

No. 41865-7-II

11/25/2015 11:23:23
STATE OF WASHINGTON
BY: [Signature]

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL THOMPSON,

Appellant.

APPEAL FROM SUPERIOR COURT OF CLARK COUNTY

HONORABLE ROGER A. BENNETT, JUDGE

CLARK COUNTY CAUSE NO. 10-1-00676-1

BRIEF OF APPELLANT

SUZAN L. CLARK, WSBA #17476
Attorney for the Appellant

Attorney at Law
1101 Broadway Street, Suite 250
Vancouver, Washington 98660

Telephone: (360) 735-9434

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1-2

III. STATEMENT OF THE CASE 2

 A. STATEMENT OF FACTS 2

 B. STATEMENT OF PROCEDURAL HISTORY.....7

IV. ARGUMENT 8

V. CONCLUSION 19

TABLE OF AUTHORITIES

TABLE OF CASES

City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993)..16

In re Dependency of V.R.R., 134 Wn. App. 573, 580, 141 P.3d 85 (2006).....10

In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).....12

State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).....10

State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968).....11

State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988).....17

State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).....12

State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974)11

State v. Elmore, 139 Wn.2d 250, 275, 985 P.2d 289 (1999)..... 17, 18

State v. Green, 94 Wn.2d .216, 616 P.2d 628 (1980).....16

State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006).....14

State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).....16

State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).....13

State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007)15

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....12

State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997).....12

<u>State v. Thomas</u> , 109 Wn.2d 222, 226 743 P.2d 816 (1987).....	13
<u>State v. Turner</u> , 169 Wn.2d 448, 466-467, 238 P.3d 461 (2010).....	18, 19
<u>State v. Weber</u> , 159 Wn.2d 252, 279, 149 P.3d 646 (2006).....	16
<u>State v. Williams</u> , 84 Wn.2d 853, 855, 529 P.2d 1088 (1975).....	10,11
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12

TABLE OF OTHER AUTHORITIES

CrR3.3(f).....	9
Wash. Const. art. I, §§ 9).....	18
Wash Const. art. IV, §§ 16.....	17,18

I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR NUMBER ONE: THOMPSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

B. ASSIGNMENT OF ERROR NUMBER TWO: SHEPPARD IMPERMISSIBLY VOUCHED FOR THE CREDIBILITY OF A WITNESS.

C. ASSIGNMENT OF ERROR NUMBER THREE: THE JUDGE MADE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

D. ASSIGNMENT OF ERROR NUMBER FOUR: THE TRIAL COURT ERRED IN SENTENCING THOMPSON ON ALL FOUR COUNTS.

E. ASSIGNMENT OF ERROR NUMBER FIVE: THE TRIAL COURT ERRED IN REFUSING TO GRANT THOMPSON'S MOTION TO CONTINUE.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION BY DENYING THOMPSON'S MOTION TO CONTINUE THE TRIAL

WHEN HIS COUNSEL WAS UNPREPARED?

B. DID THOMPSON RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY WAS UNPREPARED FOR TRIAL AND FAILED TO MAKE OBJECTIONS OR PROPERLY IMPEACH WITNESSES?

C. DID THE CUMULATIVE ERRORS DEPRIVE THOMPSON OF A FAIR TRIAL?

D. DID FAILING TO VACATE THE RAPE IN THE THIRD DEGREE CONVICTIONS VIOLATE DOUBLE JEOPARDY?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Michael Thompson attended high school with C.M.M. and A.D.M.. (RP-155, 203) C.M.M. met Thompson through her brother and while attending Summer school with him. (RP-203) C.M.M. planned to “hang out” with Thompson during the lunch hour on March 4, 2010. (RP-203)

C.M.M. testified that she went with Thompson to the auditorium via the band room. (RP-204) They talked and she gave him a hug. (RP-204 to 205) She described her mood as good and stated “I wanted to do cart wheels.”

(RP-205) C.M.M. testified that she liked Thompson and thought he was cute.

(RP-209)

C.M.M. testified that they kissed and Thompson moved his hand to the straps on her tank tops and pulled the tops down exposing her breasts.

