa window a car is seen traveling westbound on Sixth, with its brake lights on, suggesting it stopped in front of the Masa, to pick up a fare. (11/19/14 RP 38). The video does not show anyone getting into a cab, nor did any of the other videos along the street that were retrieved as evidence. (11/4/2014 RP 72-73).

Within a few days, both off-duty officers were shown the Masa video clips. (11/19/14 RP 167;172). They testified they had not noticed anything out of the ordinary, and either did not see or recognize the individual who had walked by at 1:40 a.m. (11/19/14 RP 167;175).

A forensic video analyst testified as an expert comparing some surveillance videos of Mr. Fuller entering and leaving his apartment, video of Mr. Fuller in the Pawn-X store and the suspect in the Masa video. (11/19/14 RP 109-124).

He testified the Masa video showed an individual wearing dark heavy shoes and a dark shirt and jacket, a hat with a white

stripe along the base, and a distinctive reflective area. (11/19/14 RP 117-119). He could not see with any detail what the reflective area depicted. (11/19/14 RP 119). He opined that the hat in the Masa video and the recovered Keg beanie were hats consistent in class. (11/19/14 RP 119). "Consistent in class" was defined as the same construction, not that the items were the same. (11/19/14 RP 125). He could not say the reflective area on the hat said "KEG" or that the hats were in fact the same hat. (11/19/14 RP 139;142).

Comparing the Pawn-X video with the Masa video, he opined that the skin tone in both were "not inconsistent" and both appeared to have dark areas on the face that was consistent with facial hair. (11/19/14 RP 130). He testified it would be overstated to say the footwear, clothing, and jacket in the Pawn-X video and the Masa video were the same. He stated they "simply appear to be consistent in class." (11/19/14 RP 125-26). There was insufficient detail to determine whether the individual in the Masa video had long hair. (11/19/14 RP 134).

Other Testimonial Evidence

For a short period of time, at the end of March 2009, Fuller lived with acquaintances Curtis Alm and Lucretia Randle. (11/12/14 RP 65). At trial, Alm testified that Fuller had shown him a

knife that he carried, held by a shoulder strap along his back. (11/12/14 RP 70). On cross examination, however, he admitted he he had never seen Fuller wear the knife, but rather, only a picture of it. (11/12/14 RP 81). Alm and Randle both testified that Fuller told them he hated King Cab company because they only hired foreigners. (11/12/14 RP 72; 106). Perry and Staley, two other friends Mr. Fuller had stayed with for a few weeks in March 2009, testified Fuller never said he hated Somalis or foreigners, and did not make racist comments. (11/12/14 RP 166; 11/19/14 RP 20). Perry testified the only knife Fuller carried was a small silver and black pocket knife, which he wore on his keychain. (11/19/14 RP 21).

After a jury trial Mr. Fuller was convicted on both counts with the deadly weapon enhancements. The counts were merged. He makes this timely appeal. (CP 532-533; 615).

III. ARGUMENT

A. The Trial Court Erred In Admitting Evidence Of Indentations In Mulch, Which Was Non-Probative, Misleading And Presented As Inculpatory.

A court has the inherent discretionary power to grant a motion in limine to exclude evidence as irrelevant, inadmissible, or

prejudicial. *Douglas v. Freeman,* 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). Admission or exclusion of evidence is reviewed for abuse of discretion. *State v. Powell,* 126 Wn.2d 244, 258, 893 p.2d 615 (1995). Abuse of discretion exists if the trial court's discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

The test for determining whether to exclude evidence as irrelevant is whether it has any tendency to make the existence of the fact to be proved more probable or less probable than it would be without the evidence. *State v. Renfro,* 96 Wn.2d 902, 906, 639 P.2d 737, *cert. denied,* 459 U.S. 842, 103 S.Ct. 94, 74 L.Ed.2d 86 (1982). Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury. ER 403.

Unfair prejudice is "prejudice caused by evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'" *Carson v. Fine,* 123 Wn.2d 206, 223, 867 P.2d 610 (1994)(internal citations omitted).

