

No. 70844-9-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA LAMBERT,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. Counts I, II and IV are not supported by sufficient evidence and must be reversed.

a. *There was insufficient evidence to support felony murder as charged in Count I.*

A person is guilty of murder in the first degree when:

He or she commits or attempts to commit the crime of . . . burglary in the first degree . . . and in the course of or in furtherance of such crime or in immediate flight therefrom, he . . . causes the death of a person other than one of the participants. . . .

RCW 9A.32.020(1)(c). The State must present evidence that the death was a probable consequence of the felony and must specifically prove that the felony began before the killing. *State v. Hachenedy*, 160 Wn.2d 503, 518, 158 P.3d 1152 (2007).

Hachenedy expressly rejected the “res gestae” or “transaction” approach used in older cases. “It has never been the law - notwithstanding potentially misleading language in older cases . . . - that it is sufficient merely to show the killing and the felony were part of the same transaction.” *State v. Irby*, 187 Wn. App. 183, 202, 347 P.3d 1103 (2015) (citing *Hachenedy*, 160 Wn.2d at 518). Chronology is important in proving that a murder was committed in the course of a felony. *Irby* 187 Wn. App. at 201. For a killing to have occurred in the course of burglary, “logic dictates” that the burglary must have begun before the killing. *Hachenedy*,

160 Wn.2d at 518, 158 P.3d 1152. Thus, to prove felony murder here, the State was required to prove Mr. Lambert entered the homes with intent to commit a crime – other than murder – and that after that burglary began he committed murder. The State did not do that.

As set forth in Mr. Lambert’s initial brief, this case mirrors *Irby*, and as there requires reversal.

With respect to the murder of George Lambert, Mr. Lambert was invited by his aunt to enter the house. At best, the State’s evidence establishes the burglary occurred simultaneously with and not before the murder as required by *Hacheney*. Thus, no burglary preceded the murder. In either event, the evidence is insufficient to establish felony murder.

The State offered evidence, that **after** the murder of George Lambert, Mr. Lambert began searching the home for guns. Again, as in *Irby*, such a chronology of events is insufficient to establish felony murder. 187 Wn. App. at 204.

The State responds that a homicide which precedes the felony but which is nonetheless done to facilitate that felony satisfies the necessary chronology. Brief of Respondent at 18. Even assuming the State were correct, the State does not point any evidence that Mr. Lambert killed his grandfather to facilitate a burglary. In fact, the evidence shows the

opposite was true. Mr. Lambert did not kill his aunt, but merely bound her, illustrating the homicide was not done to facilitate the burglary.

b. *There was insufficient evidence to establish first degree burglary as charged in Count IV.*

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020.

By the statute's plain terms an assault occurring prior to entry is not sufficient, nor an assault which occurs during a brief exit of the building prior to reentering. Similarly, the deadly weapon alternative requires he be armed with a deadly weapon at one of the three listed points in time. Neither alternative is satisfied here.

The murder of August Eisner occurred on his driveway and thus could not have occurred during Mr. Lambert's entry or while he was inside the house. Moreover, there was no evidence the murder occurred during Mr. Lambert's flight. Indeed, bloody footprints were found in the garage and inside the house, RP 684, indicating the murder occurred either prior to initial entry or during a brief interlude in the burglary. In fact, the State argued to the jury that Mr. Lambert was already inside the house when he saw Mr. Eisner on the driveway. RP 1623. According to the

State, Mr. Lambert exited the house, killed his grandfather and then returned to the house to continue his search for guns. RP 1624. That scenario, however, does not satisfy the requirement that an assault occur during entry, inside the building, or in the flight from the building. Thus, the State did not prove the assault alternative of first degree burglary.

