

No. 41573-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN ALLEN MAGGARD,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

STATEMENT OF THE CASE..... 1

ARGUMENT 2

A. MAGGARD'S VEHICLE WAS NOT SEARCHED BY LAW ENFORCEMENT. IF THIS COURT DECIDES A SEARCH WAS CONDUCTED, THE SEARCH WAS PERMISSIBLE UNDER THE POLICE SAFETY AND SAFETY TO THE PUBLIC EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT 2

 1. Officer Taylor Did Not Search Maggard's Vehicle, Rather He Retrieved The Firearm Out of The Vehicle 5

 2. The Search Of The Vehicle Was Lawful Due To The Exigent Circumstances Of Officer Safety And Safety Of The Public..... 7

B. MAGGARD IS PROCEDURALLY BARRED FROM CHALLENGING THE JURY TRIAL WAIVER 10

C. MAGGARD DID KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO A JURY TRIAL 11

D. MAGGARD'S CONVICTION DOES NOT VIOLATE HIS CONSTITUTIONALLY PROTECTED TRIAL RIGHTS 14

CONCLUSION 16

TABLE OF AUTHORITIES

Washington Cases

<i>State ex. rel. Lige v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217 (1992), <i>review denied</i> 120 Wn.2d 1008 (1992)	4
<i>State v. Carter</i> , 151 Wn.2d 118, 85 P.3d 887 (2004)	8
<i>State v. Choi</i> , 55 Wn. App. 895, 781 P.3d 505 (1989).....	12
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	3
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	4
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	4
<i>State v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999)	12
<i>State v. Hos</i> , 154 Wn. App. 238, 225 P.3d 389 (2010).....	11
<i>State v. Houser</i> , 95 Wn.2d 143, 622 P.2d 1218 (1980).....	3
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	3
<i>State v. McCrea</i> , 22 Wn. App. 526, 590 P.2d 367 (1979)	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)....	10, 11
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	10, 11
<i>State v. Patterson</i> , 112 Wn.2d 731, 774 P.2d 10 (1989)	8
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008).....	4
<i>State v. Stevenson</i> , 128 Wn. App. 179, 114 P.3d 699 (2005)	4, 6
<i>State v. Vasquez</i> , 109 Wn. App. 310, 34 P.3d 1255 (2001); <i>affirmed</i> 148 Wn.2d 303, 59 P.3d 648 (2002).....	12
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	12

Federal Cases

Arizona v. Gant, __U.S. __, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009)..... 7

Arkansas v. Sanders, 448 U.S. 753, 99 S. Ct. 2586, 61 L.Ed.2d 235 (1979)..... 3

Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971)..... 3

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938)..... 14

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)..... 4

Constitutional Provisions

Washington State Constitution, Article 1, section 7 2, 3

Washington State Constitution, Article 1, section 9 14

Washington State Constitution, Article 1, section 21 11

Washington State Constitution, Article 1, section 22 14

U.S. Constitution, Amendment 4 3

U.S. Constitution, Amendment 5 14

U.S. Constitution, Amendment 6 11, 14

U.S. Constitution, Amendment 14 14

Other Rules or Authorities

CrR 6.1(a)..... 12

RAP 2.5(a).....	10
Black’s Law Dictionary, 4 th edition (1968).....	5
Black’s Law Dictionary, 7 th edition	5
Webster’s Third New International Dictionary, (2002)	5

I. ISSUES

- A. Did the officers violate Maggard's constitutional rights under the Fourth Amendment of the United States Constitution and Article One, Section Seven of the Washington State Constitution by impermissibly searching his vehicle and thereby illegally intruding on his private affairs?
- B. Is Maggard procedurally barred from raising the issue of lack of a jury trial waiver when he did not preserve the issue in the trial court?
- C. Did Maggard knowingly and voluntarily waive his right to a jury trial?
- D. Did the trial court violate Maggard's constitutionally protected trial rights when it conducted a stipulated facts bench trial?

II. STATEMENT OF THE CASE

The State filed an information on July 30, 2010, charging Steven Allen Maggard¹ with one count of Unlawful Possession of a Firearm in the First Degree, occurring on or about July 27, 2010. CP 1-2. There was a CrR 3.6 suppression hearing held on October 13, 2010. RP 3-39. At the CrR 3.6 hearing the State called two witnesses, Chehalis Police Officer Christopher Taylor and Chehalis Police Officer Bruce Thompson. RP 3 and 24. Officer Taylor's and Officer Thompson's testimony at the 3.6 hearing will be discussed at length in later portions of the State's response and the State will supplement the facts at that time. The trial court denied Maggard's

¹ Hereafter, Maggard.

motion to suppress the evidence and gave an oral ruling. RP 37-38. Findings of Fact and Conclusion of Law were entered on November 1, 2010. CP 4-6.

