

No. 35549-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justen William DeFrang,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY DEFRANG

Clallam County Superior Court

Cause No. 06-1-00160-4

The Honorable Judge Ken Williams

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. DeFrang's second trial and his conviction for Residential Burglary violated his constitutional right not to be twice put in jeopardy for the same offense.
2. The trial court erred by discharging the first jury without Mr. DeFrang's consent.
3. The trial court erred by discharging the first jury without asking the jurors if they agreed with the presiding juror that they were hopelessly deadlocked.
4. The trial court erred by discharging the first jury without considering the length of the deliberations in light of the length of the trial and the complexity of the issues.
5. The trial court erred by discharging the first jury without finding that discharge was necessary to the proper administration of public justice.
6. The trial court erred by discharging the first jury without making a finding of manifest necessity.
7. The trial court erred by discharging the first jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice.
8. The trial court erred by discharging the first jury without declaring a mistrial.
9. The trial judge's decision to discharge the first jury violated Mr. DeFrang's constitutional right to a verdict from the jury that began deliberations on his case.
10. The trial court violated Mr. DeFrang's constitutional right to due process by giving an erroneous accomplice instruction.
11. The trial court's accomplice instruction was erroneous because it did not require the jury to find that Mr. DeFrang had committed an overt act.
12. The trial court's accomplice instruction was erroneous because it was internally inconsistent.

13. The trial court erred by giving Instruction No. 15, which reads as follows:

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of that particular crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not. Instruction No. 15, Supp. CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Justen DeFrang was charged with Residential Burglary and Possession of Stolen Property in the First Degree. When the jury deadlocked on the burglary charge, a judge who had not presided over the trial asked the presiding juror about the possibility of a verdict. The judge did not ask the other jurors if they agreed with the presiding juror's assessment. She did not seek Mr. DeFrang's consent to discharge the jury, did not consider the length of deliberations in light of the length of the trial and the complexity of the issues, did not make any findings relating to whether or not the jury should be discharged, and did not declare a mistrial. Instead, she took the jury's guilty verdict on the PSP charge, and discharged the jury.

Mr. DeFrang was convicted of Residential Burglary following a second trial.

1. Did Mr. DeFrang's second trial and his conviction for Residential Burglary violate his constitutional right not to be twice put in jeopardy for the same offense? Assignments of Error Nos. 1-9.

2. Did the trial court err by discharging the first jury without Mr. DeFrang's consent? Assignments of Error Nos. 1-9.

3. Did the trial court err by discharging the first jury without asking the jurors if they agreed with the presiding juror that they were hopelessly deadlocked? Assignments of Error Nos. 1-9.

4. Did the trial court err by discharging the first jury without considering the length of their deliberations in light of the length of the trial and the complexity of the issues? Assignments of Error Nos. 1-9.

5. Did the trial court err by discharging the first jury without finding that discharge was necessary to the proper administration of public justice? Assignments of Error Nos. 1-9.

6. Did the trial court err by discharging the first jury without making a finding of manifest necessity? Assignments of Error Nos. 1-9.

7. Did the trial court err by discharging the first jury without finding that extraordinary and striking circumstances required discontinuation of the trial, in order to obtain substantial justice? Assignments of Error Nos. 1-9.

8. Did the trial court err by discharging the first jury without declaring a mistrial? Assignments of Error Nos. 1-9.

9. Did the trial judge's decision to discharge the first jury violate Mr. DeFrang's constitutional right to a verdict from the jury that began deliberations in his case? Assignments of Error Nos. 1-9.

The trial court's accomplice instruction was inconsistent and contained a clear misstatement of the law. The first part of the instruction required the jury to find that Mr. DeFrang aided or agreed to aid his codefendant in the commission of the crimes. The second part of the

instruction allowed conviction if Mr. DeFrang was present and silently approved of the crimes, even if he took no action and did not express his assent.

10. Was Mr. DeFrang denied due process by the trial court's erroneous accomplice instruction? Assignment of Error Nos. 10-13.

11. Did the court's erroneous accomplice instruction improperly allow conviction without proof of an overt act? Assignment of Error Nos. 10-13.

12. Was the trial court's accomplice instruction internally inconsistent? Assignment of Error Nos. 10-13.

13. Did the inconsistency in Instruction No. 15 result from a clear misstatement of the law? Assignment of Error Nos. 10-13.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Justen DeFrang was charged with Residential Burglary and Possession of Stolen Property in the First Degree. CP 21. His jury trial started on August 7, 2006, and the case went to the jury at midday on August 10, 2006. RP (8/10/06) 47-49. On the afternoon of August 11, 2006, the jury indicated that it could not reach a verdict on one count, but that it had a verdict as to the other count. RP (8/11/06) 2.

