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NO. 69064-7-I

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

REC'D
DEC 19 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JARRAY WHITE,

Appellant.

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

The Honorable Joan E. DuBuque, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Charges, verdicts, and sentence</u>	2
2. <u>Pertinent pretrial ruling</u>	2
3. <u>Trial testimony and violation of in limine order</u>	2
4. <u>Closing argument</u>	6
C. <u>ARGUMENT</u>	7
1. THE TRIAL COURT ERRED WHEN IT DENIED WHITE’S MOTION FOR A MISTRIAL BASED ON THE DEPUTY’S PREJUDICIAL REFERENCE TO WHITE’S PRIOR DOC HEARING.	7
2. PROSECUTORIAL MISCONDUCT DENIED WHITE A FAIR TRIAL.....	11
a. <u>Introduction to applicable law</u>	12
b. <u>The prosecutor’s comments undermined the presumption of innocence, were flagrant, and no curative instruction could have mitigated the resulting prejudice.</u>	12
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	12, 13, 15
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	13
<u>State v. Boehning</u> 127 Wn. App. 511, 111 P.3d 899 (2005).....	12
<u>State v. Boogaard</u> 90 Wn.2d 733, 585 P.2d 789 (1978).....	13, 14
<u>State v. Bowen</u> 48 Wn. App. 187, 738 P.2d 316 (1987).....	8
<u>State v. Cantu</u> 156 Wn.2d 819, 132 P.3d 725 (2006).....	13
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	7
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987).....	7, 10
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	8
<u>State v. Fleming</u> 83 Wn. App. 209, 921 P.2d 1076 (1996) <u>review denied</u> , 131 Wn.2d 1018 (1997)	12
<u>State v. Gresham</u> 173 Wn.2d 405, 269 P.3d 207 (2012).....	8, 11
<u>State v. Hardy</u> 133 Wn.2d 701, 946 P.2d 1175 (1997).....	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 124 Wn.2d 57, 873 P.2d 514 (1994).....	7, 14
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010) <u>review denied</u> , 171 Wn.2d 1013 (2011)	7, 14
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968).....	10
<u>State v. Perrett</u> 86 Wn. App. 312, 936 P.2d 426 <u>review denied</u> , 133 Wn.2d 1019 (1997)	8
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	8
<u>State v. Smith</u> 189 Wash. 422, 65 P.2d 1075 (1937)	9
<u>State v. Stephens</u> 93 Wn.2d 186, 607 P.2d 304 (1980).....	13
<u>State v. Taylor</u> 60 Wn.2d 32, 371 P.2d 617 (1962).....	9
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 (2010) <u>review denied</u> , 170 Wn.2d 1003 (2010)	14
<u>State v. Wade</u> 98 Wn. App. 326, 989 P.2d 576 (1999).....	8
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	14
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	12, 13, 15

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 13

OTHER JURISDICTIONS

Lawson v. State
198 Ga. App. 594 (1991) 14

State v. Reyes
116 P.3d 305 (Utah 2005)..... 14

RULES, STATUTES AND OTHER AUTHORITIES

5 Karl B. Tegland
Wash. Prac.: Evidence § 404.10 (5th ed. 2007)..... 10

ER 402 8

ER 403 8

ER 404 7, 8

U.S. Const. amend. XIV 12

Wash. Const. art. 1, § 3 12

Wash. Const. art. I, § 21 13

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the appellant's motion for a mistrial after jurors improperly learned the appellant was subject to a Department of Corrections (DOC) hearing before trial.

2. Flagrant, prejudicial prosecutorial misconduct denied the appellant a fair trial.

Issues Pertaining to Assignment of Error

1. The appellant was charged with first degree unlawful firearm possession. He asserted police planted the gun to cover up for their rough treatment of him, including tasing, at a traffic stop. Before trial, defense counsel moved to exclude any reference to a previous DOC hearing on the matter. The trial court excluded any reference to "DOC." When State later violated the order, defense counsel moved for a mistrial, which the court denied.

Where violation of the motion in limine was a serious trial irregularity that denied the appellant a fair trial, did the trial court err in denying his motion for a mistrial?

2. The State suggested in closing argument that a "reasonable" doubt requires jury unanimity. Did the prosecutor's argument undermine the presumption of innocence and violate the appellant's right to proof of each element beyond a reasonable doubt?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged Jarray White with first degree unlawful firearm possession. CP 1-5. The jury found White guilty as charged, and the court sentenced him to a prison-based Drug Offender Sentence Alternative including 50.75 months of incarceration. CP 80-89.

This timely appeal follows. CP 91.

2. Pertinent pretrial ruling

White moved before trial to exclude any reference to a DOC hearing at which an arresting officer testified. The State agreed the DOC hearing should simply be referred to as “another hearing.” The trial court agreed. 3RP 338-40. The prosecutor later assured the court that she had instructed State’s witnesses as to the court’s rulings in limine. RP 343-44.

