

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

NO. 37714-4-II

STATE OF WASHINGTON,

Respondent.

vs.

JEFFREY J. JOHNSON

Appellant.

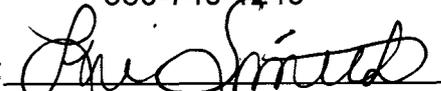
On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

A. TRIAL COUNSEL WAS NOT INEFFECTIVE 1

B. THE PROSECUTOR DID NOT COMMIT

C. MISCONDUCT 11

D. THE CUMULATIVE ERROR DOCTRINE DOES NOT
APPLY HERE 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Federal Cases

<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, (9 th Cir. 1987), <i>cert. denied</i> , 488 U.S. 948 (1988).....	3
<u>Hendricks v. Calderon</u> , 70 F.3d 1032, (9 th Cir. 1995).....	2, 3
<u>Mickens v. Taylor</u> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002).....	3
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).....	1,2,3
<u>United States v. Layton</u> , 855 F.2d 1388, (9 th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1046 (1989).....	3
<u>Yarborough v. Gentry</u> , 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).....	13

Washington Cases

<u>In re Detention of Duncan</u> , 142 Wn.App. 97, 174 P.3d 136 (2007).....	13
<u>State v. Benn</u> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	2
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	8,9
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996).....	2
<u>State v. Briggins</u> , 11 Wn.App. 687, 524 P.2d 694 (1974), <i>review denied</i> , 84 Wn.2d 1012 (1974).....	4
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	11,12

<u>State v. Carpenter</u> , 52 Wn.App. 680, 763 P.2d 455 (1988).....	2
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 2990(2000)	13
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	11
<u>State v. Grenning</u> , 142 Wn.App. 518, 174 P.3d 706 (2008).....	13
<u>State v. Hakimi</u> , 124 Wn. App. 15, 98 P.2d 809 (2004).....	3
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	3
<u>State v. Hodges</u> , 118 Wn.App. 668, 77 P.3d 375 (2003)	13
<u>State v. Korum</u> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	13
<u>State v. Kosanke</u> , 23 Wn.2d 211, 160 P.2d 541 (1945).....	5,6,7
<u>State v. Kwan Fai Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986)	11
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	2,3
<u>State v. Moran</u> , 119 Wn.App. 197, 81 P.3d 122 (2003)	5,6,7
<u>State v. Motter</u> , 139 Wn.App. 797, 162 P.3d 1190 (2007)	14
<u>State v. Nam</u> , 136 Wn.App. 698, 150 P.3d 617 (2007).....	5
<u>State v. Negrete</u> , 72 Wn.App. 62, 863 P.2d 137 (2993), <u>rev. denied</u> , 123 Wn.2d 1030, 877 P.2d 695 (1994)	12
<u>State v. Neidigh</u> , 78 Wn.App. 71, 895 P.2d 423 (1995)	4,9
<u>State v. Padilla</u> , 69 Wn.App. 295, 846 P.2d 564 (1993).....	11,13
<u>State v. Radcliffe</u> , 139 Wn.App. 214, 159 P.3d 486 (2007).....	14
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 757 (1994)	11,13
<u>State v. Saunders</u> , 91 Wn.App. 575, 958 P.2d 364 (1998)	4,5

<u>State v. Stein</u> , 140 Wn.App. 43, 165 P.3d 16 (2007)	14
<u>State v. Stevens</u> , 58 Wn.App. 478, 794 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 128 (1990)	14
<u>State v. Swan</u> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990)	12
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961(1981)	9
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	1,2
<u>State v. Weber</u> , 99 Wn.2d 158, 659 P.2d 1102 (1983)	12

STATEMENT OF THE CASE

Appellant's recitation of the facts is adequate for purposes of responding to this appeal.

A. TRIAL COUNSEL WAS NOT INEFFECTIVE.

Johnson claims his trial counsel was ineffective for failing to object to various testimony at trial. Johnson's arguments are not persuasive.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilty.") There is a strong

presumption that a defendant received effective representation.

State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert.*

denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 2d 858 (1996);

Thomas, 109 Wn.2d at 226.