Superior Court Judge George Wood, who had presided over the four-day trial, was unavailable, and another judge brought the jury into the courtroom to ask them about the status of their deliberations. RP (8/11/06)

2. She inquired as follows:

THE COURT: Good afternoon. I'm Judge Owens. I'm sitting in for Judge Wood today and I received your inquiry and are you Mr. Ramsey?

JUROR RAMSEY: I am.

THE COURT: Okay, Mr. Ramsey, you indicate and I have already indicated to counsel and to the prosecutor that you reached a verdict on one charge but you cannot reach a verdict on the other charge. I'd like to ask you –I'd like to discuss with you the possibility of reaching a verdict but first I want to caution you that because you've already commenced your deliberations, it's important that you not make any remark that may adversely effect the rights of either party or which may disclose the opinions of the members of the jury. So, Mr. Ramsey, if you would answer my questions with a yes or no, don't say anything else. Don't disclose any other information nor indicate anything else about the status of your deliberations although it's pretty clear to me what the status of your deliberations is. Is there a reasonable possibility of the

jury reaching an agreement within a reasonable time as to any of the other counts?

JUROR RAMSEY: No.

THE COURT: Okay. Counsel have any questions or with any additional inquiry?

MR. SUND: No.

MS. CASE: No, Your Honor, thank you.

THE COURT: Okay in that case we would – I would receive the verdict. Verdict for A [sic], which would be the charge of Residential Burglary, Count I, is the verdict that you could not reach?

JUROR RAMSEY: Yes.

RP (8/11/06) 2-3.

The court then accepted the jury's guilty verdict on Count II, the PSP charge. RP (8/11/06) 4-5. After accepting this verdict, the judge excused the jury:

THE COURT: Thank you, thank you very much for your service. I understand you were at it a long time and we really appreciate your service to your Government and to your community and to your judicial system. So, you are discharged and – they are done reporting then, aren't they?

RP (8/11/06) 5.

The judge did not ask Mr. DeFrang, his counsel, or the prosecuting attorney if they agreed to discharge the jury. RP (8/11/06) 2-7. She did not make any findings relating to her decision to discharge the jury, and did not formally declare a mistrial. RP (8/11/06) 2-7.

The state refiled Count II, the Residential Burglary charge, and the case went to trial a second time, three months after the first jury was

discharged. RP (10/3/06) 6-9. At the second trial, the court gave the following instruction regarding accomplice liability:

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of that particular crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not. Instruction No. 15, Supp. CP.

The second jury convicted Mr. DeFrang of Count II. He was sentenced on both convictions, and he appealed. CP 7-16, 6.

ARGUMENT

I. MR. DEFANG'S BURGLARY CONVICTION VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. A similar prohibition is set forth in Article I, Section 9 of the Washington Constitution. Wash. Const. Article I, Section 9. Both

constitutions protect an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy prevents retrial following an acquittal “even though ‘the acquittal was based upon an egregiously erroneous foundation.’” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The constitutional prohibition against double jeopardy “also embraces the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Arizona v. Washington*, 434 U.S. at 503, quoting *Wade v. Hunter*, 336 U.S. 684, at 689, 69 S. Ct. 834, 93 L.Ed. 974, (1949)¹ A second prosecution may be grossly unfair, even if the first trial is not completed:

¹ Historically, English judges had the power to discharge juries “whenever it appeared that the Crown’s evidence would be insufficient to convict.” *Arizona v. Washington*, 434 U.S. at 507-08. The constitutional prohibition against double jeopardy in the U.S. “was plainly intended to condemn this ‘abhorrent’ practice.” *Arizona v. Washington*, 434 U.S. at 507-08. Accordingly, the double jeopardy clause protects a

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial. *Arizona v. Washington*, 434 U.S. at 504-05, *footnotes omitted*.

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court's discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, 434 U.S. at 514; *State v. Juarez*, 115 Wn. App. 881 at 889, 64 P.3d 83 (2003).

Discharge of the jury without first obtaining the accused's consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Juarez*, at 889. A mistrial frees the accused from further prosecution, unless prompted by "manifest necessity." *Juarez*, at 889. To justify a mistrial, "extraordinary and striking circumstances" must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, at 889.

defendant "against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor' threatens the '[harassment] of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), *citations omitted*.

If the jury “through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge *if the other jurors agree with the foreman.*” *State v. Jones*, 97 Wn.2d 159 at 164, 641 P.2d 708 (1982), *emphasis added*.

Under such circumstances, the court must consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues.² *State v. Kirk*, 64 Wn. App. 788 at 793, 828 P.2d 1128 (1992). A mechanical focus on any single factor is insufficient to justify a mistrial and discharge of the jury. *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wn. App. 144 at 148-149, 612 P.2d 427 (1980). Where the trial court discharges a hung jury too quickly, the accused’s right to a verdict from that jury is abridged. *Jones*, at 163.

