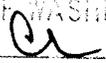


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COURT OF APPEALS
DIVISION II

COURT OF APPEALS NO. 40548-2-II

10 OCT 25 PM 12:35

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARK ANTHONY LEE,

Defendant/Appellant.

Pierce County Superior Court Cause Number No. 09-1-05281-8

**The Honorable Stephanie A. Arend,
Presiding Judge at the Trial Court**

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Mr. Lee entered or remained unlawfully in the residence or that he intended to commit a crime therein.
2. The State failed to prove beyond a reasonable doubt that Mr. Lee made a false or misleading statement to the police or that any such statement was likely to be relied upon by the police.
3. The permissive inference instruction that allowed the jury to find an element of the crime, i.e., that Mr. Lee intended to commit a crime inside the residence, relieved the State from its burden to prove that element.
4. The permissive inference instruction combined with the “or an accomplice” language in the elements and to convict instructions was misleading, confusing, and relived the State from its burden of proving all the elements of residential burglary.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the record established that Ms. Turley represented herself as the resident of the house, and that Mr. Lee reasonably believed her representation and was invited in, did the State prove he was an accomplice to residential burglary? (Assignment of Error No. One)
2. Where the record is devoid of proof that Mr. Lee made a false or misleading material statement to the police did the State prove he committed the crime of making a false or misleading statement to a public servant? (Assignment of Error No. Two)
3. Was the permissive inference instruction (Jury Instruction No. 12) improper where the inference was the sole and sufficient basis for the finding of guilt? (Assignment of Error No. Three)
4. Was the permissive inference instruction combined with the “or an accomplice” language of the elements and to convict instructions (Jury Instructions Nos. 8 and 16) misleading and confusing, and did

these combined instructions result in relieving the State of its burden to prove the elements of residential burglary? (Assignment of Error No. Four)

III. STATEMENT OF THE CASE

I. Procedural History

On November 24, 2009, the appellant/defendant, Mark Anthony Lee, was charged by Information with one count of Residential Burglary, pursuant to RCW 9A.52.025, and one count of Making a False or Misleading Statement to a Public Servant, pursuant to RCW 9A.76.175. CP 1-2.

Mr. Lee proceeded to jury trial on March 10, 2010. RP 1 3. A hearing pursuant to CrR 3.5 was held during trial on March 15, 2010. RP 3 159-183. Findings of Fact and Conclusion of Law following 3.5 Hearing were filed on March 17, 2010. CP 68-70. The jury was instructed on the lesser included offense of first degree criminal trespass. CP 71-102. Mr. Lee was convicted as charged on March 17, 2010. CP 106-108. On the same date the trial court imposed sentence.

The court sentenced Mr. Lee to sixty-three (63) months in the Department of Corrections for the residential burglary conviction. The sixty-three (63) months represented the low end of his standard range. CP 112-125. For the gross misdemeanor conviction of Making a False or Misleading Statement to a Public Servant the court imposed three hundred sixty five days (365), to run concurrent with the felony sentence. CP 126-130; RP 4 357-372.

A timely Notice of Appeal was filed on April 6, 2010. CP 133-147.

2. Summary of Trial Testimony

On November 23, 2009, at about 5:00 a.m. homeowner Richard Hamilton left his residence, located at 868 South 34th Street in Tacoma, to visit his son in Florida. RP 3 86. At about 8:30 a.m. an employee and friend of Mr. Hamilton's, named Richard Haehn, entered the residence with a key provided by Mr. Hamilton, for the purpose of repairing a bed. RP 3 96, 143. After completing his work, Mr. Haehn locked up and left the house at about 9:00 a.m. RP 3 143.

Richard Olson is another friend of Mr. Hamilton's who agreed to watch Mr. Hamilton's home while Mr. Hamilton was out of town. RP 3 116. Mr. Olson employed a woman named Alaine Turley to perform odd jobs and cleaning. RP 3 117. Ms. Turley had previously been living in a warehouse owned by Mr. Olson as well as in Mr. Olson's home. RP 3 118, 126. Ms. Turley had also stayed at the Nativity House which is a shelter for the homeless. RP 3 119.

