

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

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| IN RE THE PERSONAL |) | NO. 44226-4-II |
| RESTRAINT PETITION OF |) | RESPONSE TO |
| |) | PERSONAL RESTRAINT |
| JAY EARL McKAGUE |) | PETITION |

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Jay Earl McKague is in the custody of the Washington Department of Corrections, serving a sentence of life without the possibility of parole. He was convicted on April 1, 2009, of second degree assault, as well as third degree theft. The assault conviction was his third strike. The judgment and sentence is at CP 67-76.¹

II. STATEMENT OF PROCEEDINGS

Following a jury trial, McKague was convicted of second degree assault and third degree theft. He appealed. The Court of

¹ This court has granted the State's motion to transfer the record from the direct appeal, Case No. 39087-6-II, to this PRP.

Appeals affirmed. State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011). The substantive facts are adequately presented in that opinion. McKague sought review in the Supreme Court, which was granted, and that court also affirmed. State v. McKague, 172 Wn.2d 802, 262 P.3d 1225 (2011). The mandate issued on December 7, 2011. Appendix A, copy of mandate. This timely personal restraint petition (PRP) followed.

III. RESPONSE TO ISSUES RAISED

A. A personal restraint petition is not an appeal.

“Personal restraint petitions are not a substitute for direct review.” In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). Collateral attacks on convictions, whether based on constitutional or non-constitutional grounds, are limited, but not so limited as to prevent the consideration of serious and potentially valid claims. In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990). A petitioner claiming purported constitutional error must demonstrate actual prejudice from the error before a court will consider the merits. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 328-30, 823 P.2d 492 (1992) (applying this threshold standard to

deny relief for a constitutional error that would be per se prejudicial error on appeal).

On direct appeal, the burden is on the State to establish beyond a reasonable doubt that any error of constitutional dimensions is harmless. . . . On collateral review, we shift the burden to the petitioner to establish that the error was not harmless.

In re Pers. Restraint of Hagler, 97 Wn.2d 818, 825-26, 650 P.2d 1103 (1982).

A petitioner claiming purported non-constitutional error must “establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” In re Pers. Restraint of Fleming, 129 Wn.2d 529, 532-34, 919 P.2d 66 (1996) (applying this threshold standard to deny relief for an error that would require reversal on direct appeal).

B. The slides used during the State’s closing argument were significantly different from those used in *State v. Glasmann* and do not constitute error.

The prosecutor, during closing argument, illustrated his remarks by using a PowerPoint² presentation. A copy of the slides used is contained in Petitioner’s Appendix A. McKague asserts that this presentation is virtually identical to a presentation found to

² “PowerPoint” is a registered trademark of the Microsoft Company.

constitute prosecutorial misconduct in In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). That is not the case, and the closing argument in McKague’s trial was not prosecutorial misconduct.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). “Any allegedly improper statements should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a “substantial likelihood the instances of misconduct affected the jury’s verdict.” Id. A defendant’s failure to object to improper arguments constitutes a waiver unless the statements are “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” Id. The absence of an objection by defense counsel “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).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel’s arguments. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). See also State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State’s case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990). A prosecutor’s use of the words “I think” and “I believe” in closing argument does not necessarily indicate misconduct. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

McKague relies entirely on Glasmann to support his claim that the State’s closing argument was so egregious that his convictions must be reversed. A comparison of the two cases shows that the only similarity between them is that the prosecutor in McKague’s trial showed one slide with a photograph of McKague—not a booking

photograph, but another photo that was in evidence—with the word “guilty” superimposed over it in red letters. Considering the totality of the prosecutor’s argument in relation to the evidence produced in the case, the single word “guilty,” even if in red, cannot be considered an expression of the prosecutor’s personal opinion. Even if it were error, McKague did not object and it would require reversal only if there is a likelihood that it affected the outcome of the trial.

1. Glassman opinion.

The facts of the Glasmann case were significantly different from those of McKague’s. Glasmann was charged with, and convicted of, second degree assault, attempted second degree robbery, first degree kidnapping, and obstruction. Glasmann, 175 Wn.2d at 700-01. Glasmann did not deny that he had committed the acts charged, but he did dispute the degree of the crimes, and argued that he should be convicted of lesser included crimes. Id. at 700, 708.

The charges resulted from an altercation that occurred after Glasmann and the victim, his fiancée, celebrated his birthday with alcohol, ecstasy, and methamphetamine. Glasmann punched and kicked the victim, dragged her out of their motel room to the car, and

from the driver's seat attempted to pull her by her hair into the passenger seat of the car. While she was half in, half out of the car Glasmann ran the car onto her leg, then backed off and pulled her into the car. The victim was able to get the car stopped, grabbed the keys, and ran to a nearby convenience store, where she attempted to hide on the floor behind the cashier's counter. Police arrived. Glasmann shouted that he had a gun, invited the officers to shoot him, and put the victim in a choke hold, threatening to kill her. He held her between himself and the officers, until she was able to free herself enough that the officers could use a stun gun on Glasmann. He was taken into custody but struggled so fiercely that the officers injured him in the process. Id. at 699-700.

In closing argument, the prosecutor used a PowerPoint slide presentation in which he incorporated video from security cameras, audio recordings, photographs of the victim's injuries, and Glasmann's booking photograph, which had been admitted into evidence. Id. at 700. The photograph showed "extensive facial bruising." Id. at 700. It was "digitally altered to look more like a wanted poster than properly admitted evidence." Id. at 715, J.

Chambers concurring. Five slides used during the prosecutor's closing showed the booking photograph; one included the caption "DO YOU BELIEVE HIM?", one was captioned "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?", and three showed the word "GUILTY" superimposed across it, an additional "GUILTY" on each successive slide. Id. at 701-02.

One of the slides showed a photograph, presumably taken from the security video, of Glasmann holding the victim in a choke hold while crouched behind the counter of a minimart, with the captions "YOU JUST BROKE OUR LOVE". Another showed the victim's injuries with two captions: "What was happening right before the defendant drove over Angel . . . ", and ". . . you were beating the crap out of me!" Id. Glasmann did not object to any of the slides. Id. at 701.

The prosecutor argued that the evidence overwhelmingly supported the charges filed, but also told the jury that to reach a verdict it must decide "Did the defendant tell the truth when he testified?" and that they had a duty to compare the testimony of the State's witnesses to that of the defendant. Id. at 710.

The decision is Glassman is a plurality opinion, with four justices signing the lead opinion, one concurring, and four dissenting. However, the concurrence mirrors the lead opinion sufficiently that it can be treated as a five-four split of the court. The dissent disagreed primarily with the remedy, not the conclusion that the prosecutor committed misconduct. It is important, then, to examine exactly what the lead and concurring justices found improper about the State's argument and what it did not disapprove of. It started with the presumption that Glasmann had waived any error unless there was misconduct so "flagrant and ill intentioned that an instruction would not have cured the prejudice." Glasmann, 175 Wn.2d at 704.