The State asks this Court to adopt a new rule, one not provided for in the plain language of the statute. The State contends “it can be argued with equal force that Lambert assaulted Gene ‘in entering’ or in ‘immediate flight’ from the building.” Brief of Respondent at 20. The State is correct that each option has the same degree of factual support – none. It is undisputed that Mr. Lambert had already entered the building before the murder occurred. It is equally undisputed that he was not fleeing when the murder occurred, but instead intended to and did in fact return to the building. Moreover, it is logically impossible for a person to enter a building simultaneously to his flight therefrom. Thus, there is neither factual nor logical support for the State’s claim. The State did not prove the assault alternative of first degree burglary.

For the same reason the State failed to prove Mr. Lambert used or threatened to use the knife in a manner likely to cause death or serious injury (1) during the entry; (2) while inside the building; or (3) in the immediate flight from the building. Because the evidence was insufficient

to the establish first degree burglary, the evidence is by definition insufficient to establish first degree felony murder.

2. The convictions on Counts I, II, and VI violated Mr. Lambert's right to a unanimous jury.

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). If the jury returns “a particularized expression” as to the means relied upon for the conviction, the unanimity requirement is met. *Ortega-Martinez*, 124 Wn.2d at 707-08. If the jury does not provide a particularized expression of unanimity through a special verdict form, a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. *Id.*, 124 Wn.2d at 707-08.

On appeal, “[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means.” *State v. Kintz*, 169 Wn.2d 537, 552, 238 P.3d 470 (2010) (citing *Ortega-Martinez*, 124 Wn.2d at 707-08); *Owens*, 180 Wn.2d at 99. As discussed, the State did not prove the felony murder alternative of either Count I or II. The

absence of sufficient evidence of that alternative requires reversal of the convictions. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08. Additionally, the State did not prove either the assault or deadly weapon alternative of first degree burglary in Count IV. Even if the Court finds one of the alternatives proved beyond a reasonable doubt, the count must be reversed for lack of proof of the other. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

Finally, because the felony murder alternative is unsupported by sufficient evidence, the State cannot retry Mr. Lambert on that alternative. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997). So too, if the court finds the assault and/or deadly weapon alternatives are not supported by sufficient evidence, the State may not retry Mr. Lambert on those alternatives.

3. Even if the Court finds sufficient evidence supports each alternative, the convictions on Counts I, II, IV and VI violate Mr. Lambert's right to a unanimous verdict.

Because it is fully addressed in his prior brief, Mr. Lambert does not offer any additional argument concerning the denial of his right to a unanimous jury as expressed by “a particularized expression” by the jury as to the means relied upon for the conviction.

4. Instructions 16 and 17 omit an essential element of the offense of felony murder.

- a. *The state must prove and a jury must find each element of an offense beyond a reasonable doubt.*

“The Sixth Amendment provides that those ‘accused’ of a ‘crime’ have the right to a trial ‘by an impartial jury.’” *Alleyne v. United States*, U.S. ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013). This right, together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A similar requirement flows from the jury-trial guarantee of article I, section 22 and the due process provisions of article I, section 3 of the Washington Constitution. *State v. Mills*, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

- b. *The to-convict instructions omitted essential elements of first degree murder.*

“A ‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, “an instruction purporting to list all

of the elements of a crime must in fact do so.” *Id.* (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). A reviewing court may not look to other jury instructions to supply a missing element from a “to convict” jury instruction. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63).

Here the to-convict instructions on each of the first degree murder charges omit an essential element of the offense.

A felony murder conviction must be supported by sufficient evidence of each element of the predicate felony. *State v. Green*, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). The State must prove the defendant was committing or attempting to commit the predicate felony at the time of the murder. *State v. Kosewicz*, 174 Wn.2d 683, 691, 278 P.3d 184 (2012); RCW 9A.32.030(1)(c); *see also*, 11 *Washington Practice, Pattern Jury Instructions Criminal*, WPIC 26.04 (3d ed).

However, the instructions in this case omit this element. CP 198; CP 199.

