

NO. 34629-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK C. EARL,

Appellant.

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STATE OF WASHINGTON
BY _____
DEPT. OF JUSTICE

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

The Honorable Frederick W. Fleming, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ARGUMENTS IN REPLY</u> | 1 |
| 1. JUROR MISCONDUCT DEPRIVED EARL OF HIS RIGHT TO A FAIR TRIAL BY JURY. | 1 |
| 2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT EARL ON EITHER COUNT OF FIRST DEGREE RAPE. | 7 |
| 3. DEFENSE COUNSEL'S AGREEMENT TO A DEFECTIVE UNANIMITY INSTRUCTION DEPRIVED EARL OF EFFECTIVE ASSISTANCE OF COUNSEL. | 8 |
| 4. ADMISSION OF IMPROPER OPINION TESTIMONY REGARDING THE ALLEGED VICTIM'S VERACITY AND EARL'S GUILT WAS MANIFEST ERROR. | 12 |
| B. <u>CONCLUSION</u> | 17 |

TABLE OF AUTHORITIES

| | Page |
|---|-------|
| <u>WASHINGTON CASES</u> | |
| <u>Miller v. Likins</u> , 109 Wn. App. 140, 34 P.3d 835 (2001) | 15 |
| <u>State v. Bland</u> , 71 Wn. App. 345, 860 P.2d 1046 (1993), <u>overruled on other grounds</u> , <u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007) | 8, 9 |
| <u>State v. Boling</u> , 131 Wn. App. 329, 127 P.3d 740 (2006) | 5 |
| <u>State v. Cruz</u> , 77 Wn. App. 811, 894 P.2d 573 (1995) | 14 |
| <u>State v. Ellis</u> , 71 Wn. App. 400, 859 P.2d 632 (1993) | 11 |
| <u>State v. Elmore</u> , 155 Wn.2d 758, 123 P.3d 72 (2005) | 1, 2 |
| <u>State v. Kell</u> , 101 Wn. App. 619, 5 P.3d 47 (2000) | 5 |
| <u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007) | 12-15 |
| <u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) | 8 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|---|------|
| <u>WASHINGTON CASES</u> (CONT'D) | |
| <u>State v. Larson</u> , 88 Wn. App. 849, 946 P.2d 1212 (1997) | 6 |
| <u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996) | 12 |
| <u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988) | 16 |
| <u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007) | 8 |
| <u>State v. Sutherby</u> , ___ Wn. App. ___, 158 P.3d 91 (2007) | 14 |
| <u>State v. Watkins</u> , 136 Wn. App. 240, 148 P.3d 1112 (2006) | 12 |
| <u>State v. Williams</u> , 136 Wn. App. 486, 150 P.3d 111 (2007) | 10 |
| <u>FEDERAL CASES</u> | |
| <u>Galowski v. Murphy</u> , 891 F.2d 629 (7th Cir. 1989) | 7 |
| <u>Green v. United States</u> , 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) | 6 |

TABLE OF AUTHORITIES (CONT'D)

| | Page |
|--|------|
| <u>FEDERAL CASES (CONT'D)</u> | |
| <u>Stockton v. Virginia</u> , 852 F.2d 740 (4th Cir. 1988) | 4 |
| <u>Tanner v. United States</u> , 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987) | 3 |
| <u>United States v. Burke</u> , 257 F.3d 1321 (11th Cir. 2001) | 7 |
| <u>United States v. Amaral</u> , 488 F.2d 1148 (9th Cir. 1973) | 15 |
| <u>United States v. Briggs</u> , 291 F.3d 958 (7th Cir. 2002) | 2 |
| <u>United States v. Gaskin</u> , 364 F.3d 438 (2nd Cir. 2004) | 4 |
| <u>United States v. Prosperi</u> , 201 F.3d 1335 (11th Cir. 2000) | 2 |
| <u>United States v. Resko</u> , 3 F.3d 684 (3rd Cir. 1993) | 4 |
| <u>United States v. Washington</u> , 198 F.3d 721 (8th Cir. 1999) | 7 |