The State contended the distorted indentations in the mulch amounted to shoe impressions. Mr. Fuller challenges the

admission of the beauty bark indentation testimony as unfairly prejudicial, without sufficient basis, and as misleading to the jury.

Footwear impression evidence has been accepted in the forensic scientific community and used by the courts for over 100 years. *State v. Brewczynski,* 173 Wn.App. 541, 555, 294 P.3d 825 (2013). Here, the only "science" used was a ruler.

The indentations were so distorted the crime scene tech could not make a plaster mold for comparison. The indentations lacked any detail. Adding to the misleading opinion testimony was the conclusion that the indentations were "consistent with" 13 ½ inch long well- worn boots that lacked tread. No witness could even state with certainty the exact length of the indentation.

Unlike snow, mud, blood, sand, or dirt, the mulch was not conducive to holding any detailed impressions. There was no basis to conclude the indentations were made from shoes rather than squirrels playing in the mulch. Similarly, it was speculative, nonprobative and misleading for a nonexpert witness to conclude the indentations were shoe impressions that pointed toward the northeast, in the direction of Mr. Fuller's apartment.

In *U.S. v. Mahone,* 328 F.Supp.2d 77 (2004), the Court upheld the use of an expert in evaluating footprint impression evidence.

> "While footwear impression evidence may appear to the Defendant a simple matching process not requiring any specialized skill…it is apparent the process requires a critically trained eye to ensure accurate results. The Defendant's contention that any lay person can perform the comparisons presumes any lay person will know what to look for and how to apply the information- the significant versus insignificant markings and the weight to ascribe to each. In this way, the examiner functions like a radiologist, directing attention to the relevant aspects of the impression or medical image. That the conclusion is readily apparent after the professional explains the image more likely speaks to the effectiveness of the professional, not the simplicity of the science."

Id. at 91.

Here, the officer who testified the indentation was consistent with Fuller's boot had no particular qualifications, knowledge, experience or education to form an opinion. It is improper to provide an opinion to the jury that is based on speculation and conjecture. *Little v. King,* 160 Wn.2d 696, 705, 161 P.3d 345 (2007), as amended on denial of reconsideration, (Oct. 3, 2007).

Additionally, unfair prejudice from admission of evidence occurs whenever the probative value of evidence is negligible, but the risk that a decision will be made on an improper basis is great. *State v. Rivera,* 95 Wn.App. 132, 974 P.2d 882 (1999). It was an

abuse of discretion to allow introduction of the beauty bark indentation testimony.

Fundamental due process does not allow a criminal conviction obtained by introduction of misleading evidence important to the prosecution's case in chief. *United States v. Bagley,* 473 U.S. 677, 105 S.Ct. 3375, 87 L.E.2d 481 (1985); *Donnelly v. DeChristoforo,* 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). If such evidence could in any reasonable likelihood have affected the verdict, a new trial is required. *Giglio v. United States,* 405 U.S. 150, 153, In 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

B. The State Violated Mr. Fuller's Right To Keep Confidential His Privileged Work Product And Dismissal Was The Proper Remedy.

The Sixth Amendment to the United States Constitution grants a criminal defendant the right to represent himself at trial. *Faretta v. California,* 422 U.S. 806, 816, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Similarly, Article 1, § 22 of the Washington Constitution provides, in relevant part, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel…" unequivocally granting an accused the constitutional

right to self-representation. *State v. Kolocotronis,* 73 Wn.2d 92, 97, 436 P.2d 774 (1968); *State v. Silva,* 107 Wn.App. 605, 618, 27 P.3d 663 (2001).

