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MAY 06 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 290913

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOHN LEWIS EBERLY JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY
The Honorable Rebecca M. Baker

AMENDED APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
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I. ASSIGNMENTS OF ERROR

1. The trial court miscalculated the offender score.
2. The trial court misapplied the law when it found the first-degree burglary conviction and the second-degree assault convictions did not encompass the same criminal conduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erroneously calculated the offender score?
2. Whether the trial court erred when it focused on the use of the firearm to determine two related convictions did not encompass the same criminal conduct?

III. STATEMENT OF CASE

1. Substantive Facts

Jack Eberly Jr. (Mr. Eberly) and his wife lived in Cedar Creek, Washington, for over 20 years. 4/7/10 RP1 129-130; 4/6/10 RP1 25. The area, about 150 yards from the Canadian border, is both wooded and swarming with wildlife. 4/7/10 RP1 130. Mr. Eberly had been attacked twice by cougar. After the attacks, he carried a gun for protection. 4/7/10 RP1 131-132.

The Eberlys lived about a quarter of a mile away from Rosie Vermillion (Ms. Vermillion). 4/7/10 RP1 129-130; 4/6/10 RP1 25. Ms. Vermillion was not only the Eberlys' neighbor; she was also a friend. 4/7/10 RP1 88. She and Mr. Eberly's wife would occasionally take walks together and chat over the telephone. 4/7/10 RP1 88. The Eberlys were

very giving as was Ms. Vermillion. Ms. Vermillion gave the Eberlys eggs and feathers from the animals she raised. And the Eberlys often gave her compost for her garden. 4/7/10 RP1 88.

Mr. Eberly was particularly kind to Ms. Vermillion. He treated her with great respect and was one of the only people in the community who would check on her to see if she needed anything; particularly during the winter. 4/7/10 RP1 88-89.

One morning, Ms. Vermillion approached Mr. Eberly about a gate that was erected on an easement between Ms. Vermillion's property and the property of another neighbor. Ms. Vermillion was upset because she believed the gate obstructed access to her property. 4/6/10 RP1 25. Mr. Eberly told Ms. Vermillion that whenever she needed access, she could telephone, and he would open the gate for her. That was when the conversation became acrimonious. 4/6/10 RP1 25. The following is Ms. Vermillion's account of what happened next.

At some point, Mr. Eberly threatened to cut Ms. Vermillion's favorite cedar tree. 4/6/10 RP1 27. Ms. Vermillion told Mr. Eberly that he had no business coming on to her property and deciding what trees will come down no more than she had to go on his property to decide the same. 4/6/10 RP1 27. Mr. Eberly called Ms. Vermillion, a bitch. She called him a faggot and a cocksucker. 4/6/10 RP1 28.

Eventually, Ms. Vermillion walked away from the exchange and drove to Colville for the day. 4/6/10 RP1 28-29. Later that evening, when

Ms. Vermillion returned home, she noticed Mr. Eberly's truck on the right side of the easement, tucked behind some trees. 4/6/10 RP1 31. She drove up to her house, got out of her truck, and hurried up to her door. 4/6/10 RP1 32.

As she approached the fence to her house, she noticed a note stuck on the post with the words "DON'T MESS WITH ME" scrawled on one side in capital letters. 4/6/10 RP1 33. Ms. Vermillion grabbed the note and hurried on to her door. She could see Mr. Eberly following her. 4/6/10 RP1 34. She managed to get inside the house and to bolt lock the door. 4/6/10 RP1 35.

She yelled through the door at Mr. Eberly to leave. 4/6/10 RP1 36. Mr. Eberly ignored her and continued onto the porch. 4/6/10 RP1 36. She grabbed the telephone and tried to call 9-1-1; but there was no dial tone. 4/6/10 RP1 36-37.

Mr. Eberly pulled on the doorknob. 4/6/10 RP1 38. Ms. Vermillion found another telephone, put it in the jack, and switched it on. 4/6/10 RP1 39. She heard a pop sound. She leaned over to the window and noticed that Mr. Eberly had a gun in his hand. 4/6/10 RP1 41.

She heard a second pop and the glass window to her left exploded. Glass fragments hit her hair and her dress poofed up, like a parachute. 4/6/10 RP1 41. As she smoothed down her dress, she felt a hole. 4/6/10 RP1 41.

Suddenly, Mr. Eberly forced open the door with such strength that he landed in Ms. Vermillion's living room. 4/6/10 RP1 42. He was holding a gun. 4/6/10 RP1 42. Ms. Vermillion told the jury that Mr. Eberly was angry and drunk. 4/6/10 RP1 43. She believed Mr. Eberly was going to kill her. So, she grabbed his ponytail and punched him in the face. 4/6/10 RP1 43.

