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Division II  
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No. 50386-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

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A. SUMMARY OF ARGUMENT

Robert Hill was deprived of his Sixth Amendment right to the effective assistance of counsel because his attorney unreasonably failed to request a jury instruction on voluntary intoxication. Ample evidence showed Hill was highly intoxicated when he allegedly assaulted three sheriff deputies by pointing a pepper spray device at them. The defense theorized that Hill did not in fact intend to assault the deputies with the spray device. Yet counsel inexplicably failed to request an instruction that would have informed the jury they could consider the evidence of Hill's intoxication in deciding whether he acted with the requisite intent. Because there is a reasonable probability the outcome of the trial would have been different if the jury had received such an instruction, the assault convictions must be reversed.

In addition, the State did not prove beyond a reasonable doubt that Hill possessed a controlled substance.

B. ASSIGNMENTS OF ERROR

1. Hill received ineffective assistance of counsel, in violation of the Sixth Amendment, because his attorney unreasonably failed to propose a jury instruction on voluntary intoxication.

2. The State did not prove the elements of unlawful possession of a controlled substance beyond a reasonable doubt, in violation of constitutional due process.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant receives ineffective assistance of counsel if his attorney fails to propose a jury instruction on voluntary intoxication, the instruction is warranted by the evidence, and the defendant is prejudiced as a result. Here, the evidence established that Hill was intoxicated during the alleged assault. The jury could have found that his intoxication undermined his ability to form an intent to commit the crime. Yet counsel failed to request an instruction on voluntary intoxication. Did Hill receive ineffective assistance of counsel?

2. To prove the crime of possession of a controlled substance, the State must prove the accused had either actual or constructive possession of the substance. Constructive possession requires proof of dominion and control over the substance. Here, a controlled substance was found in the car that Hill was driving but the State did not prove he owned the car or otherwise had dominion and control over the substance. Did the State fail to prove beyond a reasonable doubt he was guilty of possession of a controlled substance?

D. STATEMENT OF THE CASE

**The jury heard undisputed evidence that Hill was intoxicated during the incident, yet they were not instructed they could take intoxication into account in deciding whether he acted with the requisite intent.**

During the afternoon of November 18, 2016, Kevin Laird was driving a concrete mixer truck at a commercial construction site in Tacoma. RP 333. As Laird was pouring concrete, Hill drove up and parked his black BMW directly in front of the mixer truck, preventing Laird from finishing the job. RP 334, 341.

Hill refused to move. RP 335. He later explained he parked his car in front of the cement truck in an effort to force the owner of the construction site to come and talk to him. RP 369. Hill had had a confrontation with the man earlier that morning and he was protesting the way he had been treated. RP 361, 371. He believed his car was legally parked on the property of a nearby business. RP 368.

Laird tried to speak to Hill through the closed driver's window but Hill just "hissed" at him. RP 335. Hill was holding a flashlight and shining it at Laird and others. RP 336. When Laird asked Hill why he would not move his car, Hill did not give him a coherent answer. RP 335. Instead, "[h]e just kind of made nonsense." RP 335. "He was

just kind of talking, but he wasn't really making any sense to anything that pertained to what we were talking about." RP 335-36.

Several people at the construction site called 911. RP 337.

Pierce County deputies Charles Roberts, Emily Holznagel, and Kevin Finnerty responded. RP 128, 201, 252.

Deputy Roberts approached the driver's side of the BMW. RP 132. The BMW's engine was running. RP 133. Roberts knocked on the window and told Hill he needed to speak to him about why he was blocking the cement truck. RP 133. Hill rolled down the window two to three inches. RP 133, 214. Roberts told him to step out of the car so they could talk. RP 133. According to Roberts, Hill put the car in reverse and backed up a short distance. RP 133, 216.

Roberts yelled at Hill and told him not to back up. RP 134. Hill slammed the car into park. RP 134. Roberts again told him to get out of the car but Hill once more put the car in reverse and started to back up. RP 134. Roberts slapped on the window of the car and told Hill to stop. RP 134. Roberts told Hill that if he did not get out of the car, he and the other deputies would break the window and forcibly remove him. RP 135. Hill put the car in reverse and backed up again. RP 135.