It is error to show to the jury evidence not admitted at trial and is reversible error if there is reason to believe the defendant was prejudiced. Id. The court concluded that the booking photo, with the addition of "phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity," was the equivalent of altered evidence. Id. The court noted that the depiction of Glasmann as "unkempt and bloody" would have had prejudicial impact because of captions that challenged his truthfulness. Id. The court also found

that the superimposed word “guilty” was even more prejudicial because it was in red letters, “the color of blood and the color used to denote losses.” Id. at 708. It is important to note that the court did *not* say that the photographs with captions which included direct quotes from witnesses or summaries of evidence that was admitted constituted altered evidence or that displaying them to the jury was error.

The Glasmann court found that the photograph, with the additional captions, constituted the prosecutor’s individual opinion that the defendant was guilty, Id. at 706-07, although it is not clear from the court’s opinion why it is an individual opinion as opposed to the opinion of the State, which the prosecutor represented. The court found this to be misconduct. It discussed at some length the “prejudicial imagery” which is considered to be of such an impact that an instruction cannot overcome it. Id. The court concluded that the “multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed,” combined with his closing argument, created such prejudice that a curative instruction would have been pointless. Id. at 708..

The only statement made in the oral part of the closing argument that the court found sufficiently objectionable to include in the lead opinion was the statement that the jury must determine whether or not Glasmann told the truth when he testified, in effect shifting the burden of proof to the defendant. While the court concluded that was misconduct it did not find it to be sufficiently egregious, standing alone, to warrant reversal. *Id.* at 713-14.

Like McKague, Glasmann was challenging only the degree of the offenses for which he was being tried, not his culpability. “Because Glasmann defended by asserting he was guilty only of lesser offenses, and nuanced distinctions often separate degrees of a crime, there is an especially serious danger that the nature and scope of the misconduct here may have affected the jury.” *Id.* at 680. In its summary of the holding, the court said:

The prosecutor’s presentation of a slide show including alterations of Glasmann’s booking photograph by addition of highly inflammatory and prejudicial captions constituted flagrant and ill intentioned misconduct that requires reversal of his convictions and a new trial, notwithstanding his failure to object at trial. *Considering the entire record and circumstances of this case*, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses rather than those charged, and

this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

It is substantially likely that the jury's verdict were (sic) affected by the prosecutor's improper declarations that the defendant was "GUILTY, GUILTY, GUILTY!", *together with* the prosecutor's challenges to Glasmann's veracity improperly expressed as superimposed messages over the defendant's bloodied face in a jail booking photograph.

Glassman, 175 Wn.2d at 714, emphasis added.

2. Argument in McKague's trial.

Like the defendant in Glasmann, McKague did not object at trial to any of the prosecutor's closing argument. Therefore, the same standard of review applies—his conviction must be affirmed unless the prosecutor committed misconduct and that misconduct was so flagrant and ill-intentioned that it could not have been cured by an instruction to the jury.

The slides used in the State's closing during McKague's trial do not contain any of the "editorial" captions that the court found prejudicial in Glasmann. All of the photographs were admitted into evidence, and some of them bear the exhibit number. Petitioner's Appendix A, 1-4, 6-7. Exhibit 3, the photograph of the front of the

grocery store, was identified by Olympia police officer Samuelson and Detective Costello and admitted into evidence without objection. RP 35, 45-46.³ All of the photos, either still photos or frame shots from a security video, were similarly in evidence and McKague does not claim that they were not. Nowhere did Glasmann disapprove the display of photographs without captions unrelated to the evidence during argument.

The prosecutor used a few slides containing only text, Petitioner's Appendix A at 4-6, and those are all definitions or elements of the charged crimes which mirror the jury instructions. CP 32-58. Glasmann did not disapprove slides repeating the law of the case.

The only slide that is even similar to one disapproved in Glasmann is the final slide, Petitioner's Appendix A at 7. This shows a photograph of McKague which is clearly a cropped portion of the photograph in Exhibit 15, Petitioner's Appendix A at 1. It is taken from the store security video, not a booking photograph; it is not altered in any way, much less made to look like a wanted poster. McKague was

³ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the three volume trial transcript dated March 30 through April 1, 2009.

not injured and there was nothing about the photograph to arouse any particular emotion in the jurors. There are arrows pointing toward the picture, leading from captions which summarize the evidence. This is not something disapproved in Glasmann. The objection in that case was to “highly inflammatory images unrelated to any specific count.” Glasmann, 175 Wn.2d at 712. The word “guilty” was here used once, not three times, and was obviously not a personal opinion as to guilt. The prosecutor was not indicating that McKague was “intrinsically GUILTY GUILTY GUILTY.” Id. He was indicating that McKague was guilty because he took a can of oysters with the intent to commit a theft, he resorted to force to retain the oysters or prevent resistance to the taking, he inflicted bodily injury, and he fled the scene, telling the driver of the car to “go-go-go.” The conclusion of guilt was solidly based on the evidence, and there was no suggestion that the prosecutor was using his “position of power and prestige to sway the jury.” Id. at 679.

McKague’s argument assumes that even one “guilty” on a photograph constitutes prosecutorial misconduct, but that is not the holding of Glasmann. That court was addressing three consecutive

slides with the word “guilty” superimposed on an altered photograph of the defendant and apparently accompanied by inflammatory editorial comments rather than a summary of the evidence that proved guilt. A careful reading of Glasmann does not support the conclusion that that court would have found prosecutorial misconduct on the facts of McKague’s case. “In this case, the use of highly inflammatory images unrelated to any specific count was misconduct that contaminated the entire proceedings.” Id. at 712.

When viewed as a whole, the prosecutor’s repeated assertions of the defendant’s guilt, improperly modified exhibits, and statement that the jurors could acquit Glasmann only if they believed him represent the type or pronounced and persistent misconduct that *cumulatively* causes prejudice demanding that a defendant be granted a new trial.

Id. at 710, emphasis added. That is not what happened in McKague’s case.

Given the overwhelming evidence against McKague, that one slide, even if it were improper, which the State does not concede, cannot be said to have improperly influenced the jury. The court in Glasmann found that no instruction could have neutralized the *cumulative effect* of the improper slides and the statements the

prosecutor made during argument. Glasmann, 175 Wn.2d at 707.

While the Glasmann court found prejudicial the prosecutor's comments that the jury could acquit only if they believed the defendant, there was no such argument presented in McKague's case. After summarizing the evidence, the prosecutor here reminded the jury that McKague was presumed innocent and it must be satisfied of his guilt before convicting. RP 254. For the remainder of the argument, he spoke solely of the evidence and the inferences that could reasonably be drawn from it, coordinating his remarks with the slides contained in Petitioner's Appendix A. RP 254-262. There was nothing improper in the rebuttal portion of the argument, RP 279-82, nor does McKague claim that there was.

3. There was no error.

The court in Glasmann did not reject the use of computer-generated visual aids during argument. "Certainly, lawyers may and should use technology to advance advocacy and judges should permit and even encourage new techniques. But we must all remember that the only purpose of visual aids of any kind is to enhance and assist the jury's understanding of the evidence." Glasmann, 175 Wn.2d at

715, J. Chambers concurring.

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999). A prosecutor may comment on the veracity of a witness as long as he does not express a personal opinion or argue facts not in the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). The State has been unable to find any cases which prohibit the use of visual aids, including PowerPoint slides during closing arguments.

