

No. 46580-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL MIKEL STIEF,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John F. Nichols

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BRIEF OF APPELLANT

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## A. INTRODUCTION

Daniel Stief was detained by a homeowner as Mr. Stief attempted to leave the homeowner's property with automobile radiators. Mr. Stief was charged with first degree burglary, first degree robbery, and possession of methamphetamine. The trial court admitted over Mr. Stief's objection evidence of an unrelated television with a missing serial number found in his car adjacent the radiators as *res gestae* and common scheme or plan evidence despite a lack of any evidence concerning the television. In admitting the evidence of the television, the court did not balance the probative value of the television with its prejudicial effect. Admission of this evidence was error and severely prejudiced Mr. Stief necessitating reversal of his convictions. Mr. Stief also seeks remand of his sentence for correction of a scrivener's error.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting prejudicial prior act evidence under ER 404(b).
2. The trial court erred in failing to balance the probative value of the disputed evidence against the prejudicial effect.

3. The trial court failed to ensure the Judgment and Sentence reflected the sentence it imposed necessitating remand.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prior acts of a defendant are not admissible simply to prove he acted in conformity with a particular character trait. Prior acts may be admissible if relevant and they fall within one of the designated exceptions enumerated in ER 404(b). Here, the trial court admitted a television found in the rear seat of Mr. Stief's car next to the stolen automobile radiators as *res gestae* and common scheme or plan evidence. Must this Court reverse Mr. Stief's convictions where the television was improper propensity evidence used solely to prove Mr. Stief was a thief, and the trial court's error was not harmless where the overwhelming prejudice of this evidence outweighed any limited probative value?

2. Remand is appropriate for the court to correct a scrivener's error. Here the trial court implicitly found the burglary and robbery to be the same criminal conduct and imposed a sentence that reflected this finding. The Judgment and Sentence did not reflect this finding. Is remand appropriate so the court can correct the Judgment and Sentence to reflect the sentence it imposed?

#### D. STATEMENT OF THE CASE

On May 22, 2014, Ray Bettger was awakened by his doorbell ringing. RP 56. He got up and looked outside to see a car in his driveway backed up to his garage. RP 58-59. Mr. Bettger retrieved his handgun and confronted the driver of the car, later identified as appellant, Daniel Stief. RP 60. Mr. Stief explained to Mr. Bettger he was there to pick-up the water heater on Mr. Bettger's front porch. RP 61.

Mr. Bettger claimed Mr. Stief began moving rapidly towards the open driver's door. RP 63. As Mr. Stief tried to close the door, he struck Mr. Bettger causing some minor injuries. RP 66. While standing outside the car, Mr. Bettger claimed he saw inside Mr. Stief's car three automobile radiators Mr. Bettger claimed were his and which he intended to recycle. RP 64-65, 91.

When Mr. Stief saw Mr. Bettger's handgun, he recoiled, which allowed Mr. Bettger to pull the keys from the ignition. RP 68. Mr. Bettger had Mr. Stief get out of the car and sit on the grass while he went inside and called the police. RP 70-72. Once Mr. Bettger went inside his house, Mr. Stief left. RP 72-73.

Mr. Stief was stopped by Clark County deputies on the road near Mr. Bettger's property. RP 113-14. Mr. Bettger identified Mr. Stief in a subsequent show-up as the person he detained on his property. RP 79-80, 135. A search of Mr. Stief revealed a glass pipe with suspected methamphetamine residue on it. RP 117.

A subsequent search of Mr. Stief's car pursuant to a search warrant revealed the three automobile radiators as well as television set:

Q: and, let's see, I'm going to show you what's been marked as State's Exhibit 17. Can you tell me if you recognize it and how?

A: Yes. I took this picture. It's the backseat of Mr. Stief's vehicle and it's a flat screen television that's been seat-belted into the seat on the backseat.

Q: Oaky. And why did you photograph that?

A: It seemed very odd in the first place.

...

Q: Where was that television related – or, where was that television sitting in relation to the radiators you found?

A: The radiators were on the floorboard of the backseat.

...

A: Yes, sir. They're – I took those pictures. The blue glove is my thumb. It is the back of that same television that I removed during the search warrant from the vehicle. One picture has the serial number sticker, that was not originally there when I found the television. The other picture shows that same shot

with just the residual gum from that sticker, where it had been. And so when I located it in another spot in the car I put it back there, and then like as a comparison, does thing [sic] fit here? And it appeared it belonged right there, it fit the spot and it had some of the pulled up areas where this one had a pulled up area.

Q: And where did you locate the removed serial number sticker?