Neither Mr. DeFrang nor his attorney gave consent for discharge of the first jury in this case. Accordingly, the discharge was equivalent to an acquittal unless supported by “extraordinary and striking

² Although the court in *Kirk* used the word “should” (“a trial court should consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues,” *Kirk*, at 793, *citing Jones* at 164), it is clear from the original context in *Jones* that the inquiry is mandatory. The Supreme Court in *Jones*, also used the word “should,” but went on to add the following: “After considering the length and difficulty of the deliberations, and making such limited inquiries of the jury as do not amount to impermissible coercion, the judge must then determine whether to exercise his discretion to discharge the jury. It is this determination, weighing the relevant considerations, which is subject to great deference from a reviewing court and which will not lightly be upset.” *Jones*, at 165. The clear implication is that a decision to discharge the jury without “weighing the relevant considerations” will not be entitled to deference.

circumstances” indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez, supra*, at 889.

First, Judge Owens did not ask the jurors if they agreed with the presiding juror’s claim that the jury was hopelessly deadlocked. Accordingly, she failed to follow the first requirement set forth in *Jones--* determining whether or not the other jurors agreed with the presiding juror, in order to ascertain whether or not discharge was truly warranted. *Jones*, at 164.

Second, there is no indication in the record that Judge Owens (who did not preside over the trial) was even aware of the length of deliberations or the length of trial, let alone the complexity of the issues. *Cf. State v. Boogaard*, 90 Wn.2d 733 at 739, 585 P.2d 789 (1978) (“Where the judge who sits with the jury did not hear the case, information with regard to the nature of the evidence and length of the trial can be supplied by counsel, as was done here.”) Thus she did not weigh even the minimal “relevant considerations” prior to discharging the jury. *Jones, supra*, at 165.

Third, Judge Owens did not make the findings required for discharge of a jury short of verdict. She did not find that discharge of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking

circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez at 889.*

Fourth, Judge Owens did not formally declare a mistrial. RP (8/11/06) 2-7. Her failure to do so deprived Mr. DeFrang of the opportunity to object or argue against her decision to discharge the jury.

For all these reasons, Judge Owens' decision to discharge the jury violated Mr. DeFrang's constitutional right to receive a verdict from the jury he selected during his first trial. His second trial and conviction on the Residential Burglary charge violated his constitutional right to the protections of the double jeopardy clause. The conviction for Residential Burglary must be reversed and the case remanded for a new sentencing hearing on the Possession of Stolen Property charge. *Jones, supra.*

II. THE TRIAL COURT'S ACCOMPLICE INSTRUCTION VIOLATED MR. DEFRANG'S CONSTITUTIONAL RIGHT TO DUE PROCESS BECAUSE IT ALLOWED CONVICTION WITHOUT EVIDENCE OF AN OVERT ACT.

Under RCW 9A.08.020, a person may be convicted as an accomplice if he, acting "[w]ith knowledge that it will promote or facilitate the commission of the crime," either "(i) solicits, commands, encourages, or requests [another] person to commit it; or (ii) aids or agrees to aid [another] person in planning or committing it." The statute does not define "aid."

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198 at 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, he must say or do something that carries the crime forward. *State v. Peasley*, 80 Wash. 99 at 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
State v. Peasley, 80 Wash. 99 at 100, 141 P. 316 (1914).

Similarly, in *State v. Renneberg*, 83 Wn.2d 735 at 739, 522 P.2d 835 (1974), the Supreme Court upheld an instruction that included the following language: “to aid and abet may consist of words spoken, or acts done...” In reaching its decision, the Court noted that an instruction is proper if it requires ““some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.”” *Renneberg*, at 739-740, quoting *State v. Redden*, 71 Wn.2d 147 at 150, 426 P.2d 854 (1967). In the absence of physical action, conviction of a crime as an accomplice requires some *expression* of assent.

Here, the trial court’s instruction on accomplice liability allowed the jury to convict if it believed Mr. DeFrang was present and silently

approved of his codefendant's crime, even if he was not prepared to assist.

The court instructed the jury as follows:

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of that particular crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not. Instruction No. 15, Supp. CP.

Instruction No. 15 explicitly defines "aid" to include assistance given by presence. This portion of the instruction allowed the jury to convict Mr. DeFrang if he was present and approved of his codefendant's crimes, whether or not he said or did anything to communicate that approval and whether or not he was willing to assist. Because of this, the instruction violates the "overt act" requirement of *Peasley, supra* and *Renneberg, supra*.