Roberts hit the window with his flashlight but the window did not break. RP 136, 217. He asked Deputy Finnerty to use his flashlight, which had a device on the end designed to break glass. RP 138. Finnerty hit the window with his flashlight and the glass broke. RP 138, 217, 253. Due to the tinting on the window, the glass stayed mostly intact but rolled away from the frame. RP 138. Roberts reached inside the car, trying to find the door handle. RP 138.

Hill started screaming. RP 138, 217. According to the deputies, he grabbed a silver pepper spray device and waved it in the direction of all three of them and pointed it at all three of them. RP 138, 218, 247, 254. The deputies did not know what the object was but they thought it could be a weapon. They said they were afraid. RP 138, 218, 238, 247, 255. In fact, the pepper spray device was loaded with a water canister and not a pepper spray canister. RP 390.

Roberts knocked Hill's hand away so that the device was no longer pointing at the deputies. RP 138-39, 219. He found the door handle and opened the door. RP 138. The deputies grabbed Hill and pulled him from the car. RP 139.

Hill struggled and resisted. RP 139, 220-21, 256. The deputies used force to get Hill to the ground. RP 139. He continued to struggle

as he was put in handcuffs and brought to the patrol car. RP 139. He struck the car repeatedly with his head. RP 257. Once inside the car, he tried to kick out the window. RP 258. The deputies used a four-point restraint to subdue him. RP 141, 258.

The deputies all agreed that Hill showed obvious signs of intoxication. His eyes were bloodshot, his speech was slurred, and his pupils were constricted. RP 134, 257. His clothing and appearance were disheveled. RP 258. “The odor of intoxicants were coming from him.” RP 158.

Another deputy arrived at the scene to process Hill for driving under the influence. CP 5. Deputy Condrey noted that Hill was “yelling” and “incoherent.” CP 5. He “could smell the strong odor of intoxicants coming from the defendant.” CP 5. Condrey “saw an empty bottle of alcohol” in his car. CP 5. Hill’s blood-alcohol concentration level was .15. RP 352-54.

The deputies obtained a warrant and searched the BMW. RP 146, 259. Inside the car, they found a bottle of pills “in a box under a box.” RP 148-50. One of the pills was tested and determined to contain Alprazolam. RP 178.

Hill was charged with three counts of third degree assault, one count of unlawful possession of a controlled substance, one count of obstructing a law enforcement officer, and one count of driving under the influence. CP 15-17. He pled guilty to the DUI charge. CP 8-13.

At trial on the other charges, Hill testified that he was drinking “Steel Reserve 211,” which is a “high gravity lager,” while he was waiting in the car. RP 370, 399, 420-21. He fell asleep and was awakened by the deputy slapping on his window. RP 399-400. Hill was in the process of taking off his seatbelt to exit the car when the window was broken. RP 400. He thought the engine was off and did not intentionally back up the car. RP 422.

Hill explained he did not intend to assault the deputies. He did not intentionally point the spray device at them but might have accidentally waved it at Deputy Roberts while he was trying to remove his seat belt. RP 400-01, 408. Hill thought only one deputy was standing outside of the car. He could not see the other two deputies because the dome light was on, the window was tinted, and it was dark outside. RP 402, 405-06. Also, the spray device was not loaded with pepper spray but with water. RP 390.

Defense counsel argued to the jury that Hill did not intentionally assault the deputies with the spray device. Instead, he was merely “sweeping [it] around.” RP 460. Yet counsel did not request a jury instruction that would have informed the jury they could take Hill’s intoxication into account in deciding whether he intended to assault the deputies.

During deliberations the jury submitted an inquiry asking several questions, some of which were related to Hill’s intoxication and its possible effect on his state of mind: (1) “At what point on the night of the incident was Hill required by law to comply with officers’ commands?” (2) “What is the drug, Alprazolam, used for?” (3) “What are the side effects?” (4) “When it interacts w/another substance such as alcohol or other mind altering drug?” (5) “Was there a toxicology report (UA)?” and (6) “definition of dominion and control.” CP 46.

The court did not answer the jury’s questions but told them that all of the evidence they could consider had been presented, and they should refer to the jury instructions. CP 47.

The jury found Hill guilty as charged of all counts. CP 48-52.

