NO. 47339-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEREK MARK LOUGHREY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Suzan Clark, Judge

SECOND CORRECTED BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting evidence of 35-year old allegations of sex abuse between Mr. Loughrey and his half-sister when he was a juvenile.

2. Mr. Loughrey did not open the door to testimony of 35-year old sex abuse allegations by testifying he was not a child molester in response to questions about the specific allegation against N.L.

3. The trial court failed to enter written findings of fact and conclusions of law as required by CrR 3.5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A party does not "open the door" to otherwise inadmissible evidence by making a passing reference to a subject that does not create a false impression. Furthermore, even if a party "opens the door," a court must evaluate whether admitting the opposing party's evidence on the topic would violate ER 403. The trial court found Mr. Loughrey "opened the door" to such evidence by stating he was "not a child molester" in response to a question about whether he committed a specific sex act against his daughter. Did the trial court abuse its discretion by refusing to perform an ER 403 analysis and admitting evidence of 35-year old child abuse allegations when Mr. Loughrey was a juvenile?

2. A trial court is required to enter written findings of fact and conclusions of law after the suppression hearing as required by CrR 3.5(c). The trial court has not entered CrR 3.5 findings and conclusions. Is the trial court's failure to do so in error?

C. STATEMENT OF THE CASE

1. Procedural Facts

The state charged Derek Loughrey with three counts of rape of a child in the first degree and two counts of child molestation in the first degree. CP 1-4. The state also alleged two aggravating sentencing factors as to each count: (1) Mr. Loughrey abused a position of trust to facilitate the offense and (2) the offense was an ongoing pattern of sexual abuse against the same victim under the age of eighteen. CP 1-4. The named victim of each offense was Mr. Loughrey's daughter, N.L., born February 8, 1995. RP 2A at 375.

Prior to trial, the court heard a CrR 3.5 hearing. RP 1 at 200-350. To date, no written findings of fact and conclusions of law supporting the court's oral ruling have been filed.

The jury found Mr. Loughrey guilty as charged on all the counts. CP 5, 7, 9, 11, 13. The jury also found Mr. Loughrey committed both the aggravating sentencing factors on each count. CP 6, 8, 10, 12, 14.

The court did not apply the aggravating factors to impose an exceptional sentence. CP 41-42. Instead, the court sentenced Mr. Loughrey

within the standard range. CP 43. On each count of rape of a child, the court imposed a minimum term of 318 months and a maximum term of life. CP 43. On each child molestation count, the court imposed a 198 month minimum term and a maximum term of life. CP 43. The court also imposed community custody for life. CP 43.

This appeal follows. CP 58-59.

2. Trial Evidence

Mr. Loughrey and his wife are of limited means. RP 2A at 377. They raised their three children in a two bedroom apartment in Vancouver. Id. Their daughter, N.L., shared one of the two bedrooms with her two brothers. Id. Mr. Loughrey slept in the other bedroom. Id. Mrs. Loughrey slept on the living room couch. RP 2A at 377-78.

Mr. Loughrey suffered from diverticulitis. RP 3A at 751. It is a debilitating condition that makes it necessary for him to be near a toilet at all times. RP 3A at 752. Early in the children's lives, he was able to work out of the home. But as his condition grew worse, he started a small in-home computer-based business and Mrs. Loughrey took a job outside of the home. Id.

N.L. was home-schooled until the fifth grade. RP 2A at 375. Her brothers were also home-schooled for a time. Id. at 378. Mrs. Loughrey was the home-school teacher. Id. Mr. Loughrey was still working outside of the

home for most of this time. Id. at 390. Mrs. Loughrey rarely left the children at home with their father. When she ran errands to the post office or the grocery store, she usually took the children with her. RP 3B at 617-18.

N.L. resented sharing a bedroom with her brothers. RP 2A at 471. As she grew older, she started to resent her parents' restrictions and rules they placed on her. She tested the boundaries and was often grounded because of it. N.L. also talked about being legally emancipated and getting her own apartment. She showed her father a pamphlet about the emancipation process. RP 3A at 737-39.