Under Washington law, the guaranteed constitutional right of self-representation is a substantive right. *Silva,* 107 Wn.App. at 620. "Just as the right to appointed counsel is not satisfied unless the representation is meaningful, the right to represent oneself cannot be satisfied unless it is made meaningful by providing the accused the resources necessary to prepare an adequate pro se defense." *Id.*

Here, Mr. Fuller was appointed a stand by counsel. The *Silva* Court clarified the role of stand by counsel: a court may appoint standby counsel over the defendant's objection to aid him if and when he requests help and to be available to represent him in the event of termination of self-representation. *Id.* at 627. Relying on *Bebb*[9], the Court held that a stand by counsel is not required to perform legal research or run errands on behalf of a pro se defendant. *Id.* at 629. Additionally, in *Bebb,* the Court acknowledged that stand by counsel, without an attorney/client privilege, does not provide a pro se defendant with the assistance

[9] *State v. Bebb,* 108 Wn.2d 515, 740 P.2d 829 (1987).

necessary to fully protect the right of access to the courts. A pro se defendant should not have to waive confidentiality of necessary disclosures in order to obtain his right of meaningful access to the judicial process. *Bebb,* 108 Wn.2d at 525.

Mr. Fuller was aware of the limitations of a stand by counsel and conducted his own research, prepared his motions, and devised his strategy for a defense. Any communications he had with his stand by counsel were, under Washington law, confidential, in order to maintain his right of meaningful access to the court.

The issue raised by Mr. Fuller is whether as a pro se defendant his research, strategy, thoughts about the case, interview notes, and motion drafts were privileged work product. He contends it is privileged work product and the State, via the jail, interfered with that privilege when it opened and either perused and/or copied his mail marked "Legal Mail".

The work product doctrine recognizes "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel…proper preparation of a …case demands that he assemble information, sift the … relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *U.S. v.*

Nobles, 422 U.S. 225, 237, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (internal citation omitted). Work product consists of interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs. *Id.*

The work product protection belongs to the attorney as well as the client and applies to criminal litigation as well as civil. *Id.* at 236;238-39. CrR 4.7(f)(1) provides that disclosure is not required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies with certain qualifications. This rule has been applied to include defense work product. *State v. Pawlyk,* 115 Wn.2d 457, 477, 800 P.2d 338 (1990).

Under Washington law, work product documents do not need to be personally prepared by counsel; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation. *Heidebrink v. Moriwaki,* 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

Here, the trial court focused on whether the mail exchanged between Fuller's mother, who acted as his legal assistant, deserved the protections of the attorney-client privilege. Mr. Fuller argued it

was work product and deserved protection. The work product doctrine is distinct from and broader than the attorney client privilege. *Hickman v. Taylor,* 329 U.S. 495, 508, 67 S.Ct. 385 (1947).

In an analogous case, a police detective admittedly intentionally read a legal pad containing privileged notes between a defendant and his attorney. *State v. Granacki,* 90 Wn.App. 598, 959 P.2d 667 (1998). Like the defendant in *Cory,* the State intentionally intruded on privileged and private communications. *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963). The remedy in both cases was dismissal. *Granacki,* 90 Wn.App. at 602.

The *Granacki* Court further held that on a motion to dismiss based on government misconduct that has interfered with a defendant's foundational right to privately communicate with his attorney, the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced. *Granacki,* 90 Wn.App. at 602 n.3, *State v. Fuentes,* 179 Wn.2d 808, 820, 318 P.2d 808 (2014). Prejudice is presumed. *Id.* at 812.

To provide meaningful access to the courts, Mr. Fuller used an assistant to perform case research, type his motions and case strategy, and file his briefings, tasks not assigned to his stand by

counsel. As a pro se litigant, Mr. Fuller's writings and his assistant's work were privileged work product. The State opened and read his legal mail, and confiscated it for 19 hours. The State bore the burden to prove beyond a reasonable doubt that Mr. Fuller was not prejudiced by such conduct.