E. ARGUMENT

**1. Hill received ineffective assistance of counsel due to his attorney's unreasonable failure to request a jury instruction on voluntary intoxication.**

The jury heard undisputed evidence that Hill was highly intoxicated at the time of the incident and that his intoxication affected his behavior and mental state. RP 134, 138-41, 158, 217, 220-21, 256-58, 335-36, 370, 399, 420-22. Moreover, Hill testified, and defense counsel argued, that Hill did not intend to assault the deputies. RP 400-01, 408, 460. Yet counsel inexplicably failed to request an intoxication instruction.

Counsel's failure to request a voluntary intoxication instruction was deficient and prejudicial. The instruction was warranted by the evidence and supported the defense theory that Hill did not act with intent. The jury's inquiry during deliberations, asking about the effects of Alprazolam and alcohol on a person's mental state, shows that the jury wanted to consider Hill's intoxication in reaching their verdict. But because of counsel's failure to request a voluntary intoxication instruction, the jury did not understand that they could take Hill's intoxication into account in deciding whether he acted with the

requisite intent. Under these circumstances, Hill's Sixth Amendment right to the effective assistance of counsel was violated.

Whether Hill received ineffective assistance of counsel due to his attorney's failure to request a voluntary intoxication instruction is reviewed *de novo*. State v. Kruger, 116 Wn. App. 685, 690, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

- a. Hill's right to the effective assistance of counsel encompassed the right to have counsel request a voluntary intoxication instruction if supported by the evidence.

An accused in a criminal case has a Sixth Amendment right to "effective assistance by the lawyer acting on the defendant's behalf." State v. Adams, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S. Const. amend. VI. To establish an ineffective assistance of counsel claim, Hill must show that his attorney's performance was deficient and that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." Kruger, 116 Wn. App. at 688.

Counsel's failure to request a voluntary intoxication instruction amounts to ineffective assistance of counsel if (1) the defendant was

entitled to the instruction; (2) there was no legitimate strategic or tactical reason *not* to request the instruction; and (3) the defendant was prejudiced. Id. at 690-91.

Here, all three prongs of this test are satisfied.

- b. Hill was entitled to a voluntary intoxication instruction.

By statute, Washington recognizes an intoxication defense. State v. Walters, 162 Wn. App. 74, 81, 255 P.3d 835 (2011); RCW 9A.16.090. The statute recognizes that whenever a crime has a “particular mental state” as a necessary element, the fact of the defendant’s intoxication “may be taken into consideration in determining such mental state.” RCW 9A.16.090.

“Voluntary intoxication does not excuse the criminality of the act but it can render the defendant incapable of forming the specific intent necessary for conviction of the crime.” State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136 (2004) (citing State v. Mriglot, 88 Wn.2d 573, 576 n.2, 564 P.2d 784 (1977)).

The proper way to present a voluntary intoxication defense is to instruct the jury that they may consider evidence of the defendant’s intoxication in deciding whether he acted with the requisite mental state. State v. Coates, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987)

(citing WPIC 18.10). It is not necessary to present expert testimony to support a voluntary intoxication defense. State v. Thomas, 123 Wn. App. 771, 781-82, 98 P.3d 1258 (2004).

A defendant is entitled to a voluntary intoxication jury instruction when (1) the crime has as an element a particular mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability to form the required mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002). "Intoxication" may be caused by alcohol, drugs or both in combination. State v. Conklin, 79 Wn.2d 805, 807, 489 P.3d 1130 (1971).

When these three conditions are satisfied, an instruction on voluntary intoxication is mandatory if requested. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Here, the charged crime of third degree assault has the requisite mental state as an element. The State must prove beyond a reasonable doubt the defendant acted with the specific intent to cause bodily harm or to create an apprehension of bodily harm. State v. Williams, 159 Wn. App. 298, 307, 244 P.3d 1018 (2011); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); CP 28 (jury instruction).

Because intent is an element of the crime, Hill was entitled to a voluntary intoxication instruction if supported by “substantial” evidence. Walters, 162 Wn. App. at 82; Kruger, 116 Wn. App. 692. The evidence must be viewed in Hill’s favor in deciding whether it was sufficient to support the instruction. In re Pers. Restraint of Sandoval, \_\_ Wn.2d \_\_, 2018 WL 456981, at \*4 (2018).