After her junior year of high school, N.L. started working at WinCo and started dating a co-worker, Alyn Cheney. RP 2A at 432, 435. Mr. and Mrs. Loughrey did not like their daughter's relationship with Alyn and told her so. Alyn helped N.L. buy a new cell phone. Id. at 436. Her parents did not give their permission to get the phone. RP 3A at 747. Mr. Loughrey was particularly concerned that Alyn would expect sex from N.L. in exchange for the phone. RP 2A at 436. There was a significant blow up between N.L. and her parents when they demanded she give them the phone. RP 3A at 750. N.L. refused to hand over the phone. Id. Within days, N.L. disclosed to her school counsellor that her father had sexually abused her years earlier. RP 2B at 517. Mr. and Mrs. Loughrey both strenuously believed N.L. made false disclosures of sexual abuse to get out of their house because N.L.

believed she would have significant freedom in foster care. RP 3A at 739-40; RP 3B at 858.

Before N.L's disclosure, Alyn shared with N.L. that he had been sexually abused by an older sister. RP 2A at 437. As a consequence, Alyn and his sister did not live in the same home. RP 2B at 499. After Alyn's sharing, N.L. texted Alyn late one evening that her father did sexual things to her when she was younger. RP 2A at 437.

After disclosing the alleged sexual abuse to her school counsellor, N.L. made a report to the police. RP 2A at 442. Because N.L. was late returning home from school that day and her parents did not know her whereabouts, they reported her to the police as a runaway. RP 2B at 586. The police went to the Loughreys' apartment to talk about their runaway concern. An officer told Mr. Loughrey N.L. was at the police station. The officer found it odd that Mr. Loughrey dropped his head and said "It doesn't matter why she's at the police department as long as she is safe," rather than asking why N.L. was at the station. While talking to the Loughreys, the officer told them about N.L.'s sex abuse allegations. Id. at 588.

At trial, N.L. said that when she was between the ages of approximately 5 to 9 years old, her father did sexual things to her. The first thing she remembered was her dad grabbing her butt when they were watching television together. RP 2A at 379. She did not think it was an

accidental touching. Id. Her father also humped her when they wrestled. Id. at 386. One time, she could feel his erection against her. Id. at 387. He also showed her porn on his computer. Id. at 397. During a viewing, he asked her if she would like to see white stuff come out of him. Id. at 398. There were instances when he would lick her vagina and her anus. Id. at 399, 402. He would have her sit on his face. Id. at 411. He would also put his fingers in her anus and then lick his fingers. Id. at 399, 403. She thought she was about eight years old at the time. Id. at 384. They were usually home alone, behind Mr. Loughrey's closed bedroom door, when things happened. Id. at 399. But there was one instance when her bother was in the bedroom with them. They were all watching a movie. Mr. Loughrey touched N.L.'s vagina under the bed covers. Id. at 404-06. N.L. sometimes thought to tell her mother. Mr. Loughrey told her that it was their secret and if mom knew, he would go away for a long time. Id. at 413. One time he gave her a dollar in exchange for kissing his penis. Id. at 415, 417. He also whispered sexual talk although she did not recall specific statements. Id. at 417.

The occurrences stopped when she took her father one of her life-sized Barbie dolls and told him to stop doing things to her and to do things to the Barbie instead. Id. at 418.

Mr. Loughrey testified at trial. When asked on direct examination if he ever engaged in cunnilingus with N.L. he raised his voice and said, "I

am not a child molester. I did not do this. She lied. She wanted out and that was her way out. I am telling you. I am not a child molester." RP 3A at 764.

Thereafter, the state moved to admit testimony from Amanda Smith, Mr. Loughrey's half-sister as she had, per the prosecutor, "suffered at the hands" of Mr. Loughrey when they were children. Id. at 769; RP 4 at 954. The prosecutor argued that Mr. Loughrey opened the door to the testimony by putting his character at issue. RP 3A at 769-70.

Over Mr. Loughrey's strenuous objection, the court allowed Ms. Smith to testify. She flew in from Kentucky. RP 4 at 952. She was born in September 1970. Id. RP 4 at 952. Mr. Loughrey was born in March 1968. RP 3A at 770. The sexual things started happening when she was in fourth or fifth grade. RP 4 at 956. Her brother would perform oral sex on her or have penile-vaginal intercourse with her. RP4 at 956. It was never consensual. Id. at 956. She asked him not to. He asked her to not tell anyone. Id. at 957. It stopped when she was in ninth grade and got her period. Id. at 958. It occurred one or two times a month. Id. at 960. She had never told anyone. N.L. told Ms. Smith about her own allegations after she left her parents' home. Id. at 962.

At defense counsel's request, the court gave the following limiting instruction as to Ms. Smith's allegations.