A trial court's decision to dismiss criminal charges is reviewed for an abuse of discretion. *State v. Perrow,* 156 Wn.App. 322, 231 P.3d 853 (2010). The trial court abused its discretion when it used the wrong legal standard. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

This matter should be remanded either for a reference hearing for the State to prove beyond a reasonable doubt Mr. Fuller was not prejudiced by its conduct; or this Court may determine the matter and dismiss based on the record: jail personnel were aware the mail was confidential and deliberately marked it "Not" Legal Mail, opened and read mail that was marked as legal mail. And, as Mr. Fuller showed on at least one occasion, the State made a copy of his mail and presented it to his defense attorney. *Fuentes,* 179 Wn. at 820;822.

C. The Prosecutor Committed Misconduct By Making Statements In The Media Regarding The Defendant's

Guilt In Direct Defiance Of The Trial Court's Directive And In Violation Of The Rules of Professional Conduct.

The Washington Rules of Professional Conduct (RPC) assign special responsibilities to prosecutors to refrain from making extra judicial comments that have a substantial likelihood of heightening public condemnation of an accused. He is also called to exercise reasonable care to prevent employees associated with the prosecutor in a criminal case from making extrajudicial statements that he knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding. RPC 3.6(a) 3.8(f).

In pretrial hearings the court admonished Mr. Lindquist, through his deputy prosecutors, on three occasions to avoid trying the case in the media, and to comply with the rules regarding statements he made to the media. The fourth occasion occurred after trial had begun: the prosecutor's Twitter account read:

> **Prosecutor Mark Lindquist to deliver opening statements tomorrow in Jaycee Fuller murder trial. Fuller killed taxi driver on Tacoma's Sixth Avenue.**

When questioned about it, Mr. Lindquist argued the public information officer was doing her job and her only mistake was in not tweeting:

> **Fuller killed taxi driver at the end of fare on Tacoma's Sixth Avenue.**

Surprisingly, the trial court did not interpret the comments as violating any ethical guidelines assigned to prosecutors and did not consider the tweet as having violated the court's directive. Comment [5] to RPC 3.8 cites:

> "A prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused."

It is clear the twitter feed and the prosecutor's comment about the twitter feed had no law enforcement purpose. The comments to RPC 3.6 [5] state there are certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to… a criminal matter, or

any other proceeding that could result in incarceration: this includes any opinion as to the guilt or innocence of a defendant or suspect in a criminal case that could result in incarceration.

The prosecutor violated the rules of professional conduct in issuing the tweet by making an unqualified statement of guilt on the day before trial began. Such misconduct should not be ignored. It violates the bedrock principle of presumption of innocence. Moreover, in the event of an acquittal or, as had already happened in Fuller's case, a remand for retrial, it leaves Mr. Fuller in the unenviable position of being either subject to public condemnation as an innocent man, or receiving another trial blemished by prejudicial statements from the prosecutor.

He also violated the court directive to comply with the rules of professional conduct. Such misconduct should not be ignored, even in the light of the mild response from the trial court.

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor's comments were improper and the comments were prejudicial. *State v. Warren,* 165 Wn.2d 17,26, 195 P.3d 940(2008).

Here, the jury was admonished to stay clear of any newspaper or internet information about the case, with the

understanding that an accused is presumed innocent and triers of fact are to consider only the evidence presented in court. It seems disingenuous to so instruct while the prosecutor's office puts out tweets that state an uncontroverted verdict of guilty before trial is completed.

In *Berger v. U.S.* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.1314 (1935) the Court held that had the case against the defendant been strong, or evidence of guilt overwhelming, a new trial based on prosecutorial misconduct might not be necessary.

This Court found that Mr. Fuller's first trial, marked by prosecutorial misconduct, required reversal and specifically noted the State failed to present evidence of premeditation or of a robbery, even though most of its evidence related to felony murder based on robbery or attempted robbery. The evidence is similarly weak in the retrial, and the prosecutorial misconduct in this second trial violated the duty of a quasi-judicial officer to ensure the defendant received a fair trial. *State v. Fuller,* 169 Wn.App. 797, 812, 282 P.3d 126 (2012).

Mr. Fuller objected numerous times to the State's use of the media about the case, both before and during trial. He was concerned it would taint the proceedings, prejudice jurors, and

open him to public disparagement. Prosecutorial remarks and opinions of unqualified guilt are restricted by the RPC for these very reasons.