3. Trial testimony and violation of in limine order

While on patrol, King County Sheriff’s deputies Robert Nishimura and Joseph Eshom saw a Chevrolet El Camino fail to signal before turning left. 5RP 450-53. The deputies focused on the car in part because a similar car had avoided being pulled over a few nights earlier by

¹ This brief refers to the verbatim report as follows: 1RP – 3/16 and 5/14/12; 2RP – 5/16/12; 3RP – 5/23/12; 4RP – 6/5/12; 6RP – 6/7/12 (morning); 7RP – 6/7/12 (afternoon); 8RP – 6/11/12; and 9RP – 7/17/12.

unexpectedly turning off the road. 5RP 479-83, 593-94. Nishimura made a U-turn and stopped the El Camino. 5RP 455.

White was the driver of the El Camino. According to the deputies, White handed Nishimura his license, then reached into his right vest pocket. 5RP 459. Nishimura asked White what he was doing, and then asked him to stop, but White merely stared straight ahead. 5RP 459. Nishimura feared White was armed, so he asked him to get out of the car. White asked, "What did I do?" 5RP 460-61.

Nishimura grabbed White's arms and attempted to frisk him, but White pulled away and faced Nishimura with clenched fists. 5RP 461-62, 508. Nishimura grabbed White's collar and tried to force him to the ground, but White scrambled away and ran. 5RP 462, 513. As Nishimura and Eshom ran after him, White continued to put his hand into his pocket. 5RP 464.

Believing he was in danger, Nishimura yelled for White to stop and threatened to use his taser. 5RP 464. As Nishimura was preparing to shoot the taser's darts at White, Eshom yelled "gun," and, for the first time, Nishimura noticed a gun in White's hand. 5RP 466, 513.

Nishimura heard a skidding noise on the pavement; Eshom, on the other hand, saw the gun fly from White's hand and hit a fence.² 5RP 466, 520, 583. White then went to the ground. The deputies approached and when they tried to handcuff White, he struggled. 5RP 466, 468. Nishimura tased White again, which allowed the officers to handcuff him. 5RP 469.

White defecated in his clothing at some point during the struggle and later vomited. 5RP 472, 533-34. Nishimura denied that was taser-induced, but Eshom testified to the contrary. 5RP 471-72, 609. Nishimura acknowledged on cross examination that he could face criminal charges for improperly using force against an arrestee. 5RP 527.

Eshom found a loaded semi-automatic pistol in the bushes near the fence. 5RP 470, 586. The gun and ammunition were tested for prints, but no useable prints were found. 4RP 418-23; 5RP 639.

While cross-examining Nishimura, defense counsel sought to impeach the deputy with his testimony from an earlier hearing. Counsel asked for a sidebar to make sure Nishimura knew not to refer to the hearing as a "DOC" hearing. At the sidebar, Nishimura was instructed, consistent with the order in limine, to not refer to a DOC hearing. 5RP

² Eshom threw his taser onto the ground at some point during the chase and believed it could have been the item that skidded. 5RP 620-21

520-51, 553-56. Nonetheless, immediately after cross-examination resumed, the following exchange occurred:

Q. All right, Deputy. So let's get back to that question. Do you recall testifying in an earlier hearing related to this matter?

A. Is this the DOC hearing you're asking about? If it's on a court hearing, I recall a 3.6 hearing a couple of weeks ago.

5RP 521.

Cross examination continued, but after the jury was excused for a recess, White moved for a mistrial. 5RP 556. Pointing out that counsel failed to make a contemporaneous objection, the court denied the motion. 5RP 558-59. Defense counsel explained she did not object because she did not want to highlight the deputy's misconduct. 5RP 559.

White testified that he was on his way to a friend's house when he was stopped by police for failing to signal. 6RP 706. White denied failing to signal. 6RP 722. When White told Nishimura he had indeed signaled, the deputy became upset. Nishimura asked for White's driver's license and walked off. He then returned to the car and, without provocation, asked White if he had a gun. 6RP 716-17. White denied reaching into his vest pocket. 6RP 719.

Nishimura and Eshom frisked White but found only a cell phone. 6RP 721. White began to feel apprehensive about the officers' behavior.

6RP 724. Eshom confirmed White's fears when he punched White in the back of the head. 6RP 724. Feeling isolated and vulnerable on the empty streets, White fled and yelled to for help. 6RP 725. Shortly thereafter, he felt his body being hit with taser darts, lost control of his muscles, and fell to the ground. 6RP 730.