Defense counsel did not object to the final slide in the PowerPoint presentation, which indicates it did not seem improper to him at the time. A review of the record as a whole indicates counsel conducted a vigorous defense, and it is reasonable to conclude that had he thought the slide was prejudicial, he would have raised the issue. Like Glasmann, McKague did not dispute that he was guilty of something, but contended that the State had charged the wrong crimes. RP 262, 274. Unlike Glasmann, the prosecutor did not

express a personal opinion as to guilt, but consistently referred to the evidence that substantiated the charged crimes. Further evidence that the jury was not unduly influenced by the prosecutor is the fact that it acquitted McKague of robbery but convicted of third degree theft, which he had admitted to. RP 293-94. Even if that one slide were error, considering all the facts and circumstances of the case, as the court did in Glasmann, it cannot be said that one slide so inflamed the jury that it ignored the evidence, disregarded the court's instructions, and abandoned its common sense to convict McKague when it otherwise would not have done so. A personal restraint petitioner must establish prejudice, and McKague has failed to do so.

4. Ineffective assistance of counsel.

McKague asserts that his counsel was ineffective for failing to object to the final slide in the State's PowerPoint presentation. Petition at 3. He does not include argument. This court may decline to review an issue for which no authority is presented. State v. Gossage, 165 Wn.2d 1, 8-9, 195 P.3d 525 (2008).

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v.

Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in

the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

The only legitimate objection defense counsel could have made to the State's closing argument was to the final slide. He did not do so, nor did the trial counsel in Glasmann. Until that case was decided it was not apparent that showing the jury a photograph of the defendant, with the word "guilty" superimposed on it, following a closing argument in which the prosecutor had argued at length that the defendant was guilty, could be error. It certainly cannot be said that in the context of this trial as a whole, defense counsel was deficient by the standards referenced above. Further, there is no chance that the one slide in the State's closing argument changed the outcome of the trial, and thus even if it were error for defense counsel to fail to object to it, there is no prejudice to the defendant. The claim of ineffective assistance of counsel is not supported by the record.

C. McKague raises several claims that his constitutional rights were violated because he was required to wear a shock device under his clothing during the trial. He has failed to establish either error or prejudice, and these claims should be denied.

1. Facts.

Before voir dire, the judge and counsel conducted a colloquy regarding preliminary matters. During that exchange, the court

commented:

One of the things I was told in chambers or actually before chambers that I went over with the attorneys was that the Court was made aware, Mr. McKague, that the jail staff have put some kind of device on you. I can't see it. My assumption is that you probably feel something just physically on your body at this point.

My understanding is that if you do what you are doing now, which is sit quietly and not make any quick movements or do any behaviors that are out of line, you are not going to feel anything other than the physical presence of what you are wearing. I want to just double-check that you have had a chance to talk with Mr. Woodrow about that and that there are not going to be any issues either with how that feels for you or with the jail staff needing to or thinking they need to use anything. Mr. Woodrow?

Defense counsel replied that he had no problem with "it" and it had not become an issue. RP 13-14. He further agreed that there were no further issues to discuss and the jury panel could be brought in. RP 14. After the jury was selected but before opening statements, there were some adjustments made to the juror's seating arrangements which resulted in the alternate juror being placed in a chair in the front row. The court asked defense counsel if that was too close for comfort, and counsel replied that it was fine. RP 30-31.

At the end of the first day of trial, the court and counsel had the following discussion:

THE COURT: The last thing I want to do is I want to clarify just for the record and ask you, Mr. Woodrow and Mr. McKague, it seems that there is not any issue with respect to the restraints. The Court has been noticing that you are behaving fine. I am assuming that you are not uncomfortable and that everything is working out. I have not noticed one way or the other. Mr. Woodrow?

MR. WOODROW: I haven't asked Jay.

THE COURT: Okay. Maybe you can talk about that tonight.

MR. WOODROW: He did change his pants and got a looser fitting pant on his leg. I think that's helped some.

THE COURT: Okay. I don't think the jury really can see anything; I can't. I just wanted to check and make sure that we are all doing okay. The Court is going to continue to expect the kind of behavior that we have had so far. It seems like things are going fine.

RP 93.

The following morning, before the jury entered the courtroom, another colloquy occurred.

THE COURT: Good morning. You can be seated. I want to go on the record before the jury comes in with a couple of matters.

.....

Secondly, it was brought to my attention, Mr. McKague,

that there has been some discussion by you in the facility downstairs about potential disruptions in the courtroom, and I just want to put you on notice that that is why we had that discussion yesterday about the lap band.

THE DEFENDANT: (Nods affirmatively.)

THE COURT: From my perspective yesterday you behaved perfectly appropriately. I did not see any problems with anything, but the lap band was put on you because the jail had some concerns about your potential behavior and potential disruptive behavior in the courtroom. Hang on a minute. I want to just finish saying what I want to say.

THE DEFENDANT: Sorry.

THE COURT: I want to caution you that the Court is not going to tolerate any disruptive behavior, frankly, by anybody in the courtroom. You have the constitutional right to be present at any part of these proceedings, and the Court respects that right and wants you to be here. I will not, however, tolerate any disruptive behavior. If there is any indication or any disruption that is looking like it is going to happen or that does happen, I am going to have you removed from the courtroom.

THE DEFENDANT: Yes, ma'am.

THE COURT: And I would consider any disruptive behavior on your part a waiver of your right to be present. I am not expecting that you will do that, but I just want to let you know that I expect appropriate behavior along the lines of what I have seen so far, okay?

THE DEFENDANT: (Nods affirmatively.)

.....

Your Honor, there will not be any disruptive behavior on my part, and I just wanted to add that the reason why I was told that I have the band on is because of the amount of time that I'm looking at.

THE COURT: Okay. Well, I appreciate that the consequences, the potential consequences, to you are very significant, and the Court takes that obviously very seriously. The jury is not aware of any potential consequences to you. They don't know what you are wearing other than the clothes on the outside, and as far as I can see again I don't think there is anything for the Court to be concerned about. I just wanted the record to be clear that that was brought to my attention.

THE DEFENDANT: Yes, Ma'am.

THE COURT: Okay. Anything else before the jury is brought in?

.....

MR. WOODROW: No.

RP 100-02.

2. The law.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury,

or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)).

A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. State v. Damon, 144 Wn.2d at 691-92.

In State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998), the court found a legitimate distinction between a shock box which does not restrain physical movement and cannot be seen by jurors from other restraint methods which are visible. In that case the distinction did not matter because the shock box worn by the defendant had actually been noticed by the jurors. Id., at 242.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial on direct appeal. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. The State bears the burden, on direct appeal, of showing that the shackling did not influence the jury's verdict. Damon, 144 Wn.2d at 692.⁴ "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

⁴ In State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998), the court said that the defendant must show that the shackling influenced the jury's verdict. Because the jury in that case never saw the defendant in shackles, he could not show prejudice.