The second and third sentences of the paragraph defining "aid" do not correct this problem. The second sentence ("A person who is present at the scene and ready to assist by his or her presence is aiding in the

commission of the crime”) identifies one situation that meets the definition of “aid,” but does not purport to exclude other possible examples. Thus a person who is present and unwilling to assist, but who approves of the crime, may be convicted if she or he knows his presence will promote or facilitate the crime. Accordingly, even with this penultimate sentence included, Instruction No. 15 is incorrect: it does not prohibit jurors from concluding that presence plus silent assent or silent approval constitutes “aid,” even where the alleged accomplice is unwilling to assist.

Similarly, the third sentence of the paragraph defining “aid” fails to save the instruction as a whole. Although the third sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. Even with the third sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed Mr. DeFrang to be convicted as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra.*

III. THE TRIAL COURT’S ACCOMPLICE INSTRUCTION WAS INTERNALLY INCONSISTENT.

When jury instructions are inconsistent, a reviewing court must determine whether the jury was misled as to its function and responsibilities. *State v. Walden*, 131 Wn.2d 469 at 478, 932 P.2d 1237 (1997), citing *State v. Wanrow*, 88 Wn.2d 221 at 239, 559 P.2d 548 (1977); see also *State v. Carter*, 127 Wn. App. 713 at 718, 112 P.3d 561 (2005). Where the inconsistency is the result of a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Walden, supra*, at 469. In such circumstances, the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *Walden, supra*, at 478. Instructional error is harmless only if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Walden*, at 478.

As noted above, a person is guilty as an accomplice if he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime,” either “(i) solicits, commands, encourages, or requests [another] person to commit it; or (ii) aids or agrees to aid [another] person in planning or committing it.” RCW 9A.08.020. Some overt act is required

for conviction; a person may not be convicted based on their mental state alone, even if they are present at the scene of the crime. *Peasley, supra*; *Renneberg, supra*.

Instruction No. 15 was internally inconsistent. The first paragraph of the instruction, which was based on RCW 9A.08.020, required the jury to find that Mr. DeFrang aided or agreed to aid another in the commission of the crime. Under this language, the jury was permitted to convict if it found that Mr. DeFrang took some action or expressed his assent to his codefendant's crime. However, the paragraph defining "aid" removed the requirement of action or assent, allowing conviction if Mr. DeFrang provided aid simply by being "present," even if he took no action and expressed no assent to the crime. Supp. CP.

The conflict between the first paragraph and the second is based on a clear misstatement of the law. A person may not be convicted based on presence alone, even if they assent to a crime, unless they give some expression of their assent. For example, a journalist who covers trespassing antiwar protesters may personally approve of the protesters' cause and their (illegal) strategy. Such a journalist would likely know that media presence encourages the illegal activity. But arresting, charging, and convicting the journalist would violate the First Amendment.

Similarly, an audience that observes trespassing antiwar protesters might include people who silently approve, people who silently disapprove, and people who are silent and neutral about the protest. Under the second paragraph of Instruction No. 15, a person who silently approves of the illegal activity with knowledge that her or his presence encourages the illegal activity could be arrested, charged, and convicted. Those who silently disapprove, or who are silent and neutral could not be prosecuted, even if they know their presence encourages the activity. The second paragraph of Instruction No. 15 allows punishment based on a person's thoughts, and violates the First and Fourteenth Amendments.

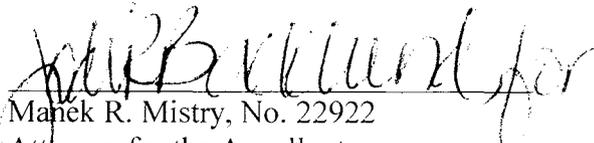
Because the inconsistency results from a clear misstatement of the law, it is presumed to have misled the jury in a manner prejudicial to Mr. DeFrang. *Walden, supra, at 469*. He is therefore entitled to a new trial. *Walden, supra, at 478*. His conviction must be reversed and the case remanded to the trial court for a new trial.

CONCLUSION

For the foregoing reasons, Count II must be vacated and the charge dismissed with prejudice, and the case must be remanded for resentencing on Count I, Possession of Stolen Property in the First Degree. In the alternative, Mr. DeFrang's conviction as to Count II must be reversed and the case remanded for a new trial on the Residential Burglary charge.

Respectfully submitted on July 18, 2007.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY JM
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Justen Defrang, DOC# 796090
Airway Heights, M-B-47-6
P.O. Box 2049
Airway Heights, WA 99001

and to:

Clallam County Prosecuting Attorney
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 17, 2007.

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

Signed at Olympia, Washington on July 18, 2007.



Jodi R. Backlund, No. 22917
Attorney for the Appellant