A: On the passenger floorboard of the back – or the driver’s back floorboard of the backseat, driver’s side. There was a little green toolbox, or whatever you want to call it, and on the inside lid it was stuck there.

RP143-46.

Mr. Stief was charged with one count of first degree robbery, one count of first degree burglary, and one count of possession of methamphetamine. CP 6-7. Prior to trial, Mr. Stief objected to any mention of the television seized from the backseat of Mr. Stief’s car, as irrelevant. CP 17. The State argued the television was relevant to the current charges involving Mr. Bettger, even though Mr. Bettger did not say the television was his:

The television itself had had the serial number removed from it. And that, Your Honor, there probably couldn’t be anything more relevant in a case where the defendant is charged with stealing property as additional property in the vehicle he’s using to try to get away that has a serial number removed from it, so –

...

It's certainly relevant as res gestae. It's relevant on its own behalf to show the Defendant's intent here, that his intent was to steal. So as far as that goes, the discussion of the television should be relevant.

RP 4-5.

Mr. Stief pointed out that there was no connection between the television and the current offenses:

My objection was based on there was certainly no follow through with the television. There was not any more information on it, so basically there's just a t.v. in there and – and, you know, there was nothing else done on it, or whether or not they ever found it stolen or anything like that.

RP 6. Over Mr. Stief's objection, the court admitted evidence of the television:

The television, I think, would – would be relevant, just to establish what else was in the backseat of the car. You usually don't have a television strapped in the backseat of your car in the middle of the night. Also, it would go to show, especially with the serial number removed, part of the common scheme or plan, lack of accident, something along those lines.

...

So, I think I'll let the pawn slip in, the television in, the pill is out.

RP 6-7. The court did not engage in any balancing of the probative value of the television against its prejudice to Mr. Stief.

Following a jury trial, Mr. Stief was convicted of first degree robbery and possession of methamphetamine. CP 49, 53. The jury was

unable to reach a verdict on first degree burglary and convicted Mr.

Stief of the lesser degree of second degree burglary. CP 50-51.

#### E. ARGUMENT

1. *The Evidence Admitted Pursuant To ER 404(B) Proved Nothing More Than Mr. Stief Acted In Conformity With A Character Trait Which Violated His Right To A Fair Trial*

a. The admission of other acts evidence violates the due process right to a fair trial.

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id.*, citing *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v.*

*Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

- b. Evidence of a person's prior actions cannot be admitted to prove he acted in conformity with that trait.

ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith.<sup>1</sup> ER 404(b) was designed “to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) is intended to prevent application by jurors of the common assumption “that ‘since he did it once, he did it again.’” *State v. Bacotgarcia*, 59 Wn.App. 815, 822, 801 P.2d 993 (1990), *review denied*, 116 Wn.2d 1020 (1991). “This prohibition encompasses not only prior bad acts and unpopular behavior but *any* evidence offered to ‘show the character of a person to prove the person acted in conformity’ with that character at the time of a crime.” *Foxhoven*, 161 Wn.2d at 175 (emphasis in original). This rule is “not designed ‘to

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<sup>1</sup> “Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(a).

deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *Id.* "In no case . . . may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

The same evidence may be admissible for other purposes though, depending on its relevance and the balancing of the probative value and danger of unfair prejudice. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). ER 404 (b) includes a nonexclusive list of permissible purposes for admitting evidence of a person's other bad acts.<sup>2</sup>

The law resists criminal convictions based upon the jury's view that the defendant is a bad person or has a history of bad conduct. Therefore, the trial court must begin with the presumption that evidence of prior misconduct is inadmissible. *State v. DeVincentis*, 150 Wn.2d

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<sup>2</sup> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

11, 17, 74 P.3d 119 (2003). However, when demonstrated, such evidence may be admissible for purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995), *quoting* ER 404(b). Before the trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. The latter factor inserts an ER 403 examination into an ER 404(b) analysis. “Unfair prejudice” is caused by evidence that is likely to arouse an emotional response rather than a rational decision. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987).

The burden of demonstrating a proper purpose for admitting evidence of a person’s prior bad acts is on the proponent of the evidence. *DeVincentis*, 150 Wn.2d at 17. The court must conduct this analysis on the record. *State v. Sublett*, 156 Wn.App. 160, 195, 231 P.3d 231 (2010), *aff’d*, 176 Wn.2d 58 (2012).

Appellate courts review a trial court's evidentiary rulings for an abuse of discretion. "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). In close cases "the scale should be tipped in favor of the defendant." *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986), quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983).

The question to be answered in applying ER 404(b) is not whether a defendant's prior bad acts are logically relevant; they are. Evidence that a criminal defendant is a "criminal type" is always relevant. But ER 404(b) reflects the long-standing policy to exclude most character evidence because

it is said to weigh too much with the jury and to so overpersuade them. . . . The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

*Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

Thus, the question to be answered in applying ER 404(b) is whether the prior acts are relevant for a purpose other than showing propensity.