The court in Hutchinson found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888. Similarly, the court in Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

In In Re Personal Restraint of Davis, 152 Wash.2d 647, 101 P.3d 1 (2004), defense counsel failed to object to the petitioner being shackled during trial. Id. at 677. It was also determined that none of the jurors saw the petitioner in shackles during the trial. Id. at 679. In Davis, after he exhausted his direct appeal, the petitioner filed a personal restraint petition arguing that it was a violation of his constitutional rights when he was shackled during trial. Additionally, the petitioner argued that it was a violation of his sixth and fourteenth amendments to the Constitution when his counsel failed to object to the shackling. Id. at 676. In reaching its decision, the Washington State Supreme Court held:

“Where there is overwhelming evidence of guilt, on appeal, unconstitutional shackling has been held to be harmless. Because this matter comes to us as a collateral attack, after defendant has been convicted and exhausted his appeal rights, the defendant is *not* entitled, as he would have been on appeal, to a presumption of prejudice which the state would have to overcome by evidence beyond a reasonable doubt. Rather, the defendant bears the burden of showing *actual* prejudice.

Id. at 698. Additionally, in addressing the issue of ineffective assistance of counsel, the Supreme Court concluded:

Assuming that the failure to object was deficient performance, Petitioner still bears the burden of proof that his counsel’s failure to object resulted in actual and substantial prejudice...the question to be answered is whether there is a reasonable probability that, absent the error, the fact-finder would have had a reasonable doubt respecting guilt.

Id. at 700. In looking at the evidence that was presented during trial, the Supreme Court concluded that because there was overwhelming evidence of his guilt, the petitioner could not show there was a “reasonable probability, *but for* his counsel’s deficient performance by not objecting, the outcome of his trial would have been different. Id. at 701.

3. Argument.

McKague asserts that he suffered prejudice because he was required to wear a shock device during trial without the court first holding a hearing to determine whether the device was needed. It is true that he did not have a hearing that included all the factors listed in Hutchinson, 135 Wn.2d 863, but he did in fact have a hearing. The court addressed the issue of his restraints three times on the record. The court concluded that the device was necessary because McKague had apparently been making statements in the jail that led corrections officers to believe he was planning some sort of disruption in the courtroom. The record reflects that he had at least three opportunities, outside the presence of the jury, to tell the court of his concerns about the restraints, but he did not do so. It is only now, after his appeal was unsuccessful, that he claims that he was virtually paralyzed with fright and unable to function during his trial. The record does not bear that out, and he has produced no evidence to support it. In his declaration, McKague asserts he was afraid even to speak to his attorney during the trial for fear of being shocked. This does not appear to be a reasonable response, particularly since he

had the opportunity to raise the issue with the court and did not do so. Petition, Appendix B.

McKague also claims in his declaration that the jurors would have seen the box if they had looked closely at him. However, he produces no evidence that any juror did in fact see anything. The judge did not see it. Defense counsel apparently did not. McKague attached to his petition a declaration from the jury foreperson, Appendix E to the petition. That declaration discusses in some detail the jury deliberations, but does not even hint that any juror saw the shock device. In his petition, he asserts that he had red marks from the device and the leg brace at the end of each day, but the declaration, Appendix B, to which he refers, includes no mention of red marks. Even if that were true, the jury would not have seen the red marks any more than it saw the shock device, and there was no prejudice to McKague.

McKague cites extensively to Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001), for details about the horrible effects of a shock from a stun belt. Petition at 13-14. That might be relevant if there was any evidence that he was wearing the same kind of device

described in that case. The fact remains, however, that he has not demonstrated that any juror was aware he was wearing a shock device, the judge did not see it while he was wearing it, and the court did address the issue sufficiently on the record that if he had any problems with the device, he had more than ample opportunity to bring those to the attention of the court.

McKague produces a declaration from his trial counsel, Appendix C to his Petition, addressing discovery issues. It is silent as to any difficulties his attorney had in communicating with him because of the shock device.

Even if this were a direct appeal, any error would be harmless because the device remained undetected, but this is a PRP, where he has the burden of establishing the error and proving prejudice. He has done neither.

McKague also claims ineffective assistance of counsel for failure to object to the restraint. He cites to In re Pers. Restraint of Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007), for the holding in that case that it was deficient performance for counsel to fail to object, despite an identified strategic reason for permitting the jury to see the

defendant in shackles. Petition at 18. Elmore was a death penalty case, and the error occurred during the penalty phase. Even though the court found error, however, it also found it to be harmless because he could not show a reasonable probability that but for counsel's deficient performance, the outcome would have been different. Id. at 261. Likewise, McKague cannot show any probability that the result of his trial would have been different had counsel objected to the shock device.

McKague asks this court to remand for a reference hearing, as authorized by RAP 16.11, to determine whether he was prejudiced. The record already shows that he was not prejudiced. Such a hearing might shed further light on the question of the necessity for the restraint. But the court clearly found that it was necessary because McKague was threatening to disrupt the trial, and even if that finding were incorrect, he still cannot show prejudice and a reference hearing would be a waste of time and money.

D. McKague's right to be present at his own trial was never violated in any respect.

McKague argues that the trial court violated his right to be present at trial in several respects.

A defendant has the right under the Confrontation Clause of the Sixth Amendment to be present at all critical stages of a criminal proceeding against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). However, when evidence is not being presented against a defendant, and so the right of confrontation is not implicated, whether a hearing is a critical stage requiring the defendant's presence is more properly analyzed under the Due Process Clause of the Fifth Amendment. Id. The defendant has the right to be present at any proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." State v. Irby, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). The due process right to be present is not absolute. A defendant has the right to be present only to the extent that his presence ensures a fair and just hearing. Irby, 170 Wn.2d at 881, again quoting Snyder.

On direct appeal, a question as to a violation of the right to be present is reviewed de novo. Irby, 170 Wn.2d at 880. Because McKague is bringing a collateral attack, he must establish prejudice

from a constitutional error.

1. Challenges to members of the jury panel.

Jury selection in McKague's case took place on March 30, 2009. Voir Dire RP 4-82. McKague was present in the courtroom from the beginning of the process. Voir Dire RP 7. The court held two side bars—one to excuse jurors for cause, Voir Dire RP 36, and one to permit the parties to exercise their peremptory challenges. Voir Dire RP 80. In his declaration, McKague asserts he was not permitted to be present at these side bars, Petition Appendix B, and the State has no reason to dispute this. The State has never heard of any represented defendant being part of the bench conference in which challenges to jurors were made.

McKague insists that the outcome of his case is controlled by State v. Irby, 170 Wn.2d 874. The two cases have nothing in common. In Irby, which was a prosecution for first degree murder with aggravating circumstances, first degree felony murder, and first degree burglary, the first day of jury selection was conducted without either attorney or the defendant present. The jury venire was sworn and given a questionnaire to fill out. Early in the afternoon, the judge

sent an e-mail to both counsel, suggesting that 10 jurors be excused and not required to return for further proceedings. Irby, 170 Wn.2d at 877-78. Irby's counsel agreed to release all of the listed jurors, while the State agreed that seven of them could be released. At the time, Irby was in jail, and there was no indication that he had been consulted about the dismissals. Id. at 878. The following day, Irby was present for voir dire. A jury was seated; based on the number of jurors in the venire, four of the dismissed jurors would have been considered to be on the jury. Id. Irby appealed his convictions. The Court of Appeals reversed and the Supreme Court affirmed. The latter court found that the due process right to be present included voir dire, and the dismissal of the seven jurors on the first day was part of voir dire. Because Irby had been in jail, his right to be present was violated. Id. at 883-84.

A defendant has the "right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of peremptory challenges." Irby, 170 Wn.2d at 883, quoting Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993), which was citing to Lewis v. United States, 146 U.S.