> Certain evidence has been admitted in this case for limited purposes. This evidence consists of testimony about the alleged sexual acts between the Defendant and Amanda Smith. This evidence may be considered only to rebut the Defendant's assertion that he lacks the character trait of someone who would commit the type of crimes alleged in this case. You may not consider it for any other purposes.

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (sub. nom 174), Instruction 18.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF 35-YEAR OLD CHILD SEX ABUSE ALLEGATIONS FOR WHICH MR. LOUGHREY WAS NEVER CHARGED.

a. Mr. Loughrey did not "open the door" to testimony about the 35-year old allegations.

The state argued, and the trial court ruled, that Mr. Loughrey "opened the door" to testimony regarding allegations that Mr. Loughrey had intercourse with his two-year-younger sister when he was between the approximate ages of 11 and 15 years old. Because of the court's ruling, and the anticipated testimony from his sister, Amanda Smith, Mr. Loughrey testified generally about the allegations in his direct testimony. He acknowledged consensual curious touching with his sister but denied any type of intercourse. The state questioned Mr. Loughrey about the sex abuse allegations extensively in cross-examination. The court's ruling to admit the evidence was erroneous.

A trial court's evidentiary rulings is reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"Otherwise inadmissible evidence is admissible on cross-examination if the witness "opens the door during direct examination and the evidence is relevant to some issue at trial." *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). "But a passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct." *Id.* Furthermore, the "opening the door" principle only allows a party "to introduce evidence on the same issue to rebut any false impression" created by the other party. *United States v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007) (emphasis in original)); *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009) ("the State may pursue the subject to clarify a false impression").

Here, Mr. Loughrey did not open the door to evidence of the 35-year old allegations for which he was never charged. When he said he was not a "child molester," he was responding to questions specifically regarding N.L., not anything else. In context. Mr. Loughrey's response that he "was

not a child molester" was relevant only to N.L., not to his sister, Amanda Smith, 35 years earlier.

To the extent Mr. Loughrey's response can be read to apply to other people, it was a mere passing reference. Mr. Loughrey's direct testimony is over 100 pages long, and mostly addresses his relationship with N.L. RP 43A at 730-837. He stated that he did not molest or rape N.L. and never would. RP 3A at 763-67. That response was a mere passing reference to his integrity and did not "open the floodgates" to evidence about a 35-year old accusation. See *State v. Avedano-Lopez*, 79 Wn. App. 706, 715, 904 P.2d 324 (1995) (defendant's "passing reference to his release from jail did not open the floodgates to questions about prior heroin sales").

Furthermore, even if he was referring to his entire life, the statement was not false. Mr. Loughrey had never been charged with a sex offense related to Ms. Smith. Indeed, at age 46, his offender score was zero. CP 41. His statement did not open the door to inadmissible evidence. *See Sine*, 493 F.3d at 1037 (accurate statement on a particular topic did not open the door to other party's evidence on the topic); *Fisher*, 165 Wn.2d at 750 (state may only rebut evidence creating "false impression").

Washington courts have reversed convictions in several cases in which trial courts improperly ruled defendants opened the door to inadmissible evidence. In *Fitzgerald*, the defendant was charged with two

counts of statutory rape for acts he allegedly committed against two girls from an Indian orphanage. *State v. Fitzgerald*, 39 Wn. App. 652, 654, 694 P.2d 1117 (1085). The defendant testified that he did not sexually abuse any girls from the orphanage and that his relationship with the girls and the orphanage was wholesome and charitable. *Id.* at 661. The trial court ruled that this testimony opened the door to testimony by a third girl that said the defendant had raped her in India. This Court disagreed:

> The State's argument that "C"'s testimony is admissible to rebut Fitzgerald's claim that he did not abuse other girls in India is without merit. Evidence of prior misconduct is impermissible for impeachment on a collateral issue.

Id.

In *State v. Stockton,* 91 Wn. App. 35, 955 P.2d 805 (1998), the defendant was charged with unlawful possession of a firearm. The defendant testified that he was attacked by a group of men who had tried to sell him drugs, and he grabbed one of their guns in self-defense. *Id.* at 39. He testified that he "was not interested" in buying drugs. *Id.* The state argued this opened the door to the question, "so you have some knowledge of how to purchase drugs on the street?" *Id.* This court disagreed, stating "Stockton's testimony that he thought the men were trying to sell him drugs was no more than a passing reference to any knowledge he may have had

about drugs.... As such, it did not open the door to testimony about his prior drug use." *Id.* at 40.