- c. The court failed to conduct the required balancing of probative value against its prejudicial effect.

The balancing of the probative value of the disputed evidence against its prejudicial effect must be conducted on the record and doubtful cases must be resolved in favor of the defendant. *Smith*, 106 Wn.2d at 776. Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted.” *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). A trial court errs by not fully articulating its balancing process in admitting ER 404(b) evidence. *State v. Carleton*, 82 Wn.App. 680, 685-86, 919 P.2d 128 (1996). The absence of a record of this probative versus prejudicial effect precludes effective appellate review. *State v. Jones*, 101 Wn.2d 113, 677 P.2d 131 (1984). Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, “within reasonable probability, materially affected the outcome of the trial.” *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993), *citing Tharp*, 96 Wn.2d at 599.

*See also Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 446, 191 P.3d 879 (2008).

Here, the trial court admitted the evidence of the television over Mr. Stief's objection based on the State's assertion that this item was admissible as part of a common scheme or plan and/or *res gestae*. RP 6-7. The court did not weigh its probative value against its prejudicial effect, despite Mr. Stief's argument that admission of this evidence was unduly prejudicial. RP 6.

d. The evidence of the television was not res gestae evidence.

Under the *res gestae* exception to ER 404(b), admission of evidence of other crimes or bad acts is allowed to complete the story of a crime or to provide the context for events close in time and place. *Powell*, 126 Wn.2d at 254. *Res gestae* permits a trial court to admit misconduct that would otherwise be inadmissible when that misconduct is connected in time, place, circumstances, or means employed and constitutes proof of the history of the crime charged. *State v. Lillard*, 112 Wn.App. 422, 432, 93 P.3d 969 (2004) (evidence of other crimes or bad acts are admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime).

The decision in *State v. Trickler*, 106 Wn.App. 727, 25 P.3d 445 (2001), is almost identical to Mr. Stief's matter and must control the outcome. In *Trickler*, officers searched the defendant's room for evidence of property stolen from Thomas Wiley and discovered personal property belonging to Mr. Wiley, as well as a credit card bearing the name "Kathleen D. Nunez" and a firearm. 106 Wn.App. at 730. The defendant was charged with unlawful possession of a firearm and possession of a stolen credit card belonging to Ms. Nunez. *Id.* at 733. At trial, the State introduced evidence of property stolen from Mr. Wiley, as well as unrelated stolen checkbooks and credit cards that were found in the defendant's possession on a *res gestae* theory. *Id.* On appeal, the court, noted that

the events leading up to the discovery of the stolen credit card were relevant and somewhat probative, it was not shown that Mr. Trickler's possession of other allegedly stolen items was an inseparable part of his possession of the stolen credit card, which is the test commonly used in this state.

*Id.* at 734. The Court went on to hold that the evidence was improperly admitted:

ER 404(b) is meant to prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act. In theory, the State probably introduced evidence of the allegedly stolen evidence (for which Mr.

Trickler was not charged) in order to give the jury a complete picture of the events leading to the discovery of the stolen credit card. In practice, however, by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief.

*Id.* at 734.

So too here, admission of the television was not admissible pursuant to the *res gestae* doctrine. Mr. Stief was not on trial for possession of the television. Further, as the *Trickler* court noted, the State failed to show the possession of the television was “an inseparable part” of Mr. Stief’s possession of the automobile radiators.

*Id.*

- e. The State failed to establish the television was part of a common scheme or plan.

Prior conduct evidence is admissible to show a common scheme or plan under ER 404(b) where (1) the evidence of prior acts is part of a larger, overarching plan; or (2) the evidence of prior acts follows a single plan to commit separate but very similar crimes. *DeVincentis*, 150 Wn.2d at 19. Such a common scheme or plan “may be established by evidence that the Defendant committed markedly similar acts of

misconduct against similar victims under similar circumstances.” *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Evidence of such a plan “must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.” *DeVincentis*, 150 Wn.2d at 19, quoting *Lough*, 125 Wn.2d at 860.

When evaluating whether the prior and current conduct are part of a common scheme or plan, the trial court examines the whole, not a part, of the planning, preparation, and execution of the misconduct.

“[T]he preferred approach is for the trial court to focus on the closeness of the relationship between the other misconduct and the charged crimes in terms of time, place and modus operandi.” *Lough*, 125 Wn.2d at 858. Although a unique modus operandi is one factor to consider, the crux of the inquiry is similarity, not uniqueness. *DeVincentis*, 150 Wn.2d at 20. The degree of similarity for the admission of evidence of a common scheme or plan must be substantial. *DeVincentis*, 150 Wn.2d at 20.