370, 373, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)).

McKague was present during voir dire and had the opportunity to assist his attorney in deciding which jurors to challenge. Nothing in Irby, or any other case, holds that the right to be present includes accompanying defense counsel to the bench. McKague had the opportunity to advise and instruct counsel, and counsel then made whatever challenges they believed appropriate. That is what defense attorneys do. McKague asserts that he had the same right to be present as Irby did, and he is correct. Irby had the right to be present for voir dire and the right to assist his attorney. So did McKague. That right was observed.

Even had there been a violation of McKague's right to be present, he has not shown any prejudice. He does not claim he would have chosen different jurors or made different challenges. Even in a direct appeal, prejudice is not presumed. State v. Wilson, 141 Wn. App. 597, 605, 171 P.3d 501 (2007). This is a personal restraint petition, and McKague must demonstrate prejudice from any claimed error.

2. Chambers conferences.

McKague maintains that his right to be present was violated when counsel met in chambers to discuss “the facts and the law” without his presence. Petition at 18. He does not offer any argument to support this claim, and as noted above, this court need not address an issue for which no authority is presented.

McKague does offer the declaration of his trial counsel who asserts that during these chamber conferences the parties discussed what they expected to happen in court that day, a stipulation was reached about medical evidence, and there was a discussion about responding to a request from the jury to view a videotape. Petition, Appendix C.

A defendant does not have the right to be present during in-chambers or bench conferences between the court and counsel where legal matters are discussed. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). It appears that some of the discussions in chambers did not even rise to that level. On the first day of trial, the court made a record that there had been a chambers conference to discuss “administrative matters to see if everybody is

ready to proceed to trial and give the court a heads up on whether there are going to be any different types of issues, and for me to get an idea of timing, how long we would need for arguments and whatnot.” RP 7. Such a discussion in no way impacts a defendant’s opportunity to defend against the charges.

During the second day of trial, the court made a record that there had been a chambers conference to discuss case management and during that time the parties had agreed to stipulate to the admission of the victim’s medical records. RP 135. McKague maintains that this is a stipulation about facts, Petition at 18, but there is no reason to think that the facts of the medical records were discussed. A strategic decision to allow an exhibit into evidence without requiring the State to lay a foundation through witnesses is a legal decision, not a factual one. And, once again, McKague has shown no prejudice whatsoever from the admission of the records. He has not identified any assistance he might have rendered to his counsel in making this decision. A “hypothetical possibility does not rise to the level of a showing that his presence bore a substantial relation to the fullness of his opportunity to defend himself, or that a

fair and just hearing was thwarted by his absence.” Wilson, 141 Wn. App. at 605. McKague does not even offer a hypothetical possibility.

3. Jury request to view videotape.

McKague claims that the court and counsel responded in chambers to a request from the jury to view a videotape. Petition at 18. That is not apparent from the record. The court said that the bailiff had brought a note from the jurors into chambers, RP 290, but the matter was addressed in the courtroom. It is not clear if McKague was present, but since he is objecting to something that he claims happened in chambers, rather than something that happened when he was not in the courtroom, perhaps he was. Both parties agreed that the video could be shown to the jury, and defense counsel waived McKague’s presence at the showing. RP 290. However, the jury reached a verdict before the court could arrange for the video to be shown. RP 291. Therefore, even if the parties did discuss the jury request in chambers, no response by the court was made, and thus there can be no prejudice to McKague.

E. There is no evidence that the jurors were anonymous to the parties in the trial, only to the public. Further, McKague has not shown prejudice.

McKague alleges that he did not know the names or addresses of any of the jurors. Petition, Appendix A. He argues that by keeping this information from him, the jury was given the impression that the court was worried about the safety of the jurors. Petition at 22.

McKague is correct that Washington courts have not addressed the issue of jury anonymity. Federal courts have held that a court should not empanel an anonymous jury without finding that there is reason to believe the jury needs protection and without making efforts to minimize any prejudicial effects on the defendant. United States v. Edmond, 311 U.S. App. D.C. 235, 52 F.3d 1080, 1090 (D.C. Cir. 1995); *accord* United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994).

The record of voir dire, which McKague attaches to his petition as Appendix D, does not support his argument. The court told the jury venire:

I also want to let you know that while the jury selection process is designed to gather information about you, I want you to understand your privacy is protected. You are randomly selected, but, as I stated at the beginning, your addresses are not released to the parties, and if you are selected for jury duty you will remain anonymous to the public. Your names and addresses won't be released to the news media, and they are not permitted to identify you.

Voir Dire RP 10.

It is apparent from this advisement that the jury would be anonymous to the public, not the parties. McKague has not alleged that his counsel did not have the questionnaires filled out by the venire. The names were made part of the court record. See Appendix 2: a copy of the clerk's minutes, indicating in the 9:40 entry on page one that the names appear in the court record, Appendix 3, the case information sheet with the names of the venire, and Appendix 4, a record of the panel chosen to hear the case. McKague did not make any objection at trial to the information he was given. Nor has he explained how he was prejudiced by not knowing the addresses of the sitting and prospective jurors. In this day of Facebook and Twitter, jurors have reason to be concerned about their privacy, and it has nothing to do with any perception that the defendant is dangerous. It is difficult enough to persuade people to serve on juries without exposing their private information to the public at large. McKague has not identified any reason that the addresses of the jurors would have been essential to his ability to defend himself. He bears the burden of proving both error and prejudice on collateral

attack, and he has done neither.

F. The record does not support McKague's assertion that the State failed to disclose exculpatory evidence, he has not shown that the evidence was exculpatory, and he has not show prejudice.

1. Emergency medical personnel records.

McKague argues that the State either did not provide the medical records created by the emergency medical personnel who treated the victim, or his attorney was not aware that he had the records. Petition at 27. His own Appendix F includes a fax cover sheet indicating that those records were faxed to defense counsel on March 27, 2009. They were not undisclosed.

Nor are they exculpatory. The notations on page 2 of the records indicates the patient had a closed minor injury of the face and minor injuries secondary to an assault. Petition, Appendix F. But the decision the jury had to make was whether the injuries constituted substantial but temporary disfigurement or a temporary but substantial impairment of a body part or an organ's function. McKague, 172 Wn.2d at 807. The jury was instructed on the elements of second degree assault, and the definition of substantial bodily harm. The terms "minor" or "major" or anything else are irrelevant.

Defense counsel likely did not recall seeing these records because they were, in fact, irrelevant. The initial diagnosis or the medical aid people who treat a person at the scene will be expected to carry less weight with a jury than the diagnosis of a physician who made a thorough examination and conducted tests. Those records were clearly no surprise to defense counsel, and by stipulating to their admissibility, he avoided having the doctor himself testify. That testimony would have made a much stronger impression on the jury than the paper records, and counsel quite reasonably did not want a doctor testifying about the specific details of the injuries.

2. Labor and Industries claim.

It is not clear how the Labor and Industries (L&I) documents that McKague includes in his Appendix F are relevant at all, nor is it clear why he believes that either the police department or the prosecutor's office had them or access to them. Nothing in his petition indicates how he came to possess them, and he makes no argument that they are exculpatory.