At about noon on November 23, 2009, Ms. Turley borrowed some tools and a truck from Mr. Olson. The tools included a drill, a hammer, some wrenches, and a Sawzall. RP 3 120. Ms. Turley borrowed the tools reportedly to do some gardening and fix a door for Mr. Hamilton. RP 3 120. Ms. Turley had an extensive personal history with Mr. Hamilton which included working for him, living with him, and a sexual relationship. RP 3 88-89.

Mr. Hamilton testified that Ms. Turley had moved out of his house about six months before November 23, 2009, but that she still “visited” him. RP 3 89. Ms. Turley had been to his home the evening before he left for Florida. CP 3 107. Mr. Hamilton testified that his sexual relationship with Ms. Turley ended “maybe a couple of weeks before” November 23, 2009. RP 3 108. Ms. Turley’s dog also stayed at Mr. Hamilton’s on occasion. RP 3 102-103.

Ms. Turley was twenty-seven (27) years old; Mr. Hamilton was almost eighty (80). RP 3 102. Mr. Hamilton was aware that Ms. Turley was a heroin addict. RP 3 104.

Mr. Haehn testified that Ms. Turley was considered to be Mr. Hamilton’s “girlfriend,” and that he had seen her at the Hamilton house regularly, including when he was there a week prior to November 23, 2009. RP 3 144.

At about 1:30 p.m. on November 23, 2009, Mr. Olson recovered his borrowed truck from Ms. Turley. He had a friend retrieve the truck at the Nativity House where Ms. Turley had apparently parked it. RP 3 120. Mr. Olson was “angry” that Ms. Turley had taken the truck to the Nativity House knowing that drugs could be obtained there, and also knowing of her drug habit. RP 3 129-130. At about 3:00 p.m. Mr. Olson drove by Mr. Hamilton’s house. Through the blinds he saw that the television was on. He telephoned Mr. Hamilton to report his observation. Mr. Hamilton was unconcerned and advised that his “worker will turn

it off in the morning.” RP 3 121.

At about 6:00 p.m. Mr. Olson again drove to Mr. Hamilton’s house. He observed a “black SUV” parked in front and “all the lights on in the house.” RP 3 100, 122. Mr. Olson knocked on the front door and asked for Alaine Turley. According to Mr. Olson the gentleman who answered the door, who Mr. Olson recognized as the appellant, replied “that the place was his.” RP 3 122. Mr. Olson again telephoned Mr. Hamilton who instructed him to call 9-1-1. RP 3 101.

Multiple police officers were dispatched to the Hamilton residence at 9:39 p.m. CP 3-5. Tacoma Police Department Patrol Officer Zachary Spangler was the first to arrive. RP 1 41. Officer Spangler parked nearby and observed a green Ford Excursion parked in the Hamilton driveway. A woman, who was later identified as Kelly Lococo, was sitting in the front passenger side of the vehicle. Officer Spangler moved closer and observed three individuals, two males and one female, walk from the house to the vehicle. The three individuals were later identified as Tracey Holmes, Alaine Turley and Mark Lee. RP 1 42, 48, 50, 61. Mr. Holmes appeared to be holding something which he placed inside the vehicle.

Officer Spangler announced his presence. RP 1 43, 47. Mr. Holmes put his hands in the air while Ms. Turley and Mr. Lee returned to the residence. RP 1 48. Mr. Holmes then yelled for Ms. Turley and Mr. Lee to come out because “the police are here;” they came out immediately. RP 1 49. At about that time additional police

officers arrived. RP 1 51.

Officers Spangler and Nicolas Jensen interviewed Ms. Turley. RP 1 51, RP 3 206. Ms. Turley maintained that she presently resided in the house. Officer Spangler verified, through Mr. Hamilton, that Ms. Turley had previously resided there, but Mr. Hamilton claimed she had already moved out. RP 1 59. The officers gave Ms. Turley an opportunity to prove she still lived there, but Ms. Turley was unable to locate either her key to the front door or any mail addressed to her inside the home. RP 1 52, RP 3 206. Photographs of Ms. Turley were, however, located atop the fireplace mantle. RP 3 215. Ms. Turley stated that she had another place where she stayed as well. RP 3 213.