(RP-209) She testified that she was unsure if he heard her say “Stop, no”, but she tried to push his hands away. (RP-209) She testified that Thompson fondled her breasts with his hand and with his mouth. (RP-210) C.M.M. testified that she pulled her tops back up and she tried to nudge Thompson away and tell him to stop, but he said “Sorry, I’m not listening.” (RP-210)

C.M.M. testified that another student came in to the auditorium while her breasts were exposed and giggled and left the room. (RP-212) She testified that Thompson apologized for not listening. (RP-212 to 213) C.M.M. testified that Thompson slid his hand down the front of her pants and she dropped down to her knees to try to get his hand out of her pants. (RP-214) C.M.M. testified that Thompson’s finger entered her vagina and she told him to stop and tried to pull his hand out of her pants. (RP-215 to 216) He stopped and they both left the auditorium. (RP-216) C.M.M. admitted that she had kissed Thompson when they were in Summer school and he had groped her breasts and buttocks. (RP-248) C.M.M. testified that Thompson may have penetrated her vagina with his finger when they were being

affectionate with each other during Summer school. (RP-257)

Kelly Eldred, campus security officer at C.M.M.'s high school testified that C.M.M. reported to her Thompson sexually assaulted C.M.M.. (RP-87) Eldred narrated a video of the auditorium, pointing out where C.M.M. told her she and Thompson were in the various areas. (RP-87) Eldred testified that Enland was expelled on May 20, 2010 (RP-98)

Irene Sheppard testified that she works at Southwest Washington Medical Center as a Sexual Assault Trauma nurse. (RP-115 to 117) She examined C.M.M. on March 5, 2010. (RP-123) Sheppard testified that C.M.M. told her she was approached in the auditorium by a much older student and that he forced himself on her in "was what I deem as sort of a cheeky or sort of hitting on a bit by asking her if she had a boyfriend..." (RP-126) Sheppard further stated her opinion that "I was pleased that she seemed to be a very reasonable young woman." (RP-127)

She described the exam procedure as "Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she's not very experienced in the ways of the world and things like that it..." (RP-128)

The prosecutor asked Sheppard if her findings were consistent with what C.M.M. had told her and Sheppard replied, "Absolutely. Yeah." (RP-

130) When asked to elaborate, she said “Just her demeanor, her story, what she presented, and just the action. And I don’t recall – if I’m mistaken – let me look at this – that there was any outward evidence. It was her physical and her emotional appearance and just the details of the actual victimization that struck me as being very credible.” (RP-130) Defense counsel objected after the last statement and the judge instructed the jury to disregard the statement. (RP-130) The witness said, “Excuse me” to which the Judge replied “It’s all right.” (RP-130)

A.D.M. knew Thompson from mutual friends and participating in DeMolay. (RP-156) She testified that she went over to Thompson’s house on two occasions. (RP-157) A.D.M. testified that the first time she went to Thompson’s house she helped him with homework and that Thompson’s dad took her home. (RP-157) A.D.M. testified that she and Thompson had kissed when he took her home after school. (RP-158)

A.D.M. testified that Thompson invited her over to watch a movie or play Wii sometime in the Fall or Winter of 2009. (RP-158 to 159) She testified that she sat on one couch and Thompson sat on another while they watched a movie. (RP-163 to 164)

A.D.M. testified that during the movie Thompson came over to the couch she was on and started kissing her and trying to pull her pants down.

(RP-164) She testified that she kept saying “No.” and “Stop.” (RP-166) He pulled her to the floor, pinned her down and took her pants off of her body. (RP-167) A.D.M. said that Thompson did not stop when asked to and that his penis penetrated her vagina. (RP-167) After he finished, A.D.M. testified that Thompson drove her home. (RP-168) A.D.M. testified that she did not tell anyone until after she heard about the allegations against Thompson involving C.M.M.. (RP-168)

Roman Enland testified that he A.D.M. told him about being sexually assaulted by Thompson and that he decided to fight Thompson. (RP-281 to 282) Enland testified that he asked Thompson “Did you do it, and you know what the fuck I am talking about?” and Thompson said “Yeah,” or what Enland took to be, yeah. (RP-287) Enland admitted he got expelled from school due to the incident. (RP-288)

S.J.H testified that she knew C.M.M. for several years prior to the alleged incident and that C.M.M. told S.J.H. that she and Thompson were in the auditorium and C.M.M. tried to come on to Thompson and Thompson pushed C.M.M. away. (RP-432 to 433)

B.D.T testified that he is the brother of Thompson and knew both C.M.M. and A.D.M. from school. (RP-4450 to 451) B.D.T recalls his dad

being home all the time in 2009 because he had lost his job. (RP-452) B.D.T. testified that a group of friends including A.D.M. came over to watch movies during the Fall of 2009 while his dad was home. (RP-453) B.D.T. indicated his dad drove A.D.M. home that night and that he had not seen her at the house on any other occasion. (RP-453 to 454)