Finally, the Supreme Court rejected the state's "open door" argument in *Fisher*, 165 Wn.2d 727. There, the defendant was charged with four counts of child molestation. *Id.* at 733. Both the defendant and his wife testified on his behalf. His wife testified she felt comfortable leaving her two daughters, Ashland and Shelby, in the defendant's care. *Id.* at 736. The defendant testified that he "never threatened the children or molested" the stepdaughter at issue. *Id.* He did admit that he head-bashed one child and slapped another. *Id.* at 736-37.

The state then cross-examined him with respect to his relationship with Ashland and Shelby, and specifically questioned him regarding a CPS report alleging that the defendant physically abused them. *Id.* at 737. The state argued that the defense had opened the door to the question, and Division Three agreed. But the Supreme Court reversed, holding the trial court abused it discretion in admitting the evidence. *Id.* at 750. The court explained:

> [T]he evidence of later physical abuse of related victims is collateral to the issue of whether Fisher sexually molested Melanie. Because the State could not present evidence on a matter collateral to the principal issue being tried, the trial court erred in permitting impeachment on this point. Therefore, the trial court abused its discretion by allowing the prosecution to introduce

rebuttal evidence regarding allegation of physical abuse against the stepchildren.

Id. at 751.

As in the foregoing cases, the trial court abused its discretion in ruling Mr. Loughrey opened the door to cross-examination and rebuttal testimony regarding prior alleged acts. Mr. Loughrey's response to his counsel's question was specific to N.L., and, even if it touched on his behavior generally, it was a mere passing reference. Finally, the alleged conduct 35 years earlier was a collateral matter inappropriate for impeachment. In sum, Mr. Loughrey did not open the door to evidence of the 35-year old allegations.

b. Even if Mr. Loughrey opened the door, the evidence was inadmissible under ER.

Even if a party has opened the door by raising a particular subject, contradictory evidence is still inadmissible if its introduction would violate ER 403. 5 K. Tegland, Washington Practice, Evidence § 103.15 at 76, 81 (5th ed. 2007); *Id.* at § 404.31, p. 599; *Fisher*, 165 Wn.2d at 750. The "opening the door" doctrine must give way to the defendant's right to a fair trial. *State v. Jones,* 144 Wn. App. 284, 298, 183 P.3d 307 (2008). "As with other types of evidence, rebuttal evidence is inadmissible if its prejudicial effect outweighs its probative value." *State v. Ortiz*, 34 Wn. App. 694, 697, 664 P.2d 1267(1983). Furthermore,

> A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest.

Id. (quoting *State v. Saltarelli*, 98 Wn.2d 358. 363, 655 P.2d 697 (1982)). "Doubtful cases should be resolved in favor of the defendant." *State v. Trickler*, 106 Wn. App. 727, 733, 25 P.3d 445 (2001).

In *Ortiz*, the defendant was charged with aggravated first degree murder for the rape and homicide of a 77-year-old woman. *Id.* at 695. The defense presented "a great deal of testimony concerning the defendant's mental capacity," implying that he did not have the ability to think and plan ahead. *Id.* at 695-96. In response, the State presented two rebuttal witnesses, one of whom testified that the defendant had threatened her at knifepoint, and one of whom testified the defendant threatened to rape her. *Id.* at 696. Division I assumed that the defendant opened the door to the evidence, but reversed under ER 403.

> Conceding, for the sake of argument, that the challenged evidence rebutted new evidence presented by the defense, we nevertheless conclude that its admission was error. The inflammatory nature of the evidence far outweighed any probative value it might have had. The cumulative effect of the rebuttal testimony was to portray the defendant as a knife-wielding potential rapist, not merely as a person with the ability to think and plan ahead. Because the defendant was charged with raping, beating and stabbing a woman to death, its prejudicial effect was undoubtedly great.

Id. at 697. *See also Stockton*, 91 Wn. App. At 41 (court held the defendant did not open the door to testimony of his prior drug use, and noted also noted that its admission violated ER 403.)