Mckague's petition contains many citations to cases discussing the State's obligation to provide exculpatory evidence, and the State

does not disagree with that law. The State provided the medical records from the doctor and the emergency medical personnel. There was no reason that the State would have been aware of the L&I documents, but even if it had been, there is nothing particularly informative, and certainly nothing exculpatory, in them.

3. Ineffective assistance of counsel.

The standard of review of a claim of ineffective assistance of counsel is set forth above and will not be repeated here. Counsel's failure to use the emergency medical records certainly does not meet that standard. The impeachment value is negligible and counsel did not find it significant enough to even remember having seen it.

G. Defense counsel made a strategic decision not to request a lesser-included instruction for fourth degree assault. A strategic decision cannot be the basis of a claim of ineffective assistance of counsel.

During a conference regarding the jury instructions, defense counsel told the court he did not want to seek a lesser-included of fourth degree assault because "it's such a lower degree crime. The jury is gonna look at it and say oh, we're not gonna give him that." RP 212. Nevertheless, when the court initially denied his lesser-included instruction for third degree assault, he decided to propose a fourth

degree assault instruction. RP 214. Although the court reconsidered and did allow an instruction for third degree assault, defense counsel chose not to propose an instruction for fourth degree assault. RP 233. In the declaration of defense counsel attached to McKague's petition as Appendix C, counsel says that he did not propose such an instruction because he did not think of it. The record contradicts that declaration.

“When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective.

Strickland 466 U.S. at 689; State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). Because counsel made a strategic decision, even if it might not have been the best decision, it cannot form the basis of a claim of ineffective assistance of counsel.

Finally, McKague offers the declaration of the jury foreperson describing the thought processes of the jurors in reaching the verdict. A jury verdict may not be impeached by reaching into the mental process of the jurors. Even evidence that “a juror misunderstood or failed to follow the court’s instructions inheres in the verdict and may not be considered.” State v. Rooth, 129 Wn. App. 761, 772, 121 P.3d 755 (2005), *citing to* Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 769, 818 P.2d 1337 (1991). McKague purports to offer this declaration to show that he was prejudiced by the various errors he claims, but by doing so he is impeaching the verdict. This he cannot do.⁵

H. There was no error, and thus no cumulative error.

⁵ In the declaration of the jury foreperson, Appendix E to the petition, the juror refers to the life sentence McKague faced. It is unclear how the juror had that information. The trial judge told the venire it would not be told the potential sentence, Voir Dire RP 34, and McKague was told the jury was not aware of the potential consequences. RP 102. Washington maintains a strict prohibition against informing the jury as to the sentence the defendant faces. State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001); State v. Murphy, 86 Wn. App. 667, 670, 937 P.2d 1173 (1997).

The cumulative error doctrine “is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Because this is a PRP, McKague would be entitled to relief only if he proved both error and prejudice, and he has done neither.

IV. CONCLUSION

McKague has failed to carry his burden of establishing either constitutional error and prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. The State respectfully asks this court to deny this PRP.

RESPECTFULLY SUBMITTED this 17th day of January, 2013.

JON TUNHEIM
Prosecuting Attorney



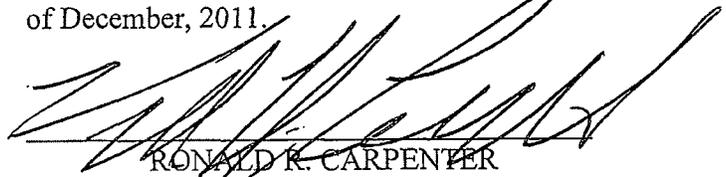
CAROL LA VERNE, WSBA#19229
Deputy Prosecuting Attorney

APPENDIX 1

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MANDATE
85657-5



IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the seal of
said Court at Olympia, this 7th day
of December, 2011.


RONALD R. CARPENTER
Clerk of the Supreme Court, State of
Washington

cc: Honorable Anne Hirsch
Betty J. Gould, Clerk
Thurston County Superior Court
Gregory Charles Link
Carol L. La Verne
Heather Stone
Reporter of Decisions

APPENDIX 2

MINUTES CONTINUED

Having been interrogated by counsel, and counsel having exercised their rights of peremptory challenge, the jurors reflected on the seating chart were sworn and impaneled. Members of the jury panel not engaged in the trial of this case were excused by the Court. The Court instructed the jury.

12:14- The jury was removed from the courtroom. Mr. Bruneau placed on the record his challenge for cause of juror number 7 made at sidebar during struck jury. Mr. Woodrow responded placing his objection the record. The Court placed on the record its ruling granting the motion to excuse juror number 7 for cause.

12:21- Court recessed.

1:47- Court reconvened outside the presence of the jury. The bailiff addressed the Court with a request to rearrange the jurors seating arrangement to accommodate a disabled juror. Neither Mr. Bruneau nor Mr. Woodrow had any objection. The Court granted the request to switch the locations of juror numbers 6 and 7. Mr. Bruneau addressed the Court to request permission to possibly call a witness out of order due to interpreter scheduling. Mr. Woodrow had no objection. The Court granted the request.

1:52- The jury was assembled in the courtroom.

1:58- Mr. Bruneau presented opening statement.

1:59- Mr. Woodrow presented opening statement.

2:00- Mr. Bruneau called **Mr. George Samuelson**, City of Olympia Police Officer, to the stand for direct examination. Officer Samuelson was sworn by the Court and testified under oath.

2:07- Mr. Woodrow conducted cross examination.

2:09- Mr. Bruneau conducted redirect examination.

2:10- Mr. Woodrow conducted recross examination.

2:11- Officer Samuelson stepped down and was excused by the Court. Mr. Bruneau called, **Mr. Sam Costello**, City of Olympia Detective, to the stand for direct examination. Detective Costello was sworn by the Court and testified under oath.

State's Exhibit numbers 23 through 28: Offered and admitted with no objection.

State's Exhibit numbers 3 through 9: Offered and admitted with no objection.

State's Exhibit numbers 1 and 2: Offered and admitted with no objection.

2:22- Detective Costello stepped down to allow testimony of an out-of-order witness. Mr. Bruneau called **Mr. Kee Ho Chang**, alleged victim, to the stand for direct examination. The interpreter, Young Lee, was sworn by the Court. Mr. Chang was sworn by the Court and testified under oath.

3:07- The jury was removed from the courtroom.

3:08- Court recessed.

3:26- Court reconvened with the jury assembled in the courtroom. Mr. Bruneau resumed direct examination of Mr. Chang.

MINUTES CONTINUED

3:38- Sidebar.

3:41 Mr. Chang stepped down. Mr. Bruneau recalled Detective Costello to the stand. The Court reminded Detective Costello that he was still under oath. Mr. Bruneau continued direct examination.

State's Exhibit numbers 10-13: Offered; objection by Mr. Woodrow to State's Exhibit 13; State's Exhibits 10, 11, and 12 admitted with no objection; sidebar requested by Mr. Woodrow to address admittance of State's Exhibit 13; Mr. Bruneau withdrew State's Exhibit 13.

4:02- Detective Costello stepped down. Mr. Bruneau requested a sidebar and discussed witness scheduling. The Court instructed and released the jury with instructions to return tomorrow morning at 9:00 a.m.

4:06- The jury was removed from the courtroom. The Court placed on the record the objection sustained at sidebar and conducted colloquy with counsel regarding proposed jury instructions,

4:09- Court recessed.