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

United States v. Yoakam,
168 F.R.D. 41 (D. Kan. 1996) 2

Watkins v. Kassulke,
90 F.3d 138 (6th Cir.1996) 7

OTHER JURISDICTIONS

People v. Ferguson,
67 N.Y.2d 383, 494 N.E.2d 77,
502 N.Y.S.2d 972 (1986) 7

RULES, STATUTES AND OTHERS

Federal Rule of Evidence 606(b) 2, 3

A. ARGUMENTS IN REPLY

1. JUROR MISCONDUCT DEPRIVED EARL OF HIS RIGHT TO A FAIR TRIAL BY JURY.

The state contends a trial court may not probe the mental processes of jurors and thus juror No. 7's testimony, including "her perception of attempts to intimidate her," cannot be considered as evidence of misconduct. Brief of Respondent (BOR) at 27-29. No. 7's subjective reaction to the rogue juror's conduct, including whether she felt intimidated, is irrelevant to the question of whether the rogue juror committed misconduct. See Opening Brief of Appellant (BOA) at 17. Either the rogue juror talked about the case during a break in deliberations without all members of the jury present or she did not. That is a fact capable of being determined without delving into the substance of juror deliberations. Proper inquiry focuses "on the conduct of the jurors and the process of deliberations, rather than the content of discussions." State v. Elmore, 155 Wn.2d 758, 774, 123 P.3d 72 (2005). "Although courts must take care not to delve into the substance of deliberations, it is possible to focus . . . on whether the juror has openly expressed an intent to defy the law or the court's instructions." Id., 155 Wn.2d at 775.

The state cites three federal cases in support of its argument that intrajury influences, as opposed to extrinsic influences, are not subject to

and to further inquire whether the rogue juror was capable of properly deliberating during the second set of deliberations.

The state also cites Tanner in support of its position that a trial court may not inquire into the internal processes of the jury. BOR at 18-19, 26; Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987). Tanner held the trial court properly refused to hold a *post-verdict* evidentiary hearing at which jurors would testify on juror alcohol and drug use during trial because FRE 606(b) barred. impeachment of the verdict with juror testimony. Id., 483 U.S. at 121-22, 125. But Tanner recognized the trial court may consider *pre-verdict* juror reports of inappropriate juror behavior to protect a defendant's constitutional right to a fair trial. Id. at 127. For this reason, Tanner helps Earl, not the state.

The state contends No. 7's testimony fails to establish a discussion about Earl's guilt or the merits of the case occurred during a break in deliberations. BOR at 30. No. 7 told the court "things were said by another juror during a break in reference to the deliberations" and that the rogue juror was trying to sway the verdict. 5RP 667, 674. Immediately after No. 7 stated "I know it said not to discuss anything about the case during breaks," the trial court asked:

The Court: And you didn't discuss anything about the case during break or -- is that correct?

Juror No. 7: Except for that this reference was made to what was discussed right before the break.

5RP 669.

The court later acknowledged "behavior" occurred. 5RP 679. Judge Fleming at no time said he disbelieved No. 7's account that the rogue juror talked about the case during a break in deliberations without all jurors present. The trial court thus erred in ceasing inquiry before verifying the rogue juror was willing to follow the court's instructions on proper deliberation. See id. at 774 (court's inquiry should cease once the trial judge confirms the juror in question "does not intend to ignore the law or the court's instructions.").

The state questions Earl's claim that discussion about the case by fewer than the full jury constitutes misconduct. BOR at 31. Gaskin and Stockton recognize it is misconduct for a subset of jurors to discuss the merits of the case, or a defendant's guilt or innocence, during a break in deliberations. United States v. Gaskin, 364 F.3d 438, 463-64 (2nd Cir. 2004); Stockton v. Virginia, 852 F.2d 740, 747 (4th Cir. 1988). Discussions among a subset of individual jurors about the merits of the case, without the full jury present and outside the bounds of the proper deliberative process, thwart the goal of collective decision-making and affect a defendant's right to a fair and impartial jury trial. United States v.

Resko, 3 F.3d 684, 689 (3rd Cir. 1993). The trial court, prior to deliberations, appropriately instructed the jury not to discuss the case separately because deliberation is a group process. 5RP 643. According to the state, a juror does not commit misconduct when she disregards a trial court's instruction on proper deliberations. The illegitimacy of that position is self-evident.

The state claims Earl must show he was prejudiced by the misconduct. BOR at 32. Earl does not bear this burden. Prejudice is presumed once juror misconduct is established, and the state bears the burden of proving the misconduct was harmless beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006); State v. Kell, 101 Wn. App. 619, 621, 5 P.3d 47 (2000).