Nishimura continued to tase White although White was on the ground and not resisting. 6RP 731. The deputies kept White facing away from some activity they did not want him to see. 6RP 733-34. White later saw Nishimura carrying something in a plastic bag. Nishimura told Eshom, "[L]ook what I got." 6RP 735-36. On the way to jail, Nishimura told White they had found a gun and White was "gonna be [gone] a long time." 6RP 736.

4. Closing argument

The prosecutor argued White had attempted to inject confusion into what was a straightforward possession case. She pointed out that, as the instructions indicated, the jury need not decide the case "beyond all doubt." 8RP 781.

It's got to be based on . . . evidence or lack of evidence . . . It's not mere speculation.

The instructions talk about an objective and reasonable examination of the evidence. The instructions talk about leaving passions or prejudice aside in deciding this case But what the instructions do not tell you and what you're not required to do is to check you common

sense at the door. It's your collective, objective reasoning. *It's your collective, reasonable basis and reasonable examination of the evidence. That's what a reasonable doubt is.*

8RP 781 (emphasis added). Defense counsel did not object.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT DENIED WHITE'S MOTION FOR A MISTRIAL BASED ON THE DEPUTY'S PREJUDICIAL REFERENCE TO WHITE'S PRIOR DOC HEARING.

A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

This Court reviews the denial of a motion for mistrial for abuse of discretion. Id. An examination of the above criteria reveals the trial court abused its discretion.

First, the error here was serious. Under ER 404(b), evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Wade,

98 Wn. App. 326, 333, 989 P.2d 576 (1999). No matter how relevant such evidence may be, ER 404(b) mandates its exclusion absent other permissible purposes. State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012); Wade, 98 Wn. App. at 337.

ER 404(b) must also be read in conjunction with ERs 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts "the jury's attention to the defendant's general propensity for criminality, the forbidden inference." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes"). It is well accepted that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. Id. at 710-11.

The manner in which the irregularity occurred is likewise relevant in assessing its seriousness. See State v. Taylor, 60 Wn.2d 32, 371 P.2d

617 (1962) (where police officer stated he contacted Taylor's parole officer and then repeated statement after trial court denied motion for a mistrial, reversal required because witness intentionally injected prejudicial information a second time); State v. Smith, 189 Wash. 422, 428, 65 P.2d 1075 (1937) (deliberate disregard of ruling in limine warranted reversal on appeal even absent defense objection).

Recognizing that White would be prejudiced if jurors learned he was involved in a DOC matter – and absent any showing that such evidence was admissible – the trial court correctly precluded the State from introducing such evidence. 3RP 338-40. Nishimura was repeatedly warned not to refer to the hearing as a "DOC hearing," yet he violated the order almost immediately after being warned. 5RP 520-51, 553-56. Given its timing and prejudicial effect, Nishimura's violation is a transparently blatant attempt to prejudice White and should not be condoned. The first factor weighs in favor of reversal.

Because the jury was aware White had prior convictions, the second factor involves a closer question. Evidence of prior convictions was admitted as (1) an element of the current charge and (2) to impeach White's credibility. Ex. 33 (listing White's 1995 convictions as predicate for first degree unlawful firearm possession); 6RP 705 (White's acknowledgment on direct examination of 2004 attempted theft

conviction). As far as the jury knew, however, the most recent conviction occurred in 2004, and its use was limited to consideration of White's credibility. Ex. 33; 6RP 705; CP 70 (Instruction 6). Unlike the properly admitted evidence, reference to a recent DOC hearing implied recent conviction and incarceration, undermining White's credibility still more. The second factor therefore weighs in favor of reversal as well.

The final question is whether a curative instruction could have cured the irregularity. Defense counsel correctly recognized a curative instruction would have highlighted the testimony, thereby increasing its prejudicial effect. As courts have recognized, some errors cannot be fixed with an instruction. Escalona, 49 Wn. App. at 255-56; State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). This is such an error. Without Nishimura's testimony, jurors would have been more likely to accept White's claims of police brutality and a corresponding motive to fabricate the allegations against him. See 5 Karl B. Tegland, Wash. Prac.: Evidence § 404.10, at 498 (5th ed. 2007) (evidence of prior felony convictions is generally inadmissible because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty).

After all, White's allegations are hardly far-fetched; while Nishimura maintained a taser would not cause a tased person to defecate or vomit, his colleague's testimony was to the contrary. 5RP 471-72, 609.

In addition, Nishimura admitted he could face criminal charges for improperly using force against an arrestee. 5RP 527. Under these circumstances, a reasonable juror could have concluded Nishimura has a reason to protect himself, which would add credence to White's version of events.

Because Nishimura's testimony created a serious trial irregularity and because introduction of the evidence was not harmless, this Court should reverse White's and remand for a new trial. Gresham, 173 Wn.2d at 734.