On November 10, 2010 the trial court held a stipulated facts bench trial. CP 40-40-43; CP 49-51. Maggard's trial counsel stated on the record that the reason for the stipulated facts trial was to allow Maggard to appeal the CrR 3.6 decision. RP 40-41. The State, trial counsel and Maggard agreed to the facts and submitted the stipulated facts to the trial court. CP 49-51. All parties signed the stipulated facts document. CP 51. The trial court convicted Maggard of Unlawful Possession of Firearm in the First Degree. RP 41; CP 7. Maggard was sentenced to 28 months in the department of corrections. CP 10. Maggard timely appealed his conviction. CP 16-17.

III. ARGUMENT

A. MAGGARD'S VEHICLE WAS NOT SEARCHED BY LAW ENFORCEMENT. IF THIS COURT DECIDES A SEARCH WAS CONDUCTED, THE SEARCH WAS PERMISSIBLE UNDER THE POLICE SAFETY AND SAFETY TO THE PUBLIC EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not

have government unreasonably intrude on one's private affairs. U.S. Const. amend IV. Probable cause is required to be established prior to the government obtaining a warrant to search. U.S. Const. amend IV. Article One, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 443, 91 S. Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), *citing Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S. Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). "The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest,

inventory searches, plain view, and *Terry*² investigated stops.”

State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Findings of fact entered by a trial court after a suppression motion will only be reviewed by the appellate court if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). “Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.” *Id.* There is substantial evidence when the “evidence is sufficient to persuade a fair-minded person of the truth of the finding,” *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court’s conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

² *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

1. Officer Taylor Did Not Search Maggard's Vehicle, Rather He Retrieved The Firearm Out of The Vehicle.

The basic definition of search is, "to look into or over carefully or thoroughly in an effort to find something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2048 (2002). Taken a step further, in the legal realm, a search can be defined as, "[a]n examination of a person's body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law-enforcement officer for the purpose of finding evidence of a crime." BLACK'S LAW DICTIONARY, 1351 (7th ed). The court has previously referenced Black's Law Dictionary in regards to the definition of search. *State v. McCrea*, 22 Wn. App. 526, 530, 590 P.2d 367 (1979).³ The court noted that the definition of search, as found in Black's Law Dictionary, implies that the officer is searching into something which is not in the officer's open view. *Id.*

In the present case before this court, Maggard is not contesting the findings of fact entered by the trial court. See Brief of Appellant 1-8. There is no assignment of error to the findings of fact from the suppression hearing. Brief Of Appellant 1, 4-8.

³ The court in *McCrea* used the definition of search as found in Black's Law Dictionary, 4th edition (1968).

Therefore the findings of fact become verities on appeal. *State v. Stevenson*, 128 Wn. App. at 193. The trial court found in the findings of fact that Officer Taylor removed the rifle from Maggard's vehicle for officer safety. CP 5. The trial court also found that "[t]here was no search of the van. Officer Talyor removed the rifle for officer safety purposes." CP 5.

The testimony from Officer Taylor during the CrR 3.6 hearing is consistent with the trial court's finding of facts as referenced above. RP 8, 21. Maggard argues that police are only authorized to search a vehicle incident to a recent occupant's arrest when the person arrested is not secure and can is within reaching distance of the passenger compartment of the vehicle at the time police search the vehicle. Brief of Appellant 6-7. Officer Taylor's actions do not constitute a search of the vehicle. Officer Taylor arrested Maggard for a driving offense and when he walked back to the van, where there was an unrestrained passenger, Officer Taylor saw a rifle in the backseat of the van. RP 6-7; CP 5. Officer Taylor stated he, "opened the sliding door, checked the area underneath the van, like I would any other vehicle at night, and retrieved the rifle and the ammo." RP 21. Officer Taylor did not look in the glove box, under the driver's seat or the center console of the van. See RP. There

is nothing in Officer Taylor's testimony on direct examination or cross-examination that would lead a person to believe Officer Taylor did anything inside the van except retrieve the rifle and ammunition that he saw from outside the van. RP 4-21. The retrieval of the rifle, which Officer Taylor did for officer safety purposes, was not a search therefore, there was no unlawful search of Maggard's vehicle and his conviction should be affirmed.