The State in response does not argue the element was included in the instructions. Instead, the State claims, “[t]he plain and obvious meaning of the instruction[s] is that the defendant was a participant in the crime of first degree burglary. Brief of Respondent 26-27. Even assuming that were true, that is not the standard for assessing the completeness of a

to-convict instruction. “An instruction purporting to list all of the elements of a crime must in fact do so.” *Smith*, 131 Wn.2d at 263 (citing *Emmanuel*). Either the element is there or it is not. In this case, the element that Mr. Lambert was committing or attempting to commit first degree burglary does not appear in Instruction 16 and 17. Thus, the instructions are erroneous.

c. This Court must reverse Mr. Lambert’s felony murder convictions.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at 265). Importantly, *Brown* did not concern an instruction which omitted an element. Instead, it concerned an erroneous definition of accomplice liability. Accomplice liability is not a separate element of any offense nor is it an alternative method of committing any offense. *State v. Carothers*, 84 Wn.2d 256, 261, 525 P.2d 731 (1974); *State v. Teal*, 152 Wn.2d 333, 338-39, 96 P.3d 974 (2004). Thus, *Brown* did not address the harmless standard for instruction which omit elements. In fact, *Brown* specifically

held an instruction which relieved the State of its burden of proof with regard to an element would be subject to the automatic-reversal rule. *Brown*, 147 Wn.2d at 339.

In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 1109 P.3d 415 (2005) (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The State cannot meet that burden in this case.

As discussed above and at length in Mr. Lambert's brief, the State did not offer sufficient proof that Mr. Lambert was committing first degree burglary at the time of either murder. The omission of the element in Instruction 16 and 17 permitted the jury to convict Mr. Lambert of felony murder even in the absence of sufficient proof of the predicate felony. As such, the State cannot show the error in the instructions was harmless.

5. Convictions of both first degree murder and first degree burglary violate double jeopardy principles.

“No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb....” U.S. Const. amend. V. Similarly, the Washington Constitution provides, “No person shall be ... twice put in jeopardy for the same offense.” Const. art. I, § 9. These clauses protect defendants against “prosecution oppression.” *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

Both the United States Supreme Court and Washington Supreme Court have recognized that entering convictions for both felony murder and the underlying felony violates double jeopardy principles. *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977); *In re the Personal Restraint of Francis*, 170 Wn.2d 517, 522 n.2, 242 P.3d 866 (2010); *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 818, 100 P.3d 291 (2004) (citing *Harris*, 433 U.S. 682). This is so because “[t]o convict a defendant of felony murder the State is required to prove beyond a reasonable doubt each element of the predicate felony.” *State v. Quillin*, 49 Wn. App. 155, 164, 741 P.2d 589 (1987).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI. Thus, “[w]hen the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings.” *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

Harris articulated the rule “[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one. 433 U.S. at 682-83 (citing *In re Neilsen*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889)). Nonetheless the State urges this court to ignore *Harris* suggesting it is “per curium opinion with virtually no analysis, and . . . does not address the importance of legislative intent to the analysis.” Brief of Respondent at 33. It seems unlikely that the Court was unaware of its own long-standing double jeopardy analysis. Moreover, the fact that it is a per curium decision likely reflects the Court’s view that application of that analysis so obviously and inescapably led to a single conclusion, thus a detailed opinion was unnecessary. But even if doubts exist as to the correctness of that outcome, all lower court are required to follow the Supreme Court’s decision.

Mr. Lambert's convictions of both burglary and felony murder predicated on the burglary violate of the Fifth Amendment.

Merger is a common-law doctrine which holds that where proof of one crime elevates the degree of another, the crime which is incidental to the other merges into the greater offense.

Merger applies where offense elevates the degree of another offense. In that circumstance the lesser offense merges into the greater, in light of the presumption "the legislature intended to punish both offenses through a greater sentence for the greater crime."

Francis, 170 Wn.2d at 524.

RCW 9A.52.050 creates an exception to this general rule for burglary. The intent of this statute with respect to burglary is to permit separate punishment for the burglary as well as the predicate crimes committed inside the building which elevate a trespass into a burglary. Pursuant to the statute, those other offenses "would not merge with the offense of first-degree burglary" *State v. Sweet*, 138 Wn.2d 466, 478, 980 P.2d 1223 (1999).