Inside the residence, Officer Spangler observed a television in the front room that had apparently been removed from its bracketing, and placed on the floor. RP 1 54. In the master bedroom, which was in disarray, the closet door was wide open. Inside the closet was a safe, which was “broken and scratched, as if somebody had been trying to get into it.” RP 1 55. Officer Spangler confirmed that the safe was intact when Mr. Hamilton left. He was unable to determine what Ms. Turley was attempting to locate inside it. RP 1 64. A briefcase and several tools were lying on the floor. RP 1 56.

In a second bedroom, Officer Jensen observed several uncapped needles and “a sweater draped over a heater that was placed directly below the window.” RP 3

209. The sweater was “slightly damp” and held small bits of grass and dirt. RP 3

210. Officer Jensen suspected that Ms. Turley entered the home via this bedroom window. RP 3 210.

Crime scene technician, Shea Wiley, processed the residence for fingerprints and took photographs. RP 3 220-221. Ms. Wiley identified latent prints in three places: on the television screen, on the interior of the closet door in which the safe was contained, and on a bottle of liquor. RP 3 230. All three prints were identified as belonging to Ms. Turley. RP 3 229.

Officer Eric Barry arrived after Officers Spangler and Jensen. He observed Mr. Lee, as well as a few other people, and two police officers, standing on the porch of the residence. RP 3 188. Officer Barry handcuffed, *Mirandized*, and placed Mr. Lee in the patrol car. RP 3 190. When asked what was going on Mr. Lee replied “man, there ain’t nothing funny going on here.” RP 3 192. When queried whether he had been inside the residence Mr. Lee responded “I don’t know what you’re talking about.” RP 3 192. Officer Barry interpreted that response as a denial that Mr. Lee had been inside. RP 3 196. Mr. Lee then stated that he had been there visiting Ms. Turley and was inside having sex with her earlier. RP 3 193. Mr. Lee also said that Ms. Turley had asked him if he knew anyone who wanted to buy the television in the front room. RP 3 195. Mr. Lee stated that he believed Ms. Turley lived in the house. When asked how she got into the house, Mr. Lee replied that he did not

know. RP 3 195.

IV. ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. LEE'S CONVICTIONS.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. United States Constitution, Amendment 14; Washington Constitution, Article 1, Section 3. “The reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on facts in issue.’” *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970)).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Green*, 94 Wn. 2d 216. 221. 616. P. 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Goodman*, 150 Wn.2d 774, 781 83 P.3d 410 (2004).

Dismissal is required following reversal for insufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). A defendant whose conviction has been reversed based upon insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), cert. denied 459 U.S. 842, 103 S.Ct. 93, 74 L.Ed. 2d 85 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed. 2d 30 (1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978)).

In the case at bar, the evidence was insufficient to prove Mr. Lee's guilt of either the residential burglary or the false statement charge.

1. The State failed to prove beyond a reasonable doubt that Mr. Lee committed the crime of residential burglary.

The State argued during closing that Mr. Lee was guilty of the crime of residential burglary under an accomplice liability theory.¹ RP 4 317. Mr. Lee's jury was instructed that "A person commits the crime of residential

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The prosecutor stated: "I would like you turn very briefly to the instruction for accomplice liability because that's my argument to you; that the evidence shows that this man was Elaine Turley's accomplice in committing this residential burglary." RP 4 317.

burglary when he or an accomplice enters or remains unlawfully in a dwelling with intent to a crime against a person or property therein.” Jury Instruction No. 8; CP 71-102. (WPIC 60.02.01 modified to include “or an accomplice;” See also RCW 9A52.025.)

Additionally, the jury was instructed as follows on accomplice liability:

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of the crime, if with knowledge that it will promote or facilitate the commission of the 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. Jury Instruction No. 15; CP 71-102 (WPIC 10.51; See also RCW 9A.08.020.)

To establish Mr. Lee’s guilt of residential burglary as an accomplice, therefore, the State was required to prove beyond a reasonable doubt that Mr.

Lee acted with knowledge that he was assisting in the commission of a

burglary; i.e., that he knew that Ms. Turley's entry was unlawful and that he intentionally aided her in the unlawful entry and in committing a crime inside the residence.