A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336. An appellate court is not likely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Indeed,

[w]hat decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). In other

words, the reviewing court must judge the reasonableness of

counsel's actions "on the facts of the particular case, viewed as of

the time of counsel's conduct." *Id.* At 690; State v. Benn, 120

Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has

stated, “[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel’s conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) *citing* McFarland, 127 Wn.2d at 336. But mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. And

decisions by trial counsel as to when or whether to object are trial tactics. State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). Counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn.App. 687, 692, 524 P.2d 694 (1974), *review denied*, 84 Wn.2d 1012 (1974).

When the claim is based on counsel's failure to challenge the admission of evidence--as it is in the present case--the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting challenged conduct; (2) that the objection to the evidence would likely have been sustained; and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Johnson has not done that here.

Johnson has not met his burden to show that there was no legitimate strategic or tactical reason for the challenged attorney conduct. Johnson complains that his counsel was ineffective for failing to object to the testimony that a third party tried to intimidate the confidential informant (c.i.) by playing a recording of the wiretap for him, and by the testimony that the third party was in court watching the trial. But failure to object will not ordinarily support an ineffective assistance of counsel claim. State v. Neidigh, supra; State v. Briggins, supra. Furthermore, Johnson cannot show that

an objection to this evidence would have been sustained, and he has not shown that the result of the trial would have been different had the evidence not been admitted. Saunders, supra.

Johnson does concede that evidence of intimidation of a witness would be admissible if it was shown that the third party was acting on *his* behalf. Brief of Appellant 14,15. Under ER 404(b), the court may admit evidence of attempts to influence or prevent testimony, as such conduct tends to show knowledge or consciousness of guilt. See State v. Kosanke, 23 Wn.2d 211, 215 160 P.2d 541 (1945) (defendant and his wife tried to persuade the parents of the victim to move to Idaho, where they would be immune to subpoena) Indeed, "Washington courts consistently admit evidence that a defendant has threatened or tried to prevent a witness from testifying at trial as evidence of consciousness of guilt." State v. Nam, 136 Wn.App. 698, 708, 150 P.3d 617 (2007); State v. Moran, 119 Wn.App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). And, our courts have determined that the probative value of such indirect admissions outweighs the unfair prejudice they may cause. Moran 119 Wn. App. at 218.

In the present case, because the third party intimidation evidence was relevant and admissible as set out above, pursuant

to Kosanke, supra and Moran, supra, Johnson cannot show that an objection to the evidence would have been sustained. Here, there is certainly an inference that the third party--who was present in the courtroom at trial--knew Johnson. Evidence was presented that a recording of the wire tap worn by the c.i., Duryea, was played for the c.i. by the third party. 1RP 59,60. It certainly is unusual for a third party to even have a copy of the wire tap, let alone to play it for a c.i. How else would the third party have obtained the recording? And why else would the third party have actually played the recording of the wiretap for the c.i. Mr. Duryea? Indeed, the fact that this third party--the man with the sunglasses--was present at the trial while the informant testified is also another factor to consider as far as intimidating Duryea goes. 1RP 59, 60. Why would this third party turn up at trial after playing the recording for the c.i. unless it was to try to scare Duryea while he was testifying?¹

It is also conceivable that defense counsel did not object to this testimony because he *knew* that Johnson had given the tape to the third party. And it probably was no coincidence that the man in the sunglasses' appeared in the court room after having played the

¹ In fact, at sentencing Johnson *admitted* that he had given the recording to third parties when he said "I was given the CD to take home to listen to it. Well, naturally, I let other people listen to it because I didn't do it and I wanted people to hear that, you know."

recording for Duryea. 1RP 59,60. This was surely meant to be a form of intimidation. 1RP 59,60. That certainly was how the confidential informant took it. 1RP 59, 60. Accordingly, because this evidence was relevant and admissible, an objection to it was not likely to have been sustained, and Johnson's ineffective assistance of counsel claim fails on this basis. State v. Kosanke, 23 Wn.2d 211, 215-216, 160 P.2d 541 (1945); State v. Moran, *supra*.