The Supreme Court has stated that “caution is called for in application of the common scheme or plan exception,” *DeVincentis*,

150 Wn.2d at 18, 74 P.3d 119, *quoting State v. DeVincentis*, 112 Wn.App. 152, 159, 47 P.3d 606 (2002), *aff'd*, 150 Wn.2d 11, 74 P.3d 119 (2003); “[r]andom similarities are not enough,” “the degree of similarity ... must be substantial,” and “admission of this kind of evidence requires more than merely similar results.” *Id.* (internal citations omitted).

No evidence was presented regarding the television. Mr. Bettger did not identify it as his property and he made no claim that a television was taken from his property. There was no evidence presented on how Mr. Stief came to possess the television; no evidence of similar burglaries in the area, no evidence that the television was even stolen and not Mr. Stief’s personal property. The evidence was merely placed in front of the jury to smear Mr. Stief. This was entirely improper.

- f. The error in admitting the evidence of the television was not a harmless error.

When a court erroneously admits prior bad acts evidence under ER 404(b), reversal is required where, “within reasonable probability, materially affected the outcome of the trial.” *Gresham*, 173 Wn.2d at 433.

Here the trial was infected by admission of irrelevant and highly prejudicial evidence. By admitting evidence of the television, the State was able to label Mr. Stief a thief, thereby allowing the jury to prejudice Mr. Stief’s guilt on the current charges. There is a reasonable probability the admission of this evidence materially affected the outcome of the trial. As a result, the error in admitting the evidence of the unrelated television was not a harmless error.

2. *This Court should remand so the trial court can correct the Judgment and Sentence to reflect the sentence imposed.*

Scrivener’s errors, or clerical errors, are the result of mistake or inadvertence. The remedy is to remand to the trial court for correction of the scrivener’s errors in the judgment and sentence. *In re Personal Restraint of Mayer*, 128 Wn.App. 694, 701, 117 P .3d 353 (2005). See CrR 7.8(a) (clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time).

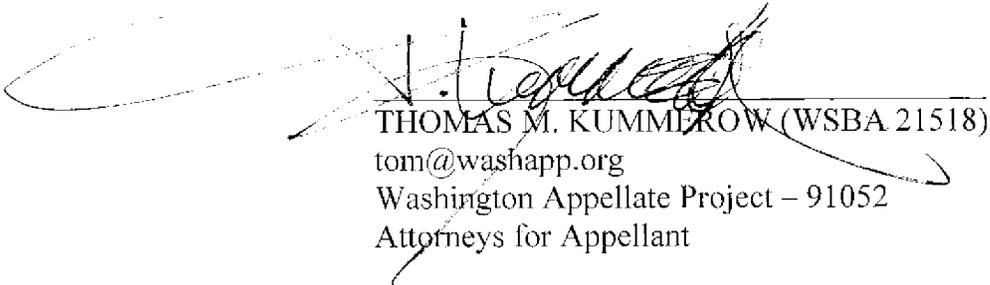
The State conceded and the court found that the burglary and robbery convictions constituted the same criminal conduct. RP 243, 251.<sup>3</sup> This finding was not reflected on the Judgment and Sentence. CP 55. As a result, this Court should remand to the trial court to make the correction on the Judgment and Sentence to reflect the sentence ultimately imposed.

F. CONCLUSION

For the reasons stated, Mr. Stief asks this Court to reverse his convictions.

DATED this 2<sup>nd</sup> day of March 2015.

Respectfully submitted,



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<sup>3</sup> The State calculated Mr. Stief's standard range for the robbery to be 46 to 61 months without a finding of same criminal conduct and 41 to 54 months with the finding. RP 243. This is consistent with a determination that without the finding, Mr. Stief had an offender score of "3" without a finding and "2" with the finding. Thus, although the court never stated it was finding same criminal conduct, its sentence of 42 months is consistent with that finding. RP 251.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 46580-9-II
	)	
DANIEL STIEF,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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191 CONSTANTINE WY		
ABERDEEN, WA 98520-9504		

SIGNED IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF MARCH, 2015.

X \_\_\_\_\_ *[Signature]*

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# WASHINGTON APPELLATE PROJECT

**March 02, 2015 - 4:05 PM**

## Transmittal Letter

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Case Name: STATE V. DANIEL STIEF

Court of Appeals Case Number: 46580-9

**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: Appellant's

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: Maria A Riley - Email: [maria@washapp.org](mailto:maria@washapp.org)

A copy of this document has been emailed to the following addresses:

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