It should be reiterated that RCW 9A.08.020 requires the State to prove "that the individual . . . acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). The record makes no such showing. While Mr. Lee did not testify, his statement to Officer Barry was that he believed Ms. Turley resided at the house, and he was unaware of how she gained entrance. The State did not present evidence to refute that statement. No evidence was presented to establish how or when Mr. Lee entered the residence. Moreover, Mr. Lee's belief that Ms. Turley resided in the house was reasonable under the circumstances. It was undisputed that Ms. Turley had, in fact, lived in the house at some point. She frequently visited the house, and was there by permission of Mr. Hamilton as recent as the night before November 23, 2009. Ms. Turley steadfastly maintained that she still lived in the house. The evidence failed to show that Mr. Lee possessed any knowledge to the contrary.

Furthermore, the State failed to prove that Mr. Lee intended to commit a crime inside the residence, either as a principal or an accomplice. Mr. Turley led him to believe that she lived there and, therefore, the television she was seeking to sell belonged to her. The State presented no evidence to show otherwise. The record shows that Ms. Turley had pleaded guilty to burglary and was an intended witness for the State. RP 4 261-262. Assuming Ms. Turley had told Mr. Lee that she no longer resided at the house, the State could and should have secured her testimony at Mr. Lee's trial.

The record here was simply incomplete to establish the requisite knowledge by Mr. Lee that the residence was not Ms. Turley's. More than presence must be shown "to establish the intent requisite" to a finding of accomplice liability. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). Reversal and dismissal is required.

2. *The State failed to prove beyond a reasonable doubt that Mr. Lee committed the crime of making a false statement to a public servant.*

Pursuant to RCW 9A.76.175:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. 'Material Statement' means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or

her official powers or duties.²

In the case at bar, the evidence did not establish that Mr. Lee made a false or misleading material statement to the police. At the close of the State's case, defense counsel moved to dismiss the false statement charge. The trial court made the following observations:

The Court: With respect to the making a false or misleading statement. I'm a little perplexed because I don't know how these statements are really material, and I don't really understand false and misleading. If I rolled back to the first thing that he said, I shouldn't say the first thing that he said, but the first thing relevant, I think, to this claim that defense counsel is asking several questions about why are you understanding that to be that, he's denying that he was inside the residence. I'm drawing a blank on the exact words, but he said something like "nothing funny is going on here," or words to that effect.

**The
Prosecutor:** I don't know what you're talking about

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Mr. Lee's jury was instructed consistent with RCW 9A.76.175. Jury Instructions Nos. 21-25. CP 71-105.

The Court: “I don’t know what you’re talking about,” and I guess I don’t know what the question was is my problem because I never really understood how that is a denial of being inside the house. RP 3 238.

Without explanation the Court, however, denied the defense half time motion to dismiss. RP 3 240.

The record here is unclear, and insufficient to support a finding of guilt for the false statement charge. As the trial court correctly observed, Officer Barry’s inference that Mr. Lee denied being inside the house was unfounded. Officer Barry’s precise inference was that Mr. Lee’s statement, that he did not understand what the officer was talking about, constituted a denial of being inside the house. RP 3 196. As the trial court also suggested, the State failed to show the materiality of the statement.

The statement that Mr. Lee did not understand what Officer Barry was talking about apparently constituted the basis for the false statement charge. Not only was Officer Barry’s inference unfounded, but also the statement was not material. The evidence fails to show how the police relied upon, or were

reasonably likely to rely upon the statement. Were this conviction to stand it would support the proposition that anyone who did not admit criminal culpability to the police would be guilty of making a false or misleading statement to a public servant.

The evidence was insufficient and reversal and dismissal is required.

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GIVING THE JURY AN IMPROPER PERMISSIVE INFERENCE INSTRUCTION.

Jury Instruction No. 12 reads as follows:

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given. CP 71-102.

Jury Instruction No. 12 effectively relieved the State from its burden of proving that Mr. Lee intended to commit a crime against a person or property once inside the residence. The instruction was objected to by his trial counsel. RP 4 303.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1372 (1992) (citing *In re*

Winship, 397 U.S. 358, 90 S.Ct. 1068 25 L.Ed.2d 368 (1970)); United States Constitution Amendment 14; Washington Constitution Article 1, § 3, § 21, § 22, Residential burglary has two elements: (a) unlawfully entering or remaining in a dwelling other than a vehicle and (b) intent to commit a crime against a person or property in that dwelling. RCW 9A.52.025(1).