*****TUESDAY, MARCH 31, 2009 – DAY 2*****

Prior to session, the Clerk premarked State's Exhibit 34.

9:09- Court was called to session by the Clerk. The Court cautioned Mr. McKague that it was warned that he may be disruptive during the trial proceedings and that any such behavior would result in his being removed from the courtroom and would further constitute a waiver of his presence for the duration of the trial.

9:15- The jury was assembled in the courtroom. Mr. Bruneau called Mr. Brandon Wolf, witness, to the stand for direct examination. Mr. Wolfe was sworn by the Court and testified under oath.

9:22- Mr. Woodrow conducted cross examination.

9:26- Mr. Wolf stepped down and was excused by the Court. Mr. Bruneau called Ms. Jessica VanLeeuwen, witness, to the stand for direct examination. Ms. VanLeeuwen was sworn by the Court and testified under oath.

9:44- Mr. Woodrow conducted cross examination.

9:49- Ms. VanLeeuwen stepped down and was excused by the Court.

9:50- Sidebar requested by Mr. Bruneau to discuss witness scheduling.

9:52- The Court instructed and released the jury for the morning break. The Court conducted colloquy with counsel regarding scheduling and proposed jury instructions.

9:55- Court recessed.

Clerk: Terry Donnelly

10:18 Court reconvened outside the presence of the jury. The jury was brought into the courtroom.

MINUTES CONTINUED

10:20 Mr. Bruneau called **Randall Scott Kuhn**, who was duly sworn and testified. Mr. Bruneau conducted direct examination.

Clerk: Alisa Williams

10:26- Objection by Mr. Woodrow; sustained.

10:33- Objection by Mr. Woodrow; sustained.

10:35- Mr. Woodrow conducted cross examination.

10:40- Mr. Bruneau conducted redirect examination.

10:42- Objection by Mr. Woodrow; sustained.

10:43- Objection by Mr. Woodrow; sidebar requested by Mr. Bruneau; overruled.

10:46- Objection by Mr. Woodrow; sustained.

10:46- Mr. Woodrow conducted recross examination.

10:47- Objection by Mr. Bruneau; overruled.

10:48- Mr. Bruneau conducted re-redirect examination.

10:49- Objection by Mr. Woodrow; overruled.

10:49- Objection by Mr. Woodrow; overruled.

State's Exhibit 35: Marked, identified as transcript of Randall Kuhn statement

10:51- Objection by Mr. Woodrow; overruled.

10:52- Objection by Mr. Woodrow; sustained.

10:52- Mr. Woodrow conducted re-recross examination.

10:52- The jury was removed from the courtroom. Mr. Kuhn stepped down and was excused by the Court. Mr. Woodrow addressed the Court with his concern about the date and time on the surveillance video and requested the jury be given a limited instruction. Mr. Bruneau responded in opposition and advised he will address the date and time issue during his direct examination with Detective Costello. The Court denied the request to give a limited instruction to the jury.

10:59- The jury was assembled in the courtroom. Mr. Bruneau called **Mr. David Drewry**, witness, to the stand for direct examination. Mr. Drewry was sworn by the Court and testified under oath.

11:03- Mr. Drewry stepped down and was excused by the Court. Mr. Bruneau recalled **Detective Costello** to the stand for direct examination. Detective Costello was sworn by the Court and testified under oath.

State's Exhibits 14-22: Offered and admitted with no objection.

State's Exhibits 29 and 30: Offered and admitted with no objection.

State's Exhibit 31: Offered and admitted with no objection.
State's Exhibit 34: Offered and admitted with no objection.
State's Exhibit 33: Offered and admitted with no objection.

11:15- Mr. Bruneau published the surveillance video admitted as State's Exhibit 33.

11:34- Detective Costello stepped down. The State rested. The jury was removed from the courtroom.

11:36- Court recessed.

11:48- Court reconvened outside the presence of the jury. Mr. Woodrow advised the Court that his client decided not to testify.

11:52- The jury was assembled in the courtroom. The defense rested. The prosecution had no rebuttal. The Court instructed and released the jury for the day, with instructions to return tomorrow morning at 9:00 a.m.

11:55- Mr. Woodrow addressed the Court to advise of his intention to argue a motion to dismiss on the robbery charge.

12:01- Court recessed.

1:37- Court reconvened outside the presence of the jury. Mr. Woodrow presented a motion to dismiss the robbery charge. Mr. Bruneau responded in opposition. Mr. Woodrow replied. The Court denied the motion to dismiss.

The Court outlined proposed jury instructions and requested any objections. Mr. Bruneau objected to Mr. Woodrow's proposed lesser included instruction number 14. Mr. Woodrow responded. Mr. Bruneau replied. Mr. Woodrow replied. The Court will not give Mr. Woodrow's instruction 14, at this time.

2:26- Court recessed.

4:02- Court reconvened outside the presence of the jury. Mr. Bruneau advised the Court that he had no exceptions to the instructions, but proposed a different order. Mr. Woodrow had no exceptions, but also suggested a different order. The Court conducted colloquy with counsel regarding the order of the proposed instructions.

4:17- Court recessed.

*****WEDNESDAY, APRIL 1, 2009 - DAY 3*****

10:17- Court was called to session by the Clerk. The Court and counsel placed on the record their discussions, arguments, and rulings held in chambers. Mr. Woodrow placed on the record his exception to the Court not giving the lesser included instruction as proposed by him.

10:33- The jury was assembled in the courtroom. All evidence having been presented, the Court read the Court's Instructions to the jury. Argument was presented to the jury by both counsel.

10:56- Mr. Bruneau presented closing argument.

11:15- Mr. Woodrow presented closing argument.
11:50- Mr. Bruneau presented rebuttal argument.

12:00- The Court instructed the jury, and instructed and released the alternate juror.

12:04- The Bailiff was sworn by the Court, after which the jury retired to the jury room to deliberate upon a verdict, taking with them the Court's Instructions, the exhibits that were admitted during the course of the trial (said exhibits were approved by counsel) and the verdict forms.

12:08- Court recessed.

2:16- Court reconvened to address the note from the jury that they would like to view the surveillance video. Neither Mr. Bruneau nor Mr. Woodrow had any objection to the video being replayed for the jury. Both Mr. Bruneau and Mr. Woodrow waived their presence while the video was played; Mr. Woodrow also waived Mr. McKague's presence. Before the jury could be brought into the courtroom and have the video played, the bailiff returned to the courtroom and advised that the jury was ready with a verdict.

2:23- Court recessed.

2:38- Court reconvened outside the presence of the jury to address a question from the jury regarding an error in one of the verdict forms. Both Mr. Bruneau and Mr. Woodrow advised they had no objection to the Court providing a response that the jury could correct it.

2:44- The jury returned to the Courtroom. The verdict was received by the Court and read by the Clerk as follows:

VERDICT FORM I, ALTERNATIVE A:

We, the jury, find the defendant, JAY EARL MCKAGUE, not guilty of the crime of ROBBERY IN THE FIRST DEGREE, as charged in Count I.

VERDICT FORM II, ALTERNATIVE A:

We, the jury, having found the defendant not guilty of the crime of ROBBERY IN THE FIRST DEGREE as charged, or being unable to unanimously agree as to that charge, find the defendant, JAY EARL MCKAGUE, guilty of the lesser included crime of THEFT IN THE THIRD DEGREE.