As in *Charlton,* the prosecutor was unquestionably aware of the rules. *State v. Charlton,* 90 Wn.2d 657, 585 P.2d 142 (1978). There, knowing the rule against commenting on marital privilege, nevertheless argued to the jury that the defendant could have called his spouse to testify on his behalf. *Id.* at 660. The Court reasoned that the impermissible comment suggested to the jury the one person who might corroborate his story did not testify: it potentially destroyed the credibility of the defendant. *Id.* at 664. Here, the prosecutor had been warned three times, and should know the rules of professional conduct: the unvarnished statement of guilt was a violation of the RPC and a violation of the court's directive. It may very well have reached jurors, despite the court's admonition to refrain from reading about the case.

If the prosecutor does not restrain himself from violating the RPC, the jury cannot and should not be required to be more ethical. With the issuance of the tweets, and the prosecutor's rationalization and explanation, the burden shifted from the prosecutor to act within the bounds of the rules of professional conduct to the jurors

to avoid any media about the case. The jury may or may not have convicted but for the impermissible comment and its effect.

The *Charlton* Court's words apply here:

> "In spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. In most of these instances, competent evidence fully sustains a conviction. Thus, we are hard pressed to imagine what, if anything, such prosecutors hope to gain by the introduction of unfair and improper tactics."

Charlton, 90 Wn.2d at 665.

Mr. Fuller respectfully asks this Court to remand for a new trial based on prosecutorial misconduct.

D. The Conviction For First Degree Felony Murder For Robbery or Attempted Robbery Must Be Dismissed For Insufficient Evidence.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman,* 135 Wn.2d 97, 954 P.2d 900 (1998). Where the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *Id.* at 103. In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-

21, 616 P.2d 628 (1980). A reviewing court draws all reasonable inferences in favor of the State. *State v. G.S.,* 104 Wn.app. 643, 651, 17 P.3d 1221 (2001). So viewed, the State's evidence here failed to show by the requisite quantum of proof that Mr. Fuller committed the crime. *State v. Stevenson,* 128 Wn.App. 179, 192, 114 P.3d 699 (2005).

To sustain a conviction for felony murder with a robbery predicate, the State was required to prove beyond a reasonable doubt that Mr. Fuller committed or attempted to commit a robbery and caused the death of another during the course of or in furtherance of the robbery. (CP 519).

The lead detective testified there were no indications of a robbery. (11/6/14 RP 363). Mr. Ahmed's money was found folded inside of his coat pockets. The pockets were *not* turned inside out and it did not appear that anyone had searched them. (11/10/14 a.m. RP 26-27). His credit cards and cell phone remained in the center console. (11/3/14 RP 149; 152).

In short, the State presented nothing beyond a bare assertion. Mr. Ahmed was not robbed, and nothing from the evidence indicates anyone attempted to rob him. The State's own evidence is insufficient to sustain a conviction for felony murder

with a robbery or attempted robbery predicate. Because of this, the conviction must be reversed and dismissed with prejudice. Similarly, the special verdict of being armed with a deadly weapon while committing the crime must also be reversed. *State v. Wright,* 131 Wn.App. 474,479, 127 P.3d 742 (2006).

E. The Evidence Was Insufficient To Sustain A Conviction For First Degree Premeditated Murder.

Due process requires that every element of a crime be proved beyond a reasonable doubt. *Green,* 94 Wn.2d at 221. While circumstantial evidence is no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *State v. Baeza,* 100 Wn.2d 487, 491, 670 P.2d 646 (1983). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, even viewing the evidence in a light most favorable to the State, could have found the elements of the charged crime beyond a reasonable doubt. *State v. Hundley,* 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

To sustain a conviction for murder in the first degree, the State was required to prove that Mr. Fuller acted with premeditated

intent to cause the death of Mr. Ahmed, and Mr. Ahmed died as a result. (CP 523).