The state argues any prejudice resulting from the rogue juror's misconduct "was eliminated when the jury was instructed to start the deliberation process over from the beginning." BOR at 32. The trial court did not verify the rogue juror was able and willing to follow the court's instructions, nor did the court re-instruct the rogue juror on proper deliberation before deliberations began anew. By removing No. 7 while retaining the rogue juror, the court sent a message to remaining jurors that they too would be removed or suffer similar abuse at the hands of the rogue

juror if they disagreed about the verdict or reported misconduct. Under these circumstances, the state is unable to establish beyond a reasonable doubt (1) the rogue juror refrained from identical misconduct during the second set of deliberations; and (2) the trial court's actions did not influence the deliberations of remaining jurors. See BOA at 20-21.

For the first time on appeal, the state claims the trial court properly denied Earl's request for a mistrial because Earl, rather than his attorney, made the request. BOR at 35. An appellate court will not affirm on the basis of a theory argued by the state for the first time on appeal. State v. Larson, 88 Wn. App. 849, 852, 946 P.2d 1212 (1997). The state therefore waived this argument by not raising it below.

In any event, the state's argument is absurd because the trial court in fact considered the merits of Earl's motion. 5RP 689-91. There is no authority for the proposition that the merits of a mistrial motion, ruled on by the trial court, should not be considered on appeal because it was brought by the defendant without the assistance of counsel.¹

¹ Earl does not concede trial counsel failed to seek a mistrial. Counsel made a tactical decision to allow his client to speak for himself. 5RP 689. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) (addressing right of allocution).

The cases cited by the state are inapposite. Two involve an attorney's decision not to seek a mistrial, which resulted in the trial court failing to address the issue. United States v. Burke, 257 F.3d 1321, 1322-23 (11th Cir. 2001); Galowski v. Murphy, 891 F.2d 629, 639 (7th Cir. 1989). The other cases, in which the court granted a mistrial, involve challenges to counsel's decision to seek a mistrial without agreement from the defendant. United States v. Washington, 198 F.3d 721, 723 (8th Cir. 1999); Watkins v. Kassulke, 90 F.3d 138, 143 (6th Cir.1996); People v. Ferguson, 67 N.Y.2d 383, 389-90, 494 N.E.2d 77, 502 N.Y.S.2d 972 (1986).

This case involves neither of those situations. Earl assigns error to the court's failure to grant the motion, not his attorney's decision to seek one. Further, the trial court addressed Earl's motion on the merits. This Court should do the same.

2. **THERE WAS INSUFFICIENT EVIDENCE TO CONVICT EARL ON EITHER COUNT OF FIRST DEGREE RAPE.**

The state paraphrases A.K.'s testimony and warps the context in which she gave her answers to argue sufficient evidence supported Earl's convictions for first degree rape. BOR at 51-52. Earl rests on the argument set forth in his opening brief because his description of the record is more accurate. BOA at 24-26.

3. DEFENSE COUNSEL'S AGREEMENT TO A DEFECTIVE UNANIMITY INSTRUCTION DEPRIVED EARL OF EFFECTIVE ASSISTANCE OF COUNSEL.

To ensure jury unanimity, either the state must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The state claims no unanimity instruction was needed for counts 3, 4, and 5 because it elected the acts pertaining to those counts. BOR at 43.

The state did not elect a single act for Count 4. 5RP 594-96, 637. A.K. testified Earl fondled her breasts on more than one occasion, but the state nowhere specified which particular act the jury must rely upon to convict for count 4. 5RP 263-66.

The state did not sufficiently elect the acts for counts 3 and 5 either. An election by the state must be clear from the record. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993), overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). The state does establish election unless (1) its closing argument, when considered with the jury instructions and the charging documents, makes clear which act the state relies on for each charge and (2) there is no possibility that the jury

could have been confused as to which act related to which charge. Bland, 71 Wn. App. at 351-52.

The state said during closing that count 5 (second degree rape) "was based on the victim, [A.K.], saying that the last time that the defendant had contact with her in this sexual manner was between Thanksgiving day and sometime in late December. She couldn't remember if it was before Christmas, on Christmas, or when the last time that she saw the defendant, but it was sometime during that month of 2003." 5RP 596. In rebuttal, the state commented "[c]ount V, rape of a child in the second degree, the last time when she testified that she talked about it in some detail, said she couldn't remember for sure, she thinks the last time was after Thanksgiving, couldn't remember if it was before or after Christmas." 5RP 637.