Evidence is sufficient to support a voluntary intoxication instruction if there is substantial evidence of intoxication and substantial evidence that the intoxication affected the defendant’s ability to form the requisite intent. Kruger, 116 Wn. App. at 691.

The evidence “must reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). There must be sufficient evidence for a rational trier of fact to conclude that the State has failed to meet its burden to prove the defendant acted with the required mental state. Kruger, 116 Wn. App. at 692.

Physical manifestations of intoxication may provide sufficient evidence from which to infer that mental processing was affected, thus entitling the defendant to an intoxication instruction. Walters, 162 Wn.

App. at 83. In Walters, for example, the evidence was sufficient where the defendant had slurred speech and droopy and bloodshot eyes, he swayed back and forth, and he did not respond to pain compliance techniques. Id. Similarly, in Kruger, the evidence was sufficient where Kruger had slurred speech, vomited at the police station, and was impervious to pepper spray. Id. at 692.

Here, as in Walters and Kruger, the evidence was sufficient to support a jury instruction on voluntary intoxication. The State's witnesses all agreed that Hill was intoxicated and his behavior was affected by it. His eyes were bloodshot, his speech was slurred, and his pupils were constricted. RP 134, 257. His clothing and appearance were disheveled. RP 258. "The odor of intoxicants was coming from him." RP 158. His speech was incoherent and he "just kind of made nonsense." RP 335-36. He seemed to have a high pain threshold. He "slammed" his head multiple times against the patrol car window. RP 140. The deputies could not subdue him until they put him in a "full-limb restraint." RP 141, 257-58. Even then, he freed himself somewhat and resumed banging his head inside the car. RP 141.

In addition, Hill's own testimony supported the inference that his intoxication seriously affected his mental state. He said he did not

know the engine of the BMW was running or that he had backed up the car when the deputy asked him to exit. RP 422. He did not realize he had pointed the pepper spray device at anyone. RP 400-01, 408. He did not perceive that there were three deputies standing outside of the car. RP 402, 405-06.

When viewed in the light most favorable to Hill, this evidence was more than sufficient to support a jury instruction on voluntary intoxication. The instruction would have been mandatory if counsel requested it. Rice, 102 Wn.2d at 123; Kruger, 116 Wn. App. at 694.

- c. Counsel had no legitimate tactical reason not to request an intoxication instruction and counsel's failure to request the instruction prejudiced Hill.

In deciding whether counsel's performance was deficient, the question is whether a reasonable attorney should have proposed an intoxication instruction under the facts of the case. Kruger, 116 Wn. App. at 693. If the instruction is supported by the evidence and the defense theory is that the defendant did not act with the requisite intent, there can be no reasonable tactical or strategic basis not to request the instruction. Id.

Here, counsel had no reasonable tactical basis not to request a voluntary intoxication instruction. As discussed, the evidence

presented at trial was more than sufficient to support the instruction. In addition, counsel was aware that Hill's blood alcohol concentration level had been later determined to be .15. RP 354.

Moreover, the defense theory was that Hill did not intend to assault the deputies. Counsel argued in closing that Hill was "waving around" the spray device in a "sweeping" motion, which "is not forming the intent, the intent necessary to prove an assault." RP 460. Hill testified he did not intentionally reach for the spray device and did not intentionally point it at the deputies. RP 400-01, 408. In fact, he was not even aware that three deputies were standing outside of the car until he was pulled from the car. RP 402-03. Also, the spray device was loaded with a water canister, not a pepper spray canister. RP 390.

An intoxication instruction would have significantly aided the defense that Hill did intend to assault the deputies. The jury would have been able to take Hill's intoxication into account in deciding whether he acted with the necessary intent. Counsel had no legitimate basis *not* to request the instruction.

Finally, Hill was prejudiced by his attorney's deficient performance. The question is whether there is a reasonable probability that, except for counsel's unprofessional errors, the result of the

proceeding would have been different. Kruger, 116 Wn. App. at 694 (citing In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002)). Where counsel's deficient performance consists of a failure to request an intoxication instruction, prejudice is established if the jury hears evidence of the defendant's intoxication and intent is the focus of the defense. Kruger, 116 Wn. App. at 694. That is because "without the instruction, the defense [is] impotent." Id. at 695.