Mr. Ahmed was attacked in his cab. No witness saw Mr. Fuller in Mr. Ahmed's cab. No evidence from within the taxi placed Mr. Fuller inside of it. (11/10/14 a.m. RP 46). Mr. Fuller's fingerprints were not on the cab and the prints in the cab for which he could not be excluded included 1/3 of the population. (11/6/14 RP 361-62; 11/12/14 RP 17; 11/10/14 RP 80). His hair was not found in the cab. His fingerprints were not on the $1 bill or the King Cab card found in the backseat of the cab. (11/3/14 RP 104;116). There was no tissue under Mr. Ahmed's fingernails and the blood was never tested to determine if it included Mr. Fuller. (11/10/14 RP 64).

The cab presented a very bloody scene, yet, no blood evidence was found in Mr. Fuller's apartment. No blood was found on anything in his room at his friend's home where he stayed after lost his apartment. (11/10/14 a.m. RP 45). No blood was found on Mr. Fuller's boots. No blood was found on his clothing. (11/10/14 p.m. RP 46). No blood was found on any of his belongings or trash searched by police.

The State's forensic video expert, reviewed the grainy Masa video and the Pawn-X video, would only go so far as to say the clothing was consistent in class. He would not say the two individuals pictured were the same person.

The State made much of the DNA found on the Keg beanie. The DNA on the outside of the cap matched Mr. Ahmed, but mixed in was a different profile type of DNA that *excluded* Mr. Fuller. There was no evidence that Mr. Fuller's DNA was on the outside of the cap, despite the assertion that he had put on the hat hours earlier.

No evidence was presented that could show how long the DNA had been inside the hat and when it got there. There was no evidence to show how long the cap had been in the parking lot before it was found. It had debris on it consistent with being outside on the ground, and animal hair. A single loose hair, analyzed for mitochondria DNA, was consistent with Fuller's maternal lineage. However, unlike nuclear DNA, mitochondrial DNA is not a unique identifier.

The lead detective testified the supposed getaway route running through the beauty bark in fact showed no discernable features. (11/6/14 RP 357). He also stated there was nothing

linking the indentations to the crime, aside from speculation that the indentations showed someone leaving the crime scene. (11/6/14 RP 358). The boots that were alleged to have made the indentations were ½" longer than any indentation in the mulch. The State presented no expert testimony matching the boot with the indentation because there was no match.

The State presented newspapers that it asserted belonged to Mr. Fuller. The papers were found at the dump. They were several feet away from the pile of rubbish that contained Fuller's belongings that were contained in bags and boxes. No evidence establishes that he ever owned, saw or touched the folded, unopened newspapers. No fingerprints were recovered from the papers.

None of the knives, including the pocketknife owned by Mr. Fuller were brought into evidence by the State. The knife used to kill Mr. Ahmed was not found and the State presented no evidence of its characteristics.

Witnesses who said they never heard him say such a thing undermined the State's theory that Fuller hated Somalis. Two other witnesses said he was angry at King Cab for only hiring Somalis, not that he hated Somalis.

Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. *State v. Prestegard,* 108 Wn.App. 14, 42-43, 38 P.3d 817 (2001). In cases, such as this, involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied by a pyramiding of inferences. *State v. Weaver,* 60 Wn.2d 87, 89, 371 P.2d 1006 (1962). Mr. Fuller respectfully asks this Court to reverse his convictions and dismiss with prejudice for insufficiency of the evidence. Similarly, he asks the Court to reverse and dismiss the special verdict finding.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Fuller respectfully asks this Court to reverse and dismiss the convictions.

Respectfully submitted this 18th day of November 2015.

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CERTIFICATE OF SERVICE

(RAP 18.5(b))

I, Marie Trombley, do hereby certify under penalty of perjury that on November 18, 2015, I mailed to the following by US Postal Service, first class mail, postage prepaid, or provided email service by prior agreement between the parties (as indicated) a true and correct copy of the brief of appellant.

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