VERDICT FORM III, ALTERNATIVE B:

We, the jury, find the defendant, JAY MCKAGUE, guilty of the crime of ASSAULT IN THE SECOND DEGREE as charged in Count I.

VERDICT FORM IV, ALTERNATIVE B:

Not used.

Cause No. 08-1-01905-9
Trial Date: MARCH 30, 2009
Page 7

MINUTES CONTINUED

The jurors were polled by the Clerk finding all jurors answering in the affirmative. The verdict was found to be in proper form and will be received filed by the Clerk. The jurors were excused by the Court.

The Court set a sentencing hearing on April 2, 2009, at 1:30 p.m. and approved and signed: **Order Establishing Conditions of Release.**

2:55- Court adjourned.

APPENDIX 3

2
Case Information Sheet -- Panel Jr. #

Date: 3/30/2009

Page: 1

Please Return to Jury Office as Soon as Possible!

FILED
SUPERIOR COURT
THURSDAY

Case ID: 08-1-01905-9 - STATE v. McKAGUE, Jay Earl

Case Retry No.: 0

Department DEPT 7

Judge: Anne Hirsch

'09 MAR 30 P4:38

RETIRED JUDGE CLERK

| Name | Hrdshp | Cause | PltPer | DefPer | Sworn | SwnAlt | NotRch | Badge | DEPUTY |
|---------------------------|----------------------------|-------------------------------------|-------------------------------------|-------------------------------------|-------------------------------------|--------------------------|--------------------------|--------|--------|
| 1 TABER, KATHERINE A | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 54949 | |
| 2 SHUSTER, LAURIE M | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 43857 | |
| 3 HEAD, THOMAS | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 84840 | |
| 4 HALL, TERESA S | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 53065 | |
| 5 KNIGHT, STEVE C | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 157543 | |
| 6 STEWART, TWYLLA L | 1 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 138954 | |
| 7 ROWLAND, KURT W | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 135868 | |
| 8 MONTAGUE, GAIL L | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 11389 | |
| 9 KASUN, STANLEY STEVEN | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 183245 | |
| 10 SOWERS, JANE E | 2 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 142548 | |
| 11 MICHEAU, DOUGLAS G | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 141728 | |
| 12 GODAT, TRACY J | 3 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 165013 | |
| 13 KOLBAS, ZACHARY M | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 139913 | |
| 14 MALMBERG, JENNIFER L | 4 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 104645 | |
| 15 PELLER, ROBERT M | 5 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 30181 | |
| 16 TOBOSA, JOHN | 6 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 109951 | |
| 17 OLIVER, ANDREW L | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 143366 | |
| 18 AVILA, WENDY V | 7 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 130832 | |
| 19 MCDONALD, BENITA LEANN | 8 <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 21398 | |
| 20 CLARIDGE, TRISHA H | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 192368 | |

Please Return to Jury Office as Soon as Possible!

Case ID: 08-1-01905-9 - STATE v. MCKAGUE, Jay Earl

Case Retry No.: 0

Department DEPT 7

Judge: Anne Hirsch

| Name | Hrdshp | Cause | PltPer | DefPer | Sworn | SwnAlt | NotRch | Badge |
|---------------------------|--------|--------------------------|-------------------------------------|--------------------------|-------------------------------------|-------------------------------------|-------------------------------------|--------|
| 21 THOMAS, GEORGE H | 9 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 88110 |
| 22 SANDAHL, KATHERINE | 10 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 102497 |
| 23 PILKEY, DIANE E | 11 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 184479 |
| 24 GORDON, MILTON M | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 200482 |
| 25 BRENNAN, SHANIN E | 12 | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | 195032 |
| 26 COLLINS, STEVE A | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 174635 |
| 27 AVERY, LEW V | ALT | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 141813 |
| 28 RUSSELL, BEVERLY M | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 139453 |
| 29 ABBOTT, JESSE W | | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 167499 |
| 30 DANDRIDGE, JACK EUGENE | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 50089 |
| 31 NORWOOD, CURTIS E | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 37067 |
| 32 TARASAWA, GREGG RIKIO | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 103153 |
| 33 GREEN, JANICE GAY | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 3243 |
| 34 WINTERS, JANICE L | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | 141911 |
| 35 WHITSON, KRISTINE M | | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | 127585 |

APPENDIX 4

JURY PANEL ** SUPERIOR COURT ** THURSTON COUNTY

Filed
 SUPERIOR COURT
 THURSTON COUNTY, WASH.
 09 APR - 1 PM 3:22
 BETTY J. GOULD, CLERK
 BY: _____ DEPUTY

Cause # 08-1-1905-9
 Plaintiff State of Washington
David Braneau
 Attorney for Plaintiff
 _____ am/pm Jurors' day completed

Defendant
Jay East McKayue
Richard Woodrow
 Attorney for Defendant
 # of Exhibits to Jury: 32

Judge: Anne Hirsch
 CC: Arlisa Williams
 CR: Cheri Davidson
 Bailiff: Betty Benefield
 Alt. Juror #1: Lew Avery
 # 141813

Rooms 129 (accommodations required), 229 and 257

| | | | | | | | | | | | |
|-----|---------------|-----|---------------|-----|---------------|----|---------------|----|---------------|----|---------------|
| 6. | 109951 | 5. | 30181 | 4. | 104045 | 3. | 145012 | 2. | 142548 | 1. | 138954 |
| | John | | Robert | | Jennifer | | Tracy | | Jane | | Tuylla |
| | Ffobasa | | Peller | | Malmberg | | Godat | | Sowers | | Stewart |
| | Wendy | | | | | | | | | | |
| | Avita | | | | | | | | | | |
| | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes |
| 12. | 195032 | 11. | 184479 | 10. | 102497 | 9. | 88110 | 8. | 21398 | 7. | 130832 |
| | Shawin | | Diane | | Katherine | | George | | Benita | | Wendy |
| | Brennan | | Hilkey | | Sandahl | | Thomas | | McDonald | | Avita |
| | | | | | | | | | | | John |
| | | | | | | | | | | | Tobasa |
| | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes | | 1. Yes 2. Yes |

CERTIFICATE OF SERVICE

I certify that I served a copy of Response to Personal Restraint Petition, on the date below as follows:

Electronically filed at Division II

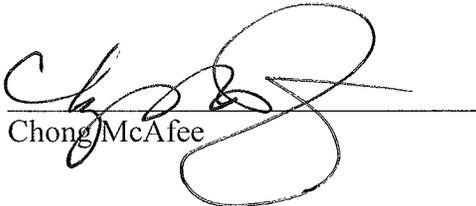
TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND VIA US MAIL TO--

JEFFREY ERWIN ELLIS, ATTORNEY FOR APPELLANT
JEFFREYWINELLIS@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of January, 2013, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

January 17, 2013 - 4:00 PM

Transmittal Letter

Document Uploaded: prp2-442264-Response.pdf

Case Name: STATE V. JAY EARL MCKAGUE

Court of Appeals Case Number: 44226-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: ____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Chong H McAfee - Email: mcafeec@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:
jeffreyerwinwillis@gmail.com