Mr. Eberly fell to the floor and Ms. Vermillion landed on top of him. 4/6/10 RP1 44. When Mr. Eberly tried to get up, he lost hold of the gun. When Ms. Vermillion noticed that he no longer had the gun, she looked for something to hit him with. 4/6/10 RP1 44-45. She grabbed a hatchet, and with its blunt end, she beat the instep of Mr. Eberly's foot. 4/6/10 RP1 46.

Mr. Eberly screamed in agony, cried profusely, and ultimately wet himself. 4/6/10 RP1 46. Ms. Vermillion then threw down the hatchet, stepped over Mr. Eberly, and headed upstairs to get her other telephone. 4/6/10 RP1 46. She found the phone and tried to call 9-1-1 again. Again there was no dial tone. 4/6/10 RP1 46.

She looked for her shotgun, but she couldn't find it. She didn't want to go back downstairs, so she thought about trying to climb out of an upstairs window. But the window was tiny and she was afraid she wouldn't fit. 4/6/10 RP1 47-48. So, she waited upstairs for Mr. Eberly to leave.

While upstairs, Ms. Vermillion had a chance to further examine the hole in her dress. She tore the hole a little so that her hand could fit through and felt a big hole in her long johns. When she looked at her hands, she noticed blood and soon realized she had been shot in the buttocks. 4/6/10 RP1 49.

Mr. Eberly finally left and Ms. Vermillion went downstairs. 4/6/10 RP1 49. Her house was a mess; there was broken glass everywhere. 4/6/10 RP1 49. On the porch, she noticed a 9 mm Luger pistol shell cartridge on the floor. She put the shell in her pocket, jumped in her truck, and drove to a neighbor's house to call 9-1-1. 4/6/10 RP1 50.

Police and emergency rescue responded to the call. 4/6/10 RP1 52. While Ms. Vermillion was being treated for her injury, she explained to police what happened and gave the officer the 9 mm Luger pistol shell cartridge. 4/6/10 RP1 52.

When police arrived at Mr. Eberly's home, the officer could not tell for certain whether Mr. Eberly was intoxicated, given his physical condition. But the officer could smell alcohol. 4/7/10 RP1 63-64; 4/7/10 RP1 73. An officer placed Mr. Eberly in handcuffs, rendered Miranda warnings, and asked what happened. 4/7/10 RP1 44. The following is Mr. Eberly's account.

Earlier that day, Ms. Vermillion approached Mr. Eberly about the gate. She was angry. 4/7/10 RP1 153. She told Mr. Eberly that the gate was not working for her because she could not access her property. 4/7/10

RP1 44. Mr. Eberly pointed out the property line and reminded Ms. Vermillion that the gate was not on her property. 4/7/10 RP1 155.

Mr. Vermillion called Mr. Eberly a faggot and a cocksucker. Mr. Eberly responded by calling Ms. Vermillion a bitch. Ms. Vermillion became enraged. She called Mr. Eberly a dick licker and threatened to rip the gate out of the ground. 4/7/10 RP1 155-156.

Mr. Eberly just laughed and walked back to his shop. 4/7/10 RP1 158. He decided that he would take Ms. Vermillion a key to the gate. 4/7/10 RP1 158. He did not want to confront her, so, he wrote a note. One side of the note read: Rosie, you need to call Gary Misner as he's the one who set boundaries. Mr. Eberly had forgotten that he wrote, DON'T MESS WITH ME the other side of the note. 4/7/10 RP1 159.

He drove to Ms. Vermillion's house and called out to her. When he realized that she was not at home, he posted the note on her fence post and left. 4/7/10 RP1 160; 4/7/10 RP1 162.

Some hours later, while checking his mail, Mr. Eberly saw Ms. Vermillion driving home. 4/7/10 RP1 163. He pulled his truck in behind her and followed her inside the gate. 4/7/10 RP1 163-164.

Ms. Vermillion got out of her truck and initially ignored Mr. Eberly. 4/7/10 RP1 164. She took the note off the fence post and read it. 4/7/10 RP1 165.

When Mr. Eberly tried to give her a key to the gate, she punched him in the face. 4/7/10 RP1 165. She then grabbed him by his ponytail

and lifted him off the ground. 4/7/10 RP1 165. She continued to punch and to beat him, as she dragged him towards her house. 4/7/10 RP1 166.