2. PROSECUTORIAL MISCONDUCT DENIED WHITE A FAIR TRIAL

The prosecutor improperly undermined White's fundamental constitutional right to the presumption of innocence and diminished the State's burden of proving each element of the offense beyond a reasonable doubt by suggesting that unless all 12 jurors agree, doubt is not reasonable. This inaccurate statement of the law likely affected the outcome at trial and was so flagrant it could not have been cured by a limiting instruction.

a. Introduction to applicable law

It is misconduct to misstate the State's burden of proof. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). When a prosecutor commits misconduct, he may deny the accused a fair trial. U.S. Const. amend. 14 Wash. Const. art. 1, § 3; State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

To determine whether a prosecutor's comments are misconduct, this Court must decide whether the remarks were improper and, if so, whether a substantial likelihood exists that they affected the jury. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where an accused does not object to the comments, the reviewing court will reverse if the misconduct is so flagrant that the resulting prejudice could not have been cured by a limiting instruction. Id. Misconduct is particularly egregious when the prosecutor seeks to mislead the jury as to the presumption of innocence, which is the foundation of the criminal justice system. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

b. The prosecutor's comments undermined the presumption of innocence, were flagrant, and no curative instruction could have mitigated the resulting prejudice.

Due process requires the State to bear the burden of proving each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S.

358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). To protect this right, each juror must reach his or her own verdict uninfluenced by facts outside the evidence and proper instructions and argument. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). “[H]owever subtly the suggestion may be expressed,” an instruction that suggests that a juror who disagrees with the majority should abandon his opinion for the sake of reaching a verdict invades the right to jury unanimity. Id. Moreover, the presumption of innocence can be “diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” Warren, 165 Wn.2d at 26 (quoting State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007)).

In two ways, the prosecutor sought to diminish the presumption of innocence and the State's burden of proof. This misconduct likely affected the verdict, was flagrant, and could not have been cured by a limiting instruction. Belgarde, 110 Wn.2d at 508.

First, the prosecutor sought to diminish the concept of "reasonable" doubt. But a "reasonable" doubt need not be justified by an articulable reason. “An unarticulated conviction that the State has failed to meet its

burden of proof will serve as a legitimate basis to acquit.” State v. Reyes, 116 P.3d 305, 312 (Utah 2005); see also State v. Walker, 164 Wn. App. 724, 731-32, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010) review denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813 (2010), review denied, 170 Wn.2d 1003 (2010) (each repudiating argument jury must “fill in the blank” with a reason for reasonable doubt).

Second, the prosecutor incorrectly implied any doubt as to an element of the crime was reasonable only if agreed upon by all 12 jurors. This is wrong; unanimity is not a precondition to finding a doubt reasonable. An accused has the right to have each juror reach his or her own verdict. Boogaard, 90 Wn.2d at 736; cf. Lawson v. State, 198 Ga. App. 594, 402 S.E.2d 344 (1991) (error to give instruction implying reasonable doubt is a collective decision to be reached by the jury as a whole rather than an individual determination, although error held not to be reversible).

Incurable prejudice is shown when the case hinges on credibility, and, therefore, “the prosecutor’s improper arguments could easily serve as the deciding factor.” Walker, 164 Wn. App. at 738. The Court reversed in Johnson because with conflicting evidence and a flagrant misstatement of the reasonable doubt standard, the Court could not conclude the verdict

was not affected. Johnson, 158 Wn. App. at 685-86. In Walker, the Court reversed, noting that that case, too, hinged on credibility. 164 Wn. App. at 738.

The misconduct not only incurable, it was flagrant. Misconduct is particularly egregious when a prosecutor misleads the jury as to the presumption of innocence. Warren, 165 Wn.2d at 26. As set forth above, courts have repeatedly repudiated an analogous, although not identical, “fill-in-the-blank” argument. And here, the prosecutor’s comments erroneously informed jurors they must reach consensus as to what constituted a reasonable doubt, suggesting doubts considered less than persuasive by the whole jury should be rejected. Rather, the jurors should have been permitted to rely on their own life experiences in weighing witness credibility and, ultimately, deciding whether White’s version of events cast doubt as to the State’s case.

In a trial that hinged on credibility, the improper argument was likely to have been the deciding factor in favor of conviction. Reversal is, therefore, required. Belgarde, 110 Wn.2d at 508.

D. CONCLUSION

Deputy Nishimura's violation of the order in limine created a serious irregularity that denied White a fair trial. In addition, flagrant, prejudicial prosecutorial misconduct denied him a fair trial. This Court should reverse White's conviction and remand for a retrial.

DATED this 19th day of December, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 69064-7-1
)	
JARRAY WHITE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JARRAY WHITE
DOC NO. 956332
CEDAR CREEK CORRECTIONS CENTER
P.O. BOX 37
LITTLEROCK, WA 98556

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF DECEMBER, 2012.

X Patrick Mayovsky

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