2. The Search Of The Vehicle Was Lawful Due To The Exigent Circumstances Of Officer Safety And Safety Of The Public.

While the State is not agreeing Officer Taylor's actions constituted a search of Maggard's vehicle, arguendo, if there was a search it was permissible under the exception to the warrant requirement of officer safety and safety of the public. Maggard argues pursuant to *Gant*⁴ and the Washington State cases which adopt *Gant* and apply it to the Washington State Constitution, that without a reasonable belief that the arrestee poses a safety risk, the officers are barred from retrieving the firearm from the vehicle. Brief of Appellant 6-8. The State respectfully disagrees with Maggard's interpretation of the exception in regards to officer safety and safety to the public.

⁴ *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 173 L.#d.2d 485 (2009).

A warrantless search is permissible under the recognized exception when delay will probably endanger the safety of the public or police officers. *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004) (citations omitted). The determination by the court if exigent circumstances existed at the time of the search “must be determined by the totality of the circumstances.” *Id.*, citing *State v. Patterson*, 112 Wn.2d 731, 735-36, 774 P.2d 10 (1989).

In *Carter* two police officers, who were at firearms training, seized an illegally modified AR-15. The officers were concerned that Carter, who was conducting the training and admitted to modifying the gun to allow it to be a fully automatic rifle, would destroy the evidence and were concerned for their safety. The court found that the warrantless seizure was permissible under the exigent circumstances exception for a warrant. *State v. Carter*, 151 Wn.2d at 129.

In the present case while Maggard was under arrest, the passenger of the vehicle, Mr. Waggoner, was still occupying the vehicle when Officer Taylor saw the rifle in the backseat. RP 7; CP 5. Officer Taylor did not know if anyone else was possibly hiding under the seats of the van. RP 21. While Mr. Waggoner was removed from the vehicle to allow Officer Taylor to retrieve the gun,

there is no evidence admitted that Mr. Waggoner was under arrest. RP 7-8, 15-19; CP 4-6. If Mr. Waggoner was free to leave after the initial contact with police, and Officer Taylor had not removed the rifle from the backseat of the van, then Mr. Waggoner would have access to the rifle while the officers were still on the scene. It is unreasonable to expect that an officer, late at night, would permit a person to remain in a vehicle where there was a firearm and ammunition available within reaching distance. Further, if the rifle was left in the vehicle and Mr. Waggoner exited the vehicle and left, there would be nothing preventing a member of the public to access the vehicle and obtain the rifle. Common sense would dictate that when an officer sees, from a lawful vantage point, a firearm in the vehicle with an unrestrained passenger who is not under arrest, and therefore would be free to access the vehicle and remove belongings from the vehicle, that the retrieval of the firearm and ammunition would be necessary to protect the officer's safety and the safety of the general public.

The search of Maggard's van to retrieve the rifle observed by Officer Taylor from outside of the vehicle was permissible under the officer safety and safety of the public exception to warrant requirement. Therefore, Maggard's conviction for unlawful

possession of a firearm in the first degree should be affirmed.

B. MAGGARD IS PROCEDURALLY BARRED FROM CHALLENGING THE JURY TRIAL WAIVER.

Maggard is barred from raising issue with his jury trial waiver under RAP 2.5(a). An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, *citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v.*

McFarland, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.*

Maggard is claiming he did not knowingly and voluntarily waive his right to a jury trial. Brief of Appellant 8-9. Maggard did not raise the issue of his jury trial waiver in the trial court, either at the time of trial or a motion after the conclusion of trial. See, RP. While the alleged error does affect a constitutional right, the error was not manifest. Maggard has not shown he suffered any prejudice due to the overwhelming evidence that he was in possession of a firearm at the time of his arrest for the driving offense. RP 6-8, 41. Maggard cannot show any prejudice, therefore no manifest error occurred. Maggard is barred from raising the issue of his jury trial waiver and his conviction should be affirmed.

C. MAGGARD DID KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVE HIS RIGHT TO A JURY TRIAL.

A criminal defendant has a constitutional right to a trial by jury. U.S. Const. amend. VI; Const. art. 1, § 21. The State has the burden of establishing that a defendant validly waived his or her right to a jury trial. *State v. Hos*, 154 Wn. App. 238, 249, 225 P.3d

389 (2010). The reviewing court “will indulge every reasonable presumption against such waiver, absent a sufficient record. *Id* at 249-50. Validity of a jury trial waiver is reviewed de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001); *affirmed* 148 Wn.2d 303, 59 P.3d 648 (2002).

A defendant may waive jury trial orally or by filing a written waiver. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); CrR 6.1(a). Compliance with CrR 6.1(a) constitutes strong evidence of a validly waived right. *State v. Choi*, 55 Wn. App. 895, 903, 781 P.3d 505 (1989). A waiver is a voluntary or intentional relinquishment of a known right. *State v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316 (1999).