Steve Thompson testified that he lived with his two sons at his residence during 2009. (RP-464 to 465) He recalled an evening in 2009 where about a half dozen kids were at the house watching a movie. (RP-466) He does not recall either of his sons or himself taking A.D.M. home that night. (RP-468) Steve Thompson indicated that there was no way A.D.M. could have been in his house with his son alone during 2009 as Steve Thompson was home every night. (RP-470)

B. STATEMENT OF PROCEDURAL HISTORY

On May 3, 2010 the state charged Thompson with one count of rape in the second degree naming C.M.M. as the alleged victim. (CP-1) On November 2, 2010 the state filed an amended information charging Thompson with rape in the second degree against C.M.M., or in the

alternative rape in the third degree against C.M.M. and added two additional counts charging rape in the second degree against a second alleged victim, A.D.M. and in the alternative rape in the third degree against A.D.M.. (CP-2)

On January 21, 2011 the state filed a third amended information and on January 24, 2011 the state filed a fourth amended information. (CP-12, 14) These amendments alleged each count separately, removing the alternative language. (CP-12, 14)

On January 20, 2011 Thompson moved to continue his trial date based on his counsel being unprepared to proceed to trial and needing further time to interview witnesses. (CP-10) The trial court denied this motion and the case proceeded to trial on January 24, 2011. (RP-16)

The jury found Thompson guilty of all four charges on January 27, 2011. (CP-35 to 38) The trial court sentenced Thompson to 130 months in prison on March 2, 2011. (CP-43) From that sentence this appeal timely follows.

IV. ARGUMENT

A. FAILURE TO GRANT THOMPSON'S MOTION TO CONTINUE.

The original information filed on May 3, 2010 charged Thompson with one count of rape in the second degree naming C.M.M. as the alleged victim. (CP-1)

On November 2, 2010 the state filed an amended information charging Thompson with rape in the second degree against C.M.M., or in the alternative rape in the third degree against C.M.M. and added two additional counts charging rape in the second degree against a second alleged victim, A.D.M. and in the alternative rape in the third degree against A.D.M.. (CP-2) No motion was submitted to join the charges, nor apparently was there any objection to the amended information.

On January 20, 2011 Thompson moved to continue his trial date based on his counsel being unprepared to proceed to trial and needing further time to interview witnesses. (CP-10) The trial court denied this motion and Thompson was forced proceed to trial on January 24, 2011, 83 days after the filing of the second amended information adding A.D.M. as a victim. (RP-16)

CrR3.3(f) gives the court discretion to authorize a continuance on the motion of a party. At a readiness hearing on January 20, 2011 Judge Barbara

Johnson denied the motion to continue and indicated that the parties could take the matter before the assigned trial judge if they wanted to be heard further. (RP-10)

The parties went before the assigned judge, the Honorable Roger A. Bennett a short time later. (RP 1-20-11 Judge Bennett Motion Hearing- 3) Without benefit of the court file, the parties explained their positions to him. (RP 1-20-11 Judge Bennett Motion Hearing- 3 to 10) Thompson's trial counsel adamantly argued that he was unprepared to proceed to trial the following Monday. (RP 1-20-11 Judge Bennett Motion Hearing- 3 through 17)

The trial court's decision to deny a continuance is reviewed for abuse of discretion. In re Dependency of V.R.R., 134 Wn. App. 573, 580, 141 P.3d 85 (2006). A trial court abuses its discretion by basing its decision on untenable grounds or untenable reasons. State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

The appellate courts recognize "that failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case." State v. Williams, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975) (citing State v. Cadena, 74 Wn.2d 185, 443 P.2d 826

(1968)). Also, a denial of a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974) Whether the denial of a continuance establishes a constitutional violation involves a case by case analysis of the specific facts involved. Cadena, supra.