Here the trial court failed to perform an ER 403 analysis once it determined Mr. Loughrey "opened the door." This was error. The evidence of the prior allegation was substantially more prejudicial than probative. Therefore, the testimony should have been excluded even if Mr. Loughrey "opened the door." *Ortiz*, 34 Wn. App. At 697. The alleged acts occurred more than 35 years before Mr. Loughrey's trial on the current charges. *Cf. State v. Acosta*, 123 Wn. App. 424, 98 P.3d 503 (2004) ("Testimony regarding unproved charges and convictions at least 10 years old does not assist the jury in determining any consequential fact in this case"). There are no intervening circumstances, as Mr. Loughrey was not so much as charged with a misdemeanor during the intervening 35 years, let alone charged with or convicted of a felony sex offense. Indeed, his offender score at sentencing was zero.

Finally, the nature of the prior alleged conduct was especially prejudicial, because it was an allegation of sexual misconduct against a child. *See Ortiz* at 697 (rebuttal testimony portraying the defendant as a knife-wielding potential rapist extremely prejudicial); *Saltarelli,* 98 Wn.2d at 363 ("in sex cases, … the prejudice potential of prior acts is at its

highest"). Thus, evidence of the 35-year old allegations were substantially more prejudicial than probative and should have been excluded irrespective of Mr. Loughrey's statement that he "was not a child molester." The trial court abused its discretion in admitting the evidence.

c. Reversal is required.

The error in admitting the extraordinary prejudicial evidence cannot be considered harmless. "[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). In *Salas*, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff's immigration status in a personal-injury case. *Id.* at 672-73. The court further held that reversal was required: "We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury." *Id.* at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of prior child molestation and rape is at least an order of magnitude greater. Indeed, in "sex cases, ... the prejudice potential of prior acts is at its highest." *Saltarelli*, 98 Wn.2d at 363. As in *Salas*, this court cannot say the admission of the improper evidence had no effect on the jury.

The prosecutor emphasized the prior allegation by cross-examining Mr. Loughrey and by flying Ms. Smith from Kentucky to testify. One cannot say that the improper cross-examination, rebuttal testimony, and closing argument had no effect on the jury.

This is especially true given the weaknesses in the state's case. N.L. only disclosed the allegations after repeated groundings, her parents' disapproval of her boyfriend Alyn, and her father's demand that she hand over money from her job at WinCo to help pay for family expenses. RP 2A at 477; RP 2B at 498. The limiting instruction given by the court regarding Amanda Smith's testimony did nothing to negate the jury's consideration of the testimony. If the jury believed Ms. Smith's testimony, the instruction still allowed the jury to conclude that Mr. Loughrey had the character of a child molester. The evidence of the 35-year old sex abuse allegations committed by juvenile Derek Loughrey was not harmless, and this court should reverse Mr. Loughrey's convictions and remand for a new trial. *Salas*, 168 Wn.2d at 673.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW PER CrR 3.5.

The trial court held a CrR 3.5 hearing to determine whether Mr. Loughrey's statements were the product of police coercion. However, the court failed to enter written findings of fact and conclusions of law as

required by CrR 3.5(c). Even if this court concludes Mr. Loughrey's statements were admissible, this court must remand the matter for the entry of written findings of fact and conclusions of law as the law requires.

CrR 3.5(c) provides, "Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefore." This rule plainly requires written findings of fact and conclusions of law. The trial court provided an oral ruling that Mr. Loughrey's statement to an investigating detective was admissible, but no written findings or conclusions were ever entered. The trial court's failure to enter written findings and conclusions violate the clear requirements of CrR 3.5(c).

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.,* 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). An oral ruling "has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment." *Id.* at 567 (emphasis added).

"When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy."

State v. Smith, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). This is so because the court rules promulgated by our supreme court provide the basis for a "consistent, uniform approach." *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). "[A]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Id.* at 624. However, where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* at 624.

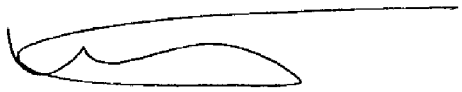
Here, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

Mr. Loughrey's convictions should be reversed and remanded for retrial.

If the convictions are not reversed, the case should be remanded for entry of written CrR 3.5 findings of fact and conclusions of law.

Respectfully submitted this 8th day of January 2016.



LISA E. TABBUT/WSBA 21344

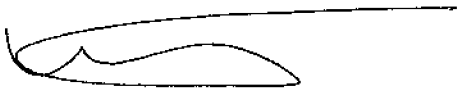
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) Derek Mark Loughrey/DOC# 380356, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 8, 2016, in Winthrop, Washington.



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