Similarly, defense counsel's failure to object to testimony of the State's expert regarding what the word "titrate" means in the context of methamphetamine making does not show that counsel was ineffective because an objection to this evidence was not likely to be sustained. That is because Johnson himself opened the door to this testimony when he claimed that the transaction he had with Duryea was really all about buying speakers and was not about buying methamphetamine. By claiming that the conversation on the recording was not about selling drugs to Duryea, Johnson opened himself up to cross examination about what he was really discussing with Duryea when Johnson's voice was heard on the wire saying "titrate." 2RP 38. Since Johnson claimed he was only selling speakers and not drugs, Johnson opened the door to allowing the State to put on evidence regarding Johnson's use of the word "titrate" and how that word is connected to

methamphetamine. So, Johnson's attorney quite likely realized that Johnson had opened the door to testimony about the meaning of "titrate" because Johnson claimed his conversation with the c.i. was only about buying speakers. This accordingly allowed the State to put forth evidence showing that the topic of Johnson's conversation with the c.i. was really about drugs--as evidenced by Johnson saying the word "titrate" in the recording. Because this evidence was properly admitted, Johnson cannot show that an objection to this evidence would have been sustained. And, because Johnson cannot show that he was prejudiced when his counsel did not object to evidence that was ultimately admissible, his ineffective assistance of counsel claims fail.

But even if this Court decides the third party intimidation evidence and the testimony about the word "titrate" was improperly admitted, and that defense counsel should have objected to it, it should nonetheless find that the admission of this evidence was harmless because overwhelming untainted evidence supports Johnson's convictions.

A 404(b) error is harmless if the evidence is of minor significance compared to the evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Because the alleged error here pertains to a violation of an evidentiary rule,

not a constitutional mandate, "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id., quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961(1981). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Bourgeois, 133 Wn.2d at 404, citing Nghiem v. State, 73 Wn.App. 405, 413, 869 P.2d 1086 (1994).

In the present case, even without the third party intimidation testimony, the evidence presented was overwhelming. The confidential informant, Mr. Duryea testified at trial that he made two controlled buys from defendant Jeff Johnson. 1RP 49-56. Duryea and the police all confirmed that Duryea and his vehicle were thoroughly searched before and after the drug buy. 1RP 14-21. And, most importantly, Duryea wore a wire and recorded the entire drug buy during the second transaction. 1RP 17-21; 1RP 30-37; 1RP 50-55. Duryea identified Johnson's voice on the recording. 1RP 58. Duryea also said the wire was never turned off. 1RP 55. The wire recording was played for the jury. 1RP 21. On the tape Duryea is heard asking Johnson for a "fat ass eight ball"--a reference to a quantity of methamphetamine. 1RP 58. On the tape

Johnson is heard saying the word "titrate" --a word that pertains to methamphetamine, according to the witness from the State crime laboratory. 1RP 43,44. Johnson claims that he and Duryea were discussing a transaction involving the purchase of speakers. But nothing is heard on the tape about Duryea buying some speaker stuffing for \$30--which is what Johnson said Duryea was doing at his place on March 2, 2007. 2RP 25 28. And, because the defense brought up the fact that the police "lost" track of Duryea's vehicle during the second buy, the State played the entire recording--in an effort to show that Duryea did not engage in any other activity while driving to buy drugs from Johnson. 1RP 74-77. The recording of the drug transaction supports Duryea's version of what went down at Jeff Johnson's house on March 2, 2007--and that was a drug delivery.

Because the overwhelming, untainted evidence proves that Johnson delivered methamphetamine to Mr. Duryea, any error by defense counsel in failing to object to the third party intimidation evidence, or to the testimony regarding the word "titrate" was harmless. Johnson's convictions should be affirmed.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Johnson also claims the prosecutor committed misconduct when he allegedly "personally vouched for Duryea's credibility" and "argued facts not in evidence." These claims have no merit.

To prove prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing State v. Kwan Fai Mak, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). Prosecutorial misconduct is reversible error only when there is "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). However, if there was no proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have prevented the resulting prejudice. State v. Padilla, 69 Wn.App. 295, 846 P.2d 564 (1993).

A prosecutor's remarks "must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied 523 U.S. 1007 (1998). Additionally, "the absence of a motion for

mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990); State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (2993), rev. denied, 123 Wn.2d 1030, 877 P.2d 695 (1994).