While the State does concede that there is no written document entitled waiver of jury trial nor is there an oral waiver of jury trial contained within the record, it is the State’s position that Maggard’s actions, ratifying his attorneys representation to the trial court in regards to the stipulated facts bench trial, constitutes a waiver of jury trial in this case. On the trial date the State presented Maggard and his trial counsel the findings for the CrR 3.6 hearing as well as the stipulated facts for the trial. RP 40. Maggard’s trial counsel stated:

Your Honor, we're on for a stipulated facts trial. As Mr. Meagher pointed out, we've reviewed, made some changes. We're willing to proceed to trial on those stipulated facts.

The stipulated facts are based upon what you found at the suppression hearing so we're using that as the basis for the facts of this case. I have reviewed those with Mr. Maggard and he signed those as well. . .

And while Your Honor is reading that, if I can make a record. And I spoke with Mr. Maggard about a stipulated facts bench trial and explained to him that in essence what The Court would do is review the stipulated facts and base its finding of guilt or innocence on that. I've explained to Mr. Maggard that although The Court's not required to find him guilty, given the fact that the suppression hearing was denied, he would most likely be found guilty. This is kind of an easier way to avoid a trial and the most likely outcome at trial given The Court's findings in this case and simply get on with an appeal. He has agreed to that so that's why we're doing this.

RP 40-41.

The State filed a Stipulated Facts agreed to by the parties.

CP 49-51. The stipulated facts pleading stated:

This matter came on for stipulated trial without a jury on November 1, 2010. The State was represented by J. Bradley Meagher, DPA. The Defendant [Steven Maggard,] was present and represented by Jonathan Meyer. The parties hereby stipulate to the following facts for the purpose of the Court rendering a verdict of guilty or not guilty beyond a reasonable doubt.

CP 49. On the last page of the stipulated facts it states "Stipulated to and Approved for entry" and affixed underneath is Maggard's

signature. If Maggard is stipulating to and approving the stipulated facts, with the language that the matter is on for a trial without a jury, and he signs the document, which would be an expression of his desire to have the matter concluded in this fashion, then Maggard is waiving his right to a jury trial. CP 49-51. This coupled with Maggard's trial counsel's colloquy to the court regarding his explanation of the procedure to Maggard, makes it clear that Maggard knowingly and voluntarily waived his right to a jury trial and memorialized that decision by signing the stipulated facts filed with the trial court. See RP 40-41; CP 49-51. Maggard's conviction should therefore be affirmed.

D. MAGGARD'S CONVICTION DOES NOT VIOLATE HIS CONSTITUTIONALLY PROTECTED TRIAL RIGHTS.

A person accused of a crime has several constitutionally guaranteed rights. U.S. Const. Amend. V, VI, XIV; Washington Const. Art. I, §§ 9 and 22. A defendant's acquiescence is not a presumption that a constitutional right has been waived. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938). The court actually "indulge[s] every reasonable presumption against waiver" of an accused federal constitutional trial rights. *Id.* The court, in determining if there was an intelligent waiver of a constitutional right, must depend on the facts and circumstances

surrounding that particular case, including the conduct of the defendant. *Id.*

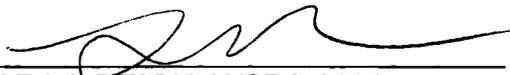
While, as argued above, the State does concede that there was not a colloquy on the record waiving Maggard's trial rights, it is the State's position that his signature on the Stipulated Facts is a manifestation of Maggard's knowing and intelligent decision to proceed with a stipulated facts bench trial rather than a jury trial or a bench trial where witnesses would be called and Maggard would be afforded the opportunity to testify. CP 49-51. Maggard stipulated to the facts for the purpose of the trial court rendering a verdict on his case. CP 49. By stipulating to the facts, Maggard was necessarily relinquishing his right to testify, call witness and cross examine the State's witnesses. CP 49-51. Therefore, the trial court did not violate Maggard's constitutional trial rights and his conviction should be affirmed.

IV. CONCLUSION

For the reasons argued above this court should affirm Maggard's conviction for unlawful possession of a firearm in the first degree.

RESPECTFULLY submitted this 2nd day of August, 2011.

JONATHAN L. MEYER
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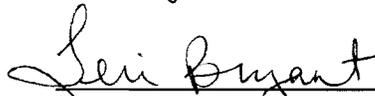
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 41573-9-II
Respondent,)
vs.) DECLARATION OF
MAILING
STEVEN ALLEN MAGGARD,)
Appellant.)
_____)

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 3, 2011, 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:

Jodi R. Backlund & Manek R. Mistry
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DATED this 3rd day of August, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing

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