That is altogether different than a case where the burglary itself is the incidental crime which forms the element of a larger crime such as felony murder. It is not a question of whether the other offenses merge into the overarching burglary but rather whether the burglary will merge into the overarching murder of which it is an element.

As set forth in Mr. Lambert's initial brief, *State v. Elmore*, 154 Wn. App. 885, 900-01, 228 P.3d 760 (2010), failed to recognize the scope of the burglary anti-merger statute and not address the rule established by cases such as *Harris*. Thus, its analysis is incomplete at best and ultimately contrary to the established rule. Where the burglary is an element of felony murder, double jeopardy principles prevent convictions of both offense. *See Harris*, 433 U.S. at 682-83.

6. The trial court improperly denied Mr. Lambert his right to represent himself in violation of the Sixth Amendment and article I, section 22.

Article I, section 22 of the Washington Constitution explicitly guarantees a defendant the right to “appear and defend in person, or by counsel.” *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010); *State v. Rafay*, 167 Wn.2d 644, 649, 222 P.3d 86, 88 (2009). The Sixth Amendment implicitly provides a right to self-representation. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Madsen concluded a defendant's lack of familiarity with the legal rules or even his obnoxious behavior was not a basis to deny him the right to self-representation. *Madsen*, 168 Wn.2d. at 509. So too, the Court held a desire for efficient and orderly court proceedings was not a valid reason the right to self-representation. *Id.* at 505.

Here, the trial court concluded Mr. Lambert forfeited his right to represent himself because of his “intransigence,” inability to follow the rules of evidence, his disrespect for the court, and “unnecessary and needless waste of time.” RP 1123. In light of *Madsen* that is an improper basis on which to find forfeiture.

The State attempts to distinguish based upon the fact that the trial court in *Madsen* never honored the right to self-representation while the court here wrongly took it away after initially honoring it is a distinction without a difference. By the State’s logic while a court could not deny the person the opportunity to exercise his right to self-representation based upon disruptive behavior, once the motion were granted the court could immediately deem the right forfeited by the very same behavior. That is nonsensical.

The State’s brief highlights instances of Mr. Lambert’s unprofessional and perhaps even obnoxious behavior, as supporting the trial court’s ruling. Brief of Respondent at 36-45. In doing so, the State simply ignores *Madsen*. The Court there cautioned:

Although the trial court’s duties of maintaining the courtroom and the orderly administration of justice are extremely important, the right to represent oneself is a fundamental right explicitly enshrined in the Washington Constitution and implicitly contained in the United States Constitution. The value of respecting this right outweighs any resulting difficulty in the administration of justice.

Madsen, 168 Wn.2d at 509. The Court noted further,

Though Madsen did interrupt the trial court on several occasions, Madsen was trying to address substantive issues that the record shows he clearly thought were unresolved and were not addressed by the court. A court may deny pro se status if the defendant is trying to postpone the administration of justice. Madsen never requested a continuance. **A court may not deny pro se status merely because the defendant is unfamiliar with legal rules or because the defendant is obnoxious.** Courts must not sacrifice constitutional rights on the altar of efficiency.

168 Wn.2d at 509 (Emphasis added).

To the extent Mr. Lambert failed to immediately comply with the evidentiary rulings or the rules of evidence, nothing suggests it was for purpose of causing delay. Like Mr. Madsen, Mr. Lambert sought to present substantive issues to the jury and court. The court complained that he was not conducting his case neatly in line with the rules of evidence. RP 1077. Again, that is not a sufficient basis to deprive him of his right. *Madsen*, 168 Wn.2d at 509; *see also, Faretta*, 422 U.S. at 836 (lack of technical legal knowledge irrelevant to exercise of right to self-representation

As *Madsen* recognized, a trial involving a pro se litigant will not run as smoothly as a case involving represented parties. A pro se litigant may stumble on procedural hurdles and as a result the trial may proceed in fits and starts. Those inefficiencies, or as the trial court here phrased them

“waste[s] of time,” are not a basis to “sacrifice [his] constitutional rights on the altar of efficiency.” *Madsen*, 168 Wn.2d at 509.