There was no objection to the prosecutor's remarks in this case. Here, the claimed misconduct was this statement by the prosecutor that the c.i. "told you what he knew and he told it accurately." 2RP 46. But what Johnson does not point out is that immediately after saying this statement the prosecutor correctly told the jury, "the credibility of witnesses is your job." Id. When reviewing a prosecutor's remarks, one must look at the instructions, the total argument, and the context in which the remarks were made. State v. Brown, supra. When we look at the complained-of remarks in context, we see that right after saying "he told it accurately" we then see that the prosecutor correctly told the jury that it was their duty to judge the credibility of witnesses--not the prosecutor's. 2RP 46.

Furthermore, the jury is instructed that the attorney's arguments are not evidence, and jurors are presumed to follow the court's instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d

1102 (1983). Moreover, the prosecutor's remarks in this case, when viewed in the context of the total argument and the instructions given to the jury, was not flagrant or ill-intentioned. Padilla, supra. In sum, there was no reversible error here because Johnson has not shown "a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 757 (1994). Thus Johnson's arguments to the contrary are without merit.

C. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY HERE.

Johnson argues that cumulative error denied him a fair trial. This argument is misplaced.

"The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal." State v. Grenning, 142 Wn.App. 518, 543, 174 P.3d 706 (2008), *citing* State v. Hodges, 118 Wn.App. 668, 673-674, 77 P.3d 375 (2003). Thus, the reviewing court "will reverse for cumulative error when several errors that are not sufficient standing alone may be prejudicial in their cumulative effect." In re Detention of Duncan, 142 Wn.App. 97, 110, 174 P.3d 136 (2007), *citing* State v. Korum, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 2990(2000). The defendant bears the

burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. State v. Stein, 140 Wn.App. 43, 70, 165 P.3d 16 (2007). Where the defendant fails to show prejudicial error, the reviewing court will not find cumulative error that deprived the defendant of a fair trial. State v. Radcliffe, 139 Wn.App. 214, 224, 159 P.3d 486 (2007).

Johnson fails to meet his burden here. Because there was no error in admitting the complained-of evidence and because Johnson has not shown that his trial counsel was ineffective, there is no error to accumulate. State v. Motter, 139 Wn.App. 797, 806, 162 P.3d 1190 (2007), *citing* State v. Stevens, 58 Wn.App. 478, 798, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990). Accordingly, Johnson's cumulative error argument fails and his convictions should be affirmed.

CONCLUSION

Johnson has not demonstrated that his trial counsel was ineffective, nor has he shown that he was prejudiced by his trial counsel's performance. But even if it was error for Johnson's trial counsel to fail to object to the complained of evidence, Johnson cannot show that the result of the trial would have been different had the trial court sustained an objection to the evidence. Nor has Johnson shown that the prosecutor committed misconduct, or that

he was prejudiced by the prosecutor's conduct. Because Johnson's claimed errors are without merit, the cumulative error doctrine does not apply. Accordingly, Johnson's convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 2nd day of February,
2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:

A handwritten signature in cursive script, appearing to read "Lori Smith", written over a horizontal line.

LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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JEFFREY JOHNSON,)
Appellant.)
_____)

NO. 37714-4-II

DECLARATION OF
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Ms. Casey Roos, paralegal for Lori Smith, Deputy Prosecuting

Attorney, declares under penalty of perjury under the laws of the State of

Washington that the following is true and correct: On February 2, 2009,

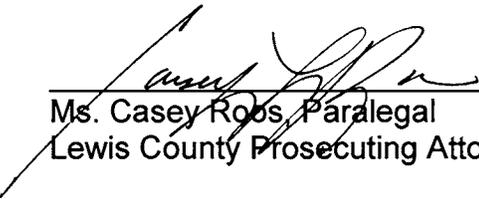
the appellant was served with a copy of the **Respondent's Brief** by

depositing same in the United States Mail, postage pre-paid, to the attorney

for Appellant at the name and address indicated below:

Peter B. Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531

DATED this 2nd day of February, at Chehalis, Washington.



Ms. Casey Roos, Paralegal
Lewis County Prosecuting Attorney Office