Mr. Eberly screamed for her to stop. But she didn't. 4/7/10 RP1 168-169. When they reached the door, Mr. Eberly cycled a round out of his handgun in an attempt to make her stop. 4/7/10 RP1 171. Ms. Vermillion threatened to get her shot gun and slammed the door on Mr. Eberly. 4/7/10 RP1 172.

Mr. Eberly tried to pull himself up by the doorknob. Just as he was almost in a standing position, the glass broke and blew out everywhere. 4/7/10 RP1 172. In shock and wanting to keep Ms. Vermillion inside, Mr. Eberly aimed and fired at the doorknob. 4/7/10 RP1 174.

2. Procedural Facts

Mr. Eberly was charged with first-degree attempted murder, first-degree burglary, and first-degree assault. CP 1-3; CP 54-56; CP 62-65. A jury trial ensued. During deliberations, the jury presented a number of inquiries to the court. One inquiry asked the court to clarify what constitutes intent to commit murder in the second degree. CP 179. Another inquiry asked the court to define the phrase "acting with the objective or purpose". CP 182.

After deliberating for some 11 hours, the jury asked the court for any additional instructions it could provide on the second-degree murder charge. CP 183. Finally, the jury announced it had reached verdicts on two of the three counts. CP 184.

The jury found Mr. Eberly not guilty of attempted first-degree murder and of first-degree assault. CP 194. However, the jury found Mr. Eberly guilty of first-degree burglary and of second-degree assault. CP 198; CP 202. Each conviction carried a firearm enhancement. CP 199; CP 204.

At sentencing, neither the State nor Mr. Eberly argued whether the convictions should be considered the same criminal conduct. On its own, the court determined the convictions did not encompass the same criminal conduct. 5/19/10 RP 18. The court found the incidences were certainly related and occurred in close proximity of time. 5/19/10 RP 18. But “there was separate criminal conduct. 5/19/10 RP 20. The court reasoned that a seriously intoxicated Mr. Eberly not only gained entry to Ms. Vermillion’s home with the use of the firearm but also separately pursued and assaulted her. 5/19/10 RP 20-21.

Based on its findings, the court sentenced Mr. Eberly to 130 months confinement in the Department of Corrections. CP 239-248. This appeal followed. CP 259.

IV. ARGUMENT

1. MR. EBERLY’S SENTENCE WAS BASED ON AN INCORRECTLY ELEVATED OFFENDER SCORE BECAUSE THE BUGLARY AND THE ASSAULT CONVICTIONS SHOULD HAVE BEEN CONSIDERED THE SAME CRIMINAL CONDUCT.

- a. The trial court miscalculated Mr. Eberly’s offender score.

When an offender score is miscalculated, the resulting sentence is as a

matter of law in excess of what is statutorily permitted for his crimes given a correct offender score. State v. Goodwin, 146 Wn.2d 861, 875-76, 50 P.3d 618 (2002). And matters of law are reviewed de novo. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Under the Sentencing Reform Act (SRA), the first step in determining the length of a sentence is to calculate the appropriate standard range. Generally, a defendant is to be sentenced within this standard range unless “substantial and compelling reasons” justify a different sentence. State v. Dunaway, 109 Wn.2d 207, 212, 743 P.2d 1237 (1987) citing Former RCW 9.94A.122 (2). The standard range is based on two factors: (1) the severity of the crime for which the defendant is being sentenced (“offense seriousness level”), and (2) the length and seriousness of the defendant’s criminal history (“offender score”). State v. Dunaway, 109 Wn.2d at 212, citing RCW 9.94A.350-.370. The defendant’s offender score is computed from his criminal history, including prior and current convictions. Id. citing RCW 9.94A.400 (1)(a).

“Same criminal conduct” is a creature of the SRA. It allows a court to impose concurrent sentences if the offenses involve the same criminal intent and victim, and are committed at the same time and place. RCW 9.94A.400 (1)(a) recodified as RCW 9.94A.589 (1)(a). It also allows a court to count multiple offenses as one crime, if they share the same objective criminal intent. RCW 9.94A.589 (1)(a).

At issue, here, is how the trial court used related convictions to

calculate Mr. Eberly's offender score. The trial court found the first-degree burglary conviction and the second-degree assault conviction did not constitute the same criminal conduct. CP 239-248.