Mr. Lambert’s convictions must be reversed.

7. The prosecutor’s questioning of Mr. Lambert drew an impermissible adverse inference from Mr. Lambert’s exercise of his right to represent himself.

Mr. Lambert’s argument concerning the improper inferences the State sought to draw from his exercise of his right to self-representation are fully set forth in his initial brief.

8. The trial court erred and violated the requirements of RCW 10.77.080 when it refused to consider Mr. Lambert’s pretrial motion for acquittal by reason of insanity.

Prior to trial and pursuant to RCW 10.77.080 Mr. Lambert requested a hearing on his motion to acquit by reason of insanity. The State filed a motion urging the court to hear the motion to acquit in conjunction with the jury trial, ostensibly to conserve resources. CP 997-1002. Mr. Lambert objected, noting among other things that evidence regarding his sanity, particularly which the State would offer in rebuttal, would not necessarily be otherwise admissible at trial on the question of guilt. 6/28/13 RP 27-28. Concluding that conducting the pretrial hearing which the statute requires would be unnecessarily burdensome, the court granted the States’ motion. CP 975-76.

In his initial brief, Mr. Lambert has provided a thorough analysis of RCW 10.77.080 under long-standing rules of statutory construction. In response, the State repeats the claim made to the trial court that the statute is silent as to the timing of the court's ruling on the motion. Brief of Respondent at 51. That ignores the plain language of the statute.

The statute expressly says the court should hold a "hearing upon the motion" at which "the defendant shall have the burden of proving by a preponderance of the evidence" that he is insane. "Absent ambiguity or a statutory definition, [a court] gives the words in a statute their common and ordinary meaning. To determine the plain meaning of an undefined term, [a court] may look to the dictionary." *HomeStreet, Inc. v. State Department of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (quoting *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976)). A "hearing upon [a] motion" is a term of common understanding, courts conduct hearings every day. No one would confuse a motion hearing with a jury trial. The plain language of the statute required the court to consider Mr. Lambert's motion for acquittal in the course of a hearing separate from and before the jury trial.

In fact, the Supreme Court has long described the motion procedure as "a statutory alternative to a jury trial, available to the defendant at his own election." *State v. Jones*, 84 Wn.2d 823, 832-33, 529

P.2d 1040 (1974); *see also*, *State v. West*, 185 Wn. App. 625, 639, 344 P.3d 1233 (2015) (the statute as “grants . . . two bites of the proverbial pear.”); 12 Wash. Prac., *Criminal Practice & Procedure* § 1011 (3d ed.) (under RCW 10.77.080 “issue of a defendant’s insanity, if not disposed of by *pretrial motion* under, must be raised and determined at the trial”). The motion for acquittal procedure cannot operate as an alternative to a jury trial if it is conducted in conjunction with a jury trial. By its plain language, the statute requires a hearing on a motion for acquittal which is separate from and before a jury trial.

RCW 10.77.080 entitled Mr. Lambert to a separate pretrial hearing on his motion for acquittal. The trial court erred in denying him that hearing.

Moreover, the court’s order created an appearance of unfairness in the proceedings. Too, the court’s order deprived Mr. Lambert his right to control his own defense. The State has not responded to either argument. This Court may treat that lack of response as a concession of error. *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003).

9. The trial court used the incorrect standard in denying Mr. Lambert’s motion for acquittal.

Mr. Lambert does not offer any additional argument regarding the trial court’s use of the incorrect standard in ruling on his motion to acquit,

beyond noting the State's apparent concession of error by its lack of response. *E.A.J.*, 116 Wn. App. at 789

B. CONCLUSION

For the reasons above and as set forth in Mr. Lambert's initial brief, this Court should reverse Mr. Lambert's convictions.

Respectfully submitted this 14th day of June, 2016.

s/ Gregory C. Link
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70844-9-I
v.)	
)	
JOSHUA LAMBERT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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