The state's comments accurately relate A.K.'s uncertainty regarding when Earl last touched her. 5RP 274, 278-79, 332-33. For this very reason, the state's remarks do not qualify as an adequate election of the particular act the jury needed to rely upon to convict. A.K. testified Earl touched her many times over the course of four years, up through the charging period for count 5. 5RP 284-85, 320-21, 328-29. Given A.K.'s uncertainty over when the last act actually occurred, jurors could all generally accept the basis for Count 5 was the "last act" but disagree as to

when the last act actually occurred. In that case, there would still be no unanimity on the specific act for Count 5.

Furthermore, neither the generalized information nor the generic "to convict" instruction for Count 5 specified the last time Earl touched A.K. CP 131-33, 158 (Instruction 19). Moreover the court instructed the jury that attorneys' arguments are not evidence, and that it was free to draw its own conclusions from the evidence presented. CP 139-40 (Instruction 1). Under these circumstances, the state did not sufficiently make an election for count 5.

For count 3 (attempted rape), the state said in closing "the act I want you to focus on is the act that occurred in the garage of the defendant's workplace, in the cemetery." 5RP 592. Telling the jury to focus on this act is not the same as electing the act. See State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007) (no election where state emphasized one particular act of assault but did not expressly elect to rely only on that single act). Neither the information nor the "to convict" instruction specified the cemetery act as the basis for count 3. CP 131-33, 153 (Instruction 14). There is a possibility that one or more jurors treated Earl's multiple attempts to touch A.K.'s breasts as acts of attempted rape. 5RP 263-66.

Finally, even if the state elected counts 3, 4 or 5, the state cites no authority for the proposition that election cures a deficient unanimity instruction that purports to cover all counts.

The state elsewhere miscasts Earl's argument as one involving double jeopardy rather than unanimity. BOR at 43-44, 46. Earl advances a unanimity argument because one subset of jurors may have relied upon one act for a certain count while another subset of jurors may have relied on that same act for a different count. See State v. Ellis, 71 Wn. App. 400, 404, 407, 859 P.2d 632 (1993) (unanimity means all twelve jurors must agree on the act used as a factual basis for any given count). At the same time, the instruction allowed the jury to convict on all five counts so long as it unanimously agreed a single act had occurred, even though there be no unanimous consensus regarding which of the five counts applied to that single, agreed-upon act.

That being said, the state's pointed distinction between the double jeopardy and unanimity arguments elsewhere undermines the state's claim that the unanimity instruction was manifestly clear. The state argues Instruction 5 protected unanimity, but Instruction 5 deals with the double jeopardy problem, not the unanimity problem. BOR at 45-46; see id. at 404 (double jeopardy violated where jury convicts twice for same criminal

act). "[T]he two ideas are fundamentally different, and to mix them is to invite confusion." Id. at 407.

The state claims the ultimate issue is whether the instructions "were insufficient to convey the concepts of jury unanimity and separate crimes being charged in each count." BOR at 46. But jury instructions on unanimity "must more than adequately convey the law. They must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Reversal on all counts is required because the unanimity instruction fails this test.

4. **ADMISSION OF IMPROPER OPINION TESTIMONY REGARDING THE ALLEGED VICTIM'S VERACITY AND EARL'S GUILT WAS MANIFEST ERROR.**

The state does not challenge Earl's assertion that its forensic child interviewer gave improper opinion testimony. BOR at 35-38. Rather, the state argues Earl may not raise this claim for the first time on appeal because it is not a manifest error under RAP 2.5(a). BOR at 37-38.

After the opening brief was filed, the Supreme Court held "manifest error" requires an almost explicit statement by the witness that the witness believed the accusing victim. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). The basic test for manifest error, however, remains the

same: whether, under the particular facts of a given case, the error actually prejudiced the defendant's right to a fair trial. Id. at 926-27.