However, as was suggested by Ms. Vermillion's version of events, the offenses did involve the same objective criminal intent, the same victim, and were committed at the same time and place. As result, the trial court should have calculated Mr. Eberly's offender score as one instead of two. For that reason, Mr. Eberly challenges his sentence.

b. Mr. Eberly is not precluded from challenging his sentence for the first time on appeal. Reviewing courts will generally not address an issue, which was not raised at trial. State v. Wiley, 63 Wn.App. 480, 482, 820 P.2d 513 (1991), overruled in part, State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). However, it has become a well-established "common law" rule that a party may challenge a sentence for the first time on appeal on the basis that it is contrary to law. See State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369 (1993); State v. Roche, 75 Wn.App. 500, 512-13, 878 P.2d 497 (1994); State v. Moen, 129 Wn.2d at 547, 919 P.2d 69.

This rule tends to bring sentences into conformity and compliance with existing sentencing statutes and avoids permitting widely varying sentences to stand only because counsel did not object in the trial court. State v. Paine, 69 Wn.App. at 884, 850 P.2d 1369; State v. Moen, 129 Wn.2d at 545-47, 919 P.2d 69.

The State may argue however that Mr. Eberly waived the right to challenge his sentence now. “An appellant can waive his right to raise on appeal an erroneous offender score based on a determination of whether his crimes constituted the same criminal course of criminal conduct.” State v. Nitsch, 100 Wn.App. 512, 523, 997 P.2d 1000 (2000).

In State v. Nitsch, the Court found the defendant had in fact waived his right to challenge his sentence on appeal because he affirmatively stated his standard range sentence was correct. 100 Wn.App. at 522.

Here, Mr. Eberly did not necessarily affirm that his sentence was correct; but he did not challenge his sentence either. His attorney basically neglected to object to the trial court’s ruling and neglected to remind the trial court of the appropriate test for analyzing convictions as same criminal conduct.

Therefore, in the alternative, Mr. Eberly challenges the effectiveness of counsel he received at sentencing. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987); see also State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980); State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007)). Consequently, a defendant may raise

the issue of same criminal conduct for the first time on appeal in the context of an ineffective assistance of counsel claim, even if he did not raise the argument in the trial court. See State v. Saunders, 120 Wn.App. 800, 825, 86 P.3d 232 (2004). These claims are mixed questions of fact and law that are reviewed de novo. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

To prevail on a claim of ineffective assistance, a defendant must satisfy the two-prong test under Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a defendant fails to establish either prong, further inquiry is not needed. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

First, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Id. Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Second, he must show that the deficient performance was prejudicial. State v. Hendrickson, 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, "the result of the proceeding would have been different." "State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694).

Here, it was objectively unreasonable for Mr. Eberly's attorney not to object to the court's same criminal conduct ruling; particularly given the fact the court did not apply the appropriate test.

Instead of focusing on whether the crimes shared the same objective criminal intent, the trial court rather arbitrarily found there was "separate criminal conduct" and seemed to only focus on how Mr. Eberly used a firearm to gain entry into Ms. Vermillion's home. 5/19/10 RP 20-21. It is likely the trial court would have found that the burglary and assault shared the same objective criminal intent, had it been reminded of the appropriate test. Mr. Eberly would only have benefited from such a request, and could not have suffered adverse consequences.

In addition, the attorney's performance was prejudicial. Because the trial court would likely have found that the offenses were the same criminal conduct, it would have reduced Mr. Eberly's offender score by one point. That point reduction would have resulted in a substantial reduction in his standard sentencing range.

The State may argue the court was not bound to consider Mr. Eberly's convictions under the same criminal conduct standard because one of the convictions was first-degree burglary.

RCW 9A.52.050 gives a court discretion to punish or to decline to punish for two crimes when a burglary and an additional crime encompass the same criminal conduct. RCW 9A.52.050; State v. Lessley, 118 Wn.2d 773, 781-82, 827 P.2d 996 (1992); State v. Bradford, 95 Wn.App. 935,

950, 978 P.2d 534 (1999); State v. Davis, 90 Wn.App. 776, 783-84, 954 P.2d 325 (1998).

However, the statute is permissive and the trial court, here, chose not to apply it. Instead, the trial court analyzed the convictions under the same criminal conduct standard. Therefore, the court was required to use the appropriate test, as analyzed below.

2. THE TRIAL COURT DID NOT FOCUS ON THE EXTENT TO WHICH CRIMINAL INTENT, AS OBJECTIVELY VIEWED, CHANGED FROM ONE CRIME TO THE NEXT WHEN IT FOUND THE CONVICTIONS ENCOMPASSED THE SAME CRIMINAL CONDUCT.