The judge indicated displeasure that Thompson's family had come forward with additional witnesses the Thursday before trial. (RP 1-20-11 Judge Bennett Motion Hearing-17) This case involved numerous high school student witnesses. The timing of the trial was such that Thompson became aware of amended information adding a second alleged victim in early November (CP-2), before the Thanksgiving and Christmas holidays made it more difficult to locate students at school. At trial, Thompson's counsel was ill prepared to put forth his defense because of his inability to interview witnesses and prepare them for testimony. The state forced offers of proof regarding the testimony of a number of witnesses and Thompson's Counsel was clearly unprepared to establish the relevance of many of the witnesses. (RP-305 to 340)

Thompson would respectfully submit that forcing him to go to trial

with Counsel who was admittedly unprepared to proceed deprived him of his constitutional right to a fair trial.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

The appellate court reviews claims of ineffective assistance of counsel de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006)

To establish ineffective assistance of counsel, Thompson must establish both (1) that counsel's performance was deficient and (2) that the deficient performance resulted in prejudice to the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Thompson would respectfully submit that he received ineffective assistance of counsel in a number of ways.

Thompson acknowledges that the appellate courts will indulge in a strong presumption of reasonableness" until the defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. State v. Thomas, 109 Wn.2d 222, 226 743 P.2d 816 (1987)

"This presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial." State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

Counsel admits to being unprepared in his request for continuance as outlined, *infra*.

Counsel sought to impeach Enland with juvenile adjudications for crimes of dishonesty. (RP-298 to 301) His comments on the record show that he is having difficulty discerning what adjudications Enland's record establish. (RP-298 to 299) When pushed as to why he wants the court to exercise discretion and admit evidence of juvenile adjudications for crimes of dishonesty, Counsel withdrew his request to have the adjudications admitted. (RP-300 to 301)

Enland was the only witness to testify that Thompson allegedly

A.D.M.itted the crime to him. (RP-287 to 288) There is absolutely no tactical reason to not try to impeach him with juvenile adjudications of crimes of dishonesty. Counsel was caught unprepared and withdrew his efforts when pressed by the court. In a case with no physical evidence, witness credibility is of paramount importance and this failure is further evidence of counsels ineffectiveness and lack of preparation.

Counsel made an issue of the state failing to test C.M.M.'s bra for DNA and indicated he did not know where the bra was until well into the defense case at trial. (RP-374) The prosecutor indicated that the bra was in evidence the entire time. (RP-374) Over the prosecutor's objection, the trial court allowed Counsel to ask his investigator if the bra should have been submitted for DNA testing by the state as part of the investigation. (RP-374)

On cross-examination the prosecutor questioned the investigator about why the defense did not submit the bra for testing. (RP-408 to 409) Counsel failed to object to this line of questioning. Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct. See State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006).

Counsel failed to object to Sheppard impermissibly giving her personal opinion about C.M.M.'s story. . Sheppard testified that C.M.M.

told her she was approached in the auditorium by a much older student and that he forced himself on her in “was what I deem as sort of a cheeky or sort of hitting on a bit by asking her if she had a boyfriend...” (RP-126) Sheppard further stated her opinion that “I was pleased that she seemed to be a very reasonable young woman.” (RP-127)

She described the exam procedure as “Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she’s not very experienced in the ways of the world and things like that it...” (RP-128)

Thompson would respectfully submit that these statements were improper opinion testimony designed to bolster the credibility of the victim and elicit sympathy for her.

"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow. . . . [It] is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt. State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007)

Thompson would submit that Sheppard’s opinions constitute both manifest error that can be raised for the first time on appeal and ineffective

assistance of counsel. She gave her opinion of Thompson's conduct as "was what I deem as sort of a cheeky or sort of hitting on a bit by asking her if she had a boyfriend.." (RP-126) and in turn opined "I was pleased that she seemed to be a very reasonable young woman." (RP-127)

In general, no witness, lay or expert, may testify as to his or her opinion about the credibility of a witness. City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993). The jury determines the credibility of witnesses. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

Under the cumulative error doctrine, the appellate court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). In a case with no physical evidence, witness credibility is of paramount concern and Counsel's failures as enumerated above denied Thompson a fair trial and effective assistance of counsel as guaranteed by the constitution.

C. THE TRIAL COURT MADE AN IMPROPER COMMENT ON THE

EVIDENCE.

Article IV, §§ 16 the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision is designed to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted. State v. Elmore, 139 Wn.2d 250, 275, 985 P.2d 289 (1999).