As in Kruger, Hill was prejudiced by his attorney's failure to request an intoxication instruction. Intent was the focus of the defense, and the jury heard extensive testimony about Hill's intoxication. Without the instruction, the jury was unable to consider the effects of Hill's intoxication on his mental state.

The jury's inquiry underscores the prejudice resulting from counsel's deficient performance. The jury asked several questions related to Hill's intoxication and its effect on his mental state. The jury asked what the drug Alprazolam is used for and what its side effects are when it is taken alone or in combination with alcohol or other drugs. CP 46. The jury also asked whether there was a toxicology report. CP 46. These questions suggest the jury wanted to consider the effects of Hill's intoxication during its deliberations. There is a reasonable

probability that, had the jury been instructed they *could* consider evidence of intoxication in deciding whether Hill acted with the requisite intent, the outcome of the trial would have been different.

In sum, Hill was entitled to a voluntary intoxication instruction and counsel had no legitimate basis not to request the instruction. Hill was prejudiced by counsel's deficient performance. His Sixth Amendment right to the effective assistance of counsel was violated.

**2. The State did not prove beyond a reasonable doubt that Hill had dominion and control over the Alprazolam.**

Constitutional due process places the burden on the State to prove the elements of an offense beyond a reasonable doubt. State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. The question on review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Although the State may rely upon circumstantial evidence, “inferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). “A ‘modicum’ of evidence does not meet this standard.” Rich, 184 Wn.2d at 903 (quoting Jackson, 443 U.S. at 320).

To prove the charged crime of unlawful possession of a controlled substance, the State was required to prove beyond a reasonable doubt that Hill possessed a controlled substance. RCW 69.50.4013(1); State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); CP 41.

Possession can be actual or constructive. Staley, 123 Wn.2d at 798. Actual possession requires the item be in the actual, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, Hill did not have actual physical custody of the Alprazolam. It was found “in a box under a box” in the BMW. RP 148-50. Thus, the State was required to prove he had constructive possession of it.

Constructive possession involves “dominion and control” over the item. Callahan, 77 Wn.2d at 29; CP 39 (jury instruction). Constructive possession is established by viewing the totality of the

circumstances. State v. Turner, 103 Wn. App. 515, 522-23, 13 P.3d 234 (2000). The fact that a person has dominion and control over the premises where contraband is found is not alone sufficient to prove constructive possession. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). “It is not a crime to have dominion and control over the premises where the substance is found.” Olivarez, 63 Wn. App. at 486.

To prove constructive possession, the State need not show exclusive control over the controlled substance, but it must show more than mere proximity. State v. Bowen, 157 Wn. App. 821, 827-28, 239 P.3d 1114 (2010). If an individual is the sole occupant of a car where contraband is found, and has sole possession of the vehicle’s keys, that is sufficient to prove he had dominion and control over the vehicle’s contents. Id. (citing State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969)). But conversely, where these factors are absent, the State must present additional evidence to demonstrate dominion and control.

Here, the evidence was insufficient to establish constructive possession. Although Hill was the sole occupant of the BMW that day, it was not registered to him but to his mother. RP 174. The key that

was in the ignition would not open the trunk of the car. RP 203, 243-44. In other words, Hill did not have sole possession of the car keys.

In addition, there was no evidence that Hill was aware of the presence of the bottle in the car. The deputies found the bottle “in a box under a box.” RP 148-50. It was not tested for fingerprints.

In sum, the evidence was insufficient to prove beyond a reasonable doubt that Hill “possessed” a controlled substance.

F. CONCLUSION

Hill received ineffective assistance of counsel, in violation of the Sixth Amendment, because his attorney unreasonably failed to request a voluntary intoxication jury instruction. The three assault convictions must be reversed and remanded for a new trial. Also, the State failed to prove all of the elements of unlawful possession of a controlled substance. The conviction must be reversed and the charge dismissed.

Respectfully submitted this 22nd day of January, 2018.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 50386-7-II
	)	
ROBERT HILL,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22<sup>ND</sup> DAY OF JANUARY, 2018, 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF JANUARY, 2018.



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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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