In Kirkman, the examining doctor testified his findings neither corroborated nor undercut the child's account, the child's report of sexual touching was clear and consistent with appropriate affect, and that she used appropriate vocabulary. Id., 159 Wn.2d at 923, 929. The Court held this testimony was not sufficiently explicit to constitute an error that may be raised for the first time on appeal. Id. at 930. Testimony that the child's account was "clear and consistent" did not constitute an opinion on her credibility because a witness may "clearly and consistently" provide an account that is false. Id. The Court also held a detective's testimony regarding his interview of the child was not manifest error because it was simply an account of the interview protocol he used to obtain the child's statement, and the detective did not testify he believed the child was telling the truth. Id. at 930-31.

Kirkman is distinguishable because the improper testimony in Earl's case is more explicit and had prejudicial consequences at trial. A.K. first testified she told Knight the truth.² Jennifer Knight, the forensic interviewer, then testified (1) she carefully followed an interviewing

² 5RP 280-81, 336.

protocol designed to maximize the ability of a child to make an untainted disclosure of abuse; (2) she was adept at recognizing when children were being deceptive by means of canned answers; (3) A.K. used speech typical of abused children; and (4) Knight was not surprised by A.K.'s recantation because victims of sexual abuse typically come from unstable families. SRP 456, 491-92, 498, 499-500, 501-02. In essence, Knight informed the jury A.K. told the truth when she accused Earl of abuse in a case which turned on A.K.'s credibility. In contrast to the challenged testimony in Kirkman, there was nothing ambiguous about Knight's testimony, which led only to the conclusion that A.K. was telling the truth when she said Earl abused her. See State v. Cruz, 77 Wn. App. 811, 815, 894 P.2d 573 (1995) ("inferential testimony that leaves no other conclusion but that a defendant is guilty cannot be condoned, no matter how artfully worded.").

In Sutherby, decided after the Supreme Court issued Kirkman, the alleged victim's mother testified her daughter smiled when she lied, but did not smile when she accused the defendant of rape. State v. Sutherby, ___ Wn. App. ___, 158 P.3d 91, 95 (2007). Nothing in the opinion indicates defense counsel objected to this testimony. This Court nevertheless held the mother's improper opinion testimony deprived the defendant of his right to have the jury determine the child's credibility and reversed

the rape and child molestation convictions. This Court recognized the mother in essence told the jury her daughter told the truth when she related the incriminating events, and gave information to the jury that she claimed would enable the jurors to evaluate her daughter's testimony. Id., 158 P.3d at 95-96.

The same thing happened in Earl's case, except that the improper testimony came from an expert rather than a lay person. See United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (recognizing expert testimony may unduly bias jury "because of its aura of special reliability and trustworthiness."); Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) ("[W]hen ruling on somewhat speculative testimony, the trial court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert.").

The trial court agreed the state presented the expert "to say that [A.K.] was telling the truth," but nevertheless allowed the testimony because defense counsel ultimately failed to object when the expert testified. 5RP 482, 486. This is not a case where defense counsel deprived the trial court of an opportunity to prevent the admission of this improper evidence. See Kirkman, 159 Wn.2d at 926 (objection gives trial court the opportunity to prevent error). The state made an offer of proof and the parties engaged

in extensive colloquy about the admissibility of this testimony before the expert testified.³ 5RP 474-90. The trial court should have excluded the improper opinion testimony at that point.

"Constitutional errors are treated specially because they often result in serious injustice to the accused" and "adversely affect the public's perception of the fairness and integrity of judicial proceedings." State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). This Court must reverse the convictions because manifest constitutional error affected the outcome of Earl's case.

³ Before the colloquy, Knight testified forensic interviewers follow a protocol designed to maximize untainted disclosures of abuse. 5RP 456. After the colloquy, Knight testified she followed the protocol when she interviewed A.K. 5RP 491-92.

B. CONCLUSION

For the reasons stated, this Court should reverse Earl's convictions on all counts, dismiss counts 1 and 2 with prejudice, and remand for a new trial on counts 3, 4 and 5.

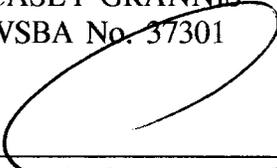
DATED this 12th day of July, 2007.

Respectfully Submitted,

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

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
| |) | |
| vs. |) | COA NO. 34629-0-II |
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| FRANK CHESTER EARL, |) | |
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| 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 12TH DAY OF JULY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
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STATE OF WASHINGTON
BY _____
DEPUTY
Court Reporter
B. H. H. H.

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JULY 2007.

x *Patrick Mayovsky*