To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements. Elmore, Supra at 276; An impermissible comment on the evidence indicates to the jury the judge's personal attitudes toward the merits of the cause. State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988)

When the prosecutor asked Sheppard if her findings were consistent with what C.M.M. had told her, Sheppard replied, "Absolutely. Yeah." (RP-130) When asked to elaborate, she said "Just her demeanor, her story, what she presented, and just the action. And I don't recall – if I'm mistaken – let me look at this – that there was any outward evidence. It was her physical and her emotional appearance and just the details of the actual victimization that

struck me as being very credible.” (RP-130) Defense counsel objected after the last statement and the judge instructed the jury to disregard the statement. (RP-130) The witness said, “Excuse me” to which the Judge replied “It’s all right.” (RP-130)

Thompson would respectfully submit that the Judge’s last comment constituted a comment on the evidence in that the jury could construe his remark to mean that it was okay to vouch for the credibility of the witness. Article IV, §§ 16 of the Washington Constitution, Elmore, supra.

D. THE TRIAL COURT FAILED TO VACATE THE RAPE IN THE THIRD DEGREE CHARGES ON DOUBLE JEOPARDY GROUNDS.

The trial court erroneously sentenced Thompson on all four counts, finding that the rape in the third degree charges merged into the rape in the second degree charges (CP-43) In State v. Turner, 169 Wn.2d 448, 466-467, 238 P.3d 461 (2010) the Washington Supreme Court addressed the issue:

The double jeopardy clause prohibits the imposition of multiple punishments for the same criminal conduct ("same offense," Wash. Const. art. I, §§ 9). In keeping with this principle, the trial courts in *Turner* and *Faagata* vacated the

lesser of two convictions that each defendant received for his offense. The courts also attempted to keep the vacated convictions "alive" for purposes of possible reinstatement should the convictions for the greater offenses be reversed. This contravenes double jeopardy as stated forcefully in *Womac* and clarified herein, and it finds no support in double jeopardy jurisprudence. It remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant's conviction for a more serious offense based on the same act is subsequently overturned on appeal.

Thompson would respectfully submit that the rape in the third degree convictions in his case should be vacated on double jeopardy grounds.

V. CONCLUSION

For the reasons set forth above, Thompson respectfully requests this court reverse his convictions on all charges and remand the matter for a new trial.

Respectfully submitted this 20th day of September 2011,



SUZAN L. CLARK, WSBA #17476
Attorney for the Appellant

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STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL THOMPSON,

Appellant,

v

STATE OF WASHINGTON,

Respondent

NO 41865-7-II

DECLARATION OF MAILING

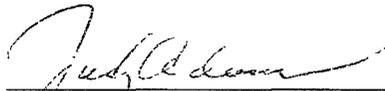
I, Judy Adams declare

That I am a citizen of the United States of America, that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein, that on the 28th day of September, 2011 declarant mailed to the following named individuals, to-wit

Mr David Ponzoha
Division II Court of Appeals
950 Broadway, Suite 300
Tacoma, Washington 98402

Ms Ann Crusier
Clark County Prosecuting Attorney
P O Box 5000
Vancouver, WA 98666-5000

a copy of this Declaration and a copy of the Brief of Appellant



JUDY ADAMS

SUZAN L CLARK
ATTORNEY AT LAW
1101 BROADWAY STREET, SUITE 250
VANCOUVER, WA 98660
(360) 735-9434

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

MICHAEL THOMPSON,
Appellant,

v

STATE OF WASHINGTON,
Respondent.

NO 41865-7-II
AMENDED
DECLARATION OF MAILING

I, Judy Adams declare

That I am a citizen of the United States of America; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the following dates declarant mailed to the following named individuals, to-wit:

Mr. David Ponzoha
Division II Court of Appeals
950 Broadway, Suite 300
Tacoma, Washington 98402

By U S Mail:
September 28, 2011 Brief of Appellant
& Declaration of Mailing

By e-mail:
September 30, 2011 Amended Declaration of
Mailing

Ms Ann Cruser
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

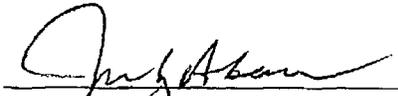
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September 28, 2011 Brief of Appellant
& Declaration of Mailing
September 30, 2011 Amended Declaration of
Mailing

SUZAN L. CLARK
ATTORNEY AT LAW
1101 BROADWAY STREET, SUITE 250
VANCOUVER, WA 98660

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Mr. Michael S. Thompson, DOC# 346737
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

By U.S. Mail.
September 30, 2011 Brief of Appellant &
Amended Declaration of Mailing


JUDY ADAMS

SUZAN L. CLARK
ATTORNEY AT LAW
1101 BROADWAY STREET, SUITE 250
VANCOUVER, WA 98660