As indicated above, a sentencing court's calculation of an offender score is reviewed de novo. However, appellate courts review a determination on same criminal conduct for an abuse of discretion or misapplication of the law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Typically, appellate courts construe RCW 9.94A.589 (1)(a) narrowly to disallow most assertions of "same criminal conduct." State v. Price, 103 Wn.App. 845, 855, 14 P.3d 841 (2000); State v. Flake, 76 Wn.App. 174, 180, 883 P.2d 341 (1994). Nonetheless, appellate courts will reverse a sentencing court's determination of same criminal conduct when there is a "clear abuse of discretion or a misapplication of the law." State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990).

Under RCW 9.94A.589 (1)(a), whenever a person is to be sentenced for two or more current offenses, the sentence range for each offense shall be determined by using all other current offenses as if they were prior convictions in calculating the defendant's offender score. The statute further provides that if some or all of the current offenses encompass the "same criminal conduct," then those current offenses "shall be counted as one crime." RCW 9.94A .589 (1)(a).

"Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589 (1)(a). Importantly, if any one element is missing, multiple offenses cannot be considered the same criminal conduct and they must be counted separately in calculating the defendant's offender score. State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Washington courts apply the test set out in State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987) to determine whether a defendant has the same criminal intent with respect to multiple crimes. State v. Garza-Villarreal, 123 Wn.2d 42, 46, 864 P.2d 1378 (1993). The Court in Dunaway required courts to focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next, in deciding if crimes encompassed the same criminal conduct. Dunaway, 109 Wash.2d at 215, 743 P.2d 1237.

The Court noted that this often includes an analysis of whether one crime furthered the other and whether the time and place of the two crimes remained the same. Id. The fact that one crime furthered commission of the other may indicate the presence of the same intent. Id.; State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). If the facts clearly demonstrate either the same objective intent or a change in objective intent, the issues will be resolved as a question of law. State v. Rodriguez, 61 Wn.App. 812, 816, 812 P.2d 868 (1991). “If the facts are sufficient to support either finding, then the matter lies within the trial court’s discretion, and an appellate court will defer ‘to the trial court’s determination of what constitutes the same criminal conduct when assessing the appropriate offender score.’ “ Id. (quoting State v. Burns, 114 Wn.2d 314, 317, 788 P.2d 531 (1990)).

In State v. Adame, 56 Wn.App. 803, 811, 785 P.2d 1144 (1990), this Court noted that when considering same criminal conduct “[i]ntent is not the particular *mens rea* element of the particular crime, but rather is the offender’s objective criminal purpose in committing the crime.”

Here, according to Ms. Vermillion’s account, there was neither a break in time between the two offenses during which Mr. Eberly’s criminal objective could have changed substantially, nor was there time for him to form a new criminal intent. Moreover, when Mr. Eberly shot through the door and then forced his way into her home, his objective criminal purpose did not change from one crime to the next. According to

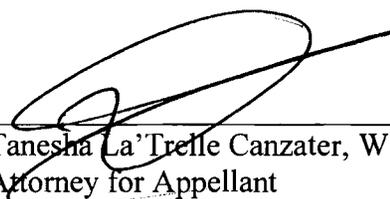
Ms. Vermillion's version of events, Mr. Eberly's objective criminal purpose was to inflict on her, bodily harm.

Moreover, Ms. Vermillion's version of events strongly suggests that the first-degree burglary only served to further the second-degree assault. Therefore, the trial court should have found the first-degree burglary conviction and the second-degree assault convicted encompassed the same criminal conduct. The only appropriate remedy is to remand for resentencing.

V. CONCLUSION

For the reasons set forth above, Mr. Eberly respectfully asks this Court to reverse the trial court's decision and to remand for resentencing.

Respectfully submitted this 4th day of MAY, 2011.



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STATE OF WASHINGTON
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DECLARATION OF MAILING

May 4, 2011

Court of Appeals Case No. 290913
Superior Court Case No. 09-1-00093-4
Case Name: *State of Washington v. John Lewis Eberly, Jr.*

I declare under penalty and perjury of the laws of the State of Washington that on **Wednesday, May 4, 2011** I filed an *AMENDED APPELLANT'S OPENING BRIEF* plus one copy with Division Three Court of Appeals and served copies of the same on the following counsel of record or other interested party by depositing in the United States of America mails an addressed postage paid envelope to the following:

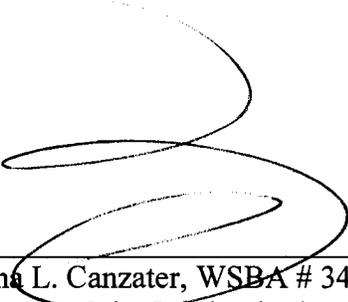
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¹ I also served counsel with a CD disk that contains verbatim reports of proceedings filed in this case.

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