The State may rely, in part, on permissive inferences to meet its burden of proof. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). A permissive inference allows, but does not require, a jury to infer the existence of a presumed fact from a proven fact. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). In burglary prosecutions, the State may generally rely on the statutorily-created permissible inference that a person who enters or remains unlawfully in a building has the intent to commit a crime therein. RCW 9A.52.040; *State v. Brunson*, 128 Wn.2d 98, 111, 905 P.2d 346 (1995).

When an inference is merely part of the prosecution's proof supporting an element of the crime, due process only requires the presumed fact to flow "more likely than not" from the proof of the basic fact. *State v. Hanna*, 123 Wn.2d at 710 (citing *County Court of Ulster Cy. v. Allen*, 422 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed. 777 (1979)). But where, as here, the inference is the

“sole and sufficient basis for a finding of guilt,” the more rigid reasonable doubt standard of proof applies to the inference. *Ulster*, 442 U.S. at 167; *State v. Delmarter*, 68 Wn.2d 98, 107, 905 P.2d 346 (1995); *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). Whether an inference meets the reasonable doubt standard must be determined on a case-by-case basis in light of the particular evidence presented to the jury in each case. *Hanna*, 123 Wn.2d at 712.

In *State v. Jackson*, 112 Wn. 2d 867, 774 P.2d 1211 (1989), the Supreme Court held that an intent inference was improper where there was insufficient proof of unlawful entry by the defendant. The same is true in Mr. Lee’s case. The inference was the sole and sufficient basis for the finding of Mr. Lee’s intent to commit a crime. The basic fact was not proved. The evidence showed that Ms. Turley represented herself to be legally entitled to the premises and that Mr. Lee believed this to be true.

“An inference should not arise where there exists other reasonable conclusions that would follow from the circumstances.” *Id.* at 876. Here, a reasonable conclusion was that Mr. Lee believed Ms. Turley resided in the house. The evidence supported this conclusion. The court erred by giving the

jury the inference instruction, thus denying Mr. Lee his due process rights.

Exacerbating the problem of the permissive inference instruction were the modified elements and the to-convict instructions, which had been altered from the standard WPICs to include the words “or an accomplice,” to which trial counsel objected. Jury Instructions Nos. 8 and 16; CP 71-102.³ RP 4 252.

While the “or an accomplice” language has previously been approved for use in Washington instructions,⁴ in this case it only resulted in confusing and misleading instructions. Combined with the permissive inference instruction, the jury likely understood that a conviction was proper if the State proved that Mr. Lee or Ms. Turley entered the house unlawfully. Furthermore, the “or an accomplice” language was unsuited to the facts of Mr. Lee’s case

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Jury Instruction No. 8 reads: “A person commits the crime of residential burglary when he *or an accomplice* enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein.” Jury Instruction No. 16 reads in relevant part: “To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about November 23, 2009, the defendant *or an accomplice*, entered or remained unlawfully in a dwelling.”

4

See *State v. Haack*, 88 Wash.App. 423, 958 P.2d 1001 (1997)

because the State's sole theory was that Mr. Lee was an accomplice to Ms. Turley, not that Ms. Turley was an accomplice to Mr. Lee.

The permissive inference instruction was improper under these facts. Reversal is required.

V. CONCLUSION

For all of the foregoing reasons and conclusions Mr. Lee respectfully requests that this Court reverse and dismiss his convictions of Residential Burglary and Making a False or Misleading Statement to a Public Servant.

DATED this 25th day of October, 2010.

Respectfully Submitted,



Sheri L. Arnold, WSBA No. 18760
Attorney for Appellant

COURT OF APPEALS
DIVISION II

10 OCT 25 PM 12:35

STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

The undersigned certifies that on October 25, 2010, she delivered in person to the Pierce County Prosecutor's Office, County- City Building, 910 Tacoma Avenue South, Tacoma, Washington 98402, and delivered by United States Mail to appellant, Mark A. Lee, DOC # 921932, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, Washington 98326, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on October 25, 2010.



Norma Kinter