

**FILED**

SEP 08, 2015

Court of Appeals

Division III

State of Washington

COA No. 32960-7-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

GENE CAMARATA, Appellant.

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RESPONDENT'S BRIEF

Kittitas County Prosecutor's Office  
205 W. 5<sup>th</sup> Street, Suite 213  
Ellensburg, Washington 98926  
509-962-7520

TABLE OF CONTENTS

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ANSWERS TO ISSUES & ASSIGNMENTS OF ERROR ..... 3-4

STATEMENT OF CASE ..... 3-11

ARGUMENT.....11-34

FIRST ISSUE .....11-17

SECOND ISSUE.....17-22

THIRD ISSUE.....22-25

FOURTH ISSUE.....25-26

FIFTH ISSUE.....26-34

CONCLUSION ..... 34-35

## **ANSWERS TO ISSUES AND ASSIGNMENTS OF ERROR**

1. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND THAT THE APPELLANT GENE CAMARATA KNOWINGLY PROVIDED A FALSE ADDRESS WHEN HE REGISTERED TO VOTE AND DECLARED HIS CANDIDACY FOR DEMOCRAT PRECINCT COMMITTEE OFFICER (PCO) BY USING HIS FORMER RESIDENTIAL ADDRESS [1001 E 8<sup>th</sup> Ave. (#4)] WHICH HAD BEEN BURNED DOWN BY THE FIRE DEPARTMENT FOUR YEARS EARLIER.
2. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO FIND THAT THE APPELLANT KNOWINGLY PROVIDED A FALSE RESIDENTIAL ADDRESS ON HIS APPLICATION FOR VOTER REGISTRATION AND DECLARATION OF CANDIDACY “IN KITTITAS COUNTY” REGARDLESS IF THE APPELLANT WAS PHYSICALLY IN “KITTITAS COUNTY” BECAUSE THE SECRETARY OF STATE AUTHORIZES A PERSON TO REGISTER TO VOTE AND DECLARE HIS CANDIDACY FOR PUBLIC OFFICE ELECTRONICALLY VIA THE WASHINGTON SECRETARY OF STATE WEBSITE IN OLYMPIA WHICH THEN FEEDS THE INFORMATION TO THE SPECIFIC JURISDICTION WHERE THE PERSON INTENDS TO REGISTER TO VOTE AND DECLARE HIS CANDIDACY FOR PUBLIC OFFICE.
3. THE PROSECUTOR DID NOT COMMIT FLAGRANT PREJUDICIAL MISCONDUCT BY ARGUING IN CLOSING THAT THE STATE DID NOT NEED TO PROVE THAT THE APPELLANT WAS PHYSICALLY “IN KITTITAS COUNTY” WHEN HE REGISTERED TO VOTE AND DECLARED HIS CANDIDACY FOR PUBLIC OFFICE ELECTRONICALLY, VIA THE SECRETARY OF STATE WEBSITE IN OLYMPIA, BECAUSE AS ARGUED

ABOVE, THE PROSECUTOR'S ARGUMENT WAS GROUNDED IN LAW, AND THE TRIAL COURT HAD ALREADY ADDRESSED THE ISSUE AFTER THE APPELLANT MOVED FOR A DIRECTED VERDICT AND JUDGMENT OF ACQUITTAL – BOTH OF WHICH WERE DENIED AFTER EXTENSIVE ARGUMENT BY BOTH SIDES AND QUESTIONING FROM THE TRIAL COURT.

4. THE APPELLANT'S PUBLIC RIGHT TO TRIAL WAS NOT VIOLATED BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR FOLLOWING THE WASHINGTON SUPREME COURT'S DECISION IN STATE V. LOVE, NO. 89619-4 (JULY 16, 2015).
5. THE APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED, DURING IN JURY SELECTION, IN EXCUSING A JUROR WHO REPORTED TO THE BAILIFF THAT SHE WAS A CONVICTED FELON WITHOUT INQUIRING WHETHER HER CIVIL RIGHTS HAD BEEN RESTORED IS NOT SUBJECT TO REVIEW BECAUSE THE APPELLANT DID NOT PRESERVE THE ISSUE FOR APPEAL WHEN HE AGREED THAT THE JUROR WAS PROBABLY NOT QUALIFIED TO SIT ON THE JURY AND ULTIMATELY DEFERRED TO THE COURT.
  - A. NEITHER THE APPELLANT NOR JUROR #36'S CONSTITUTIONAL RIGHTS WERE IMPLICATED BECAUSE THE APPELLANT FAILED TO PRESERVE THE ISSUE ON APPEAL.

### STATEMENT OF THE CASE

On June 12, 2013, the State of Washington charged the Appellant Gene Camarata with Violation of the Voter Registration Law and Providing False Information on Declaration of Candidacy. CP 5-7. The following events constitute the relevant statement facts for purposes of this appeal.

On November 20, 2014, the case proceeded to trial. 2 RP 3.

During jury selection, Juror #36 told the bailiff that she was a convicted felon. The bailiff told the trial court. The trial court told the parties. All noted that Juror #36 did not answer the questionnaire asking if she was on supervision with the Department of Corrections.

The State moved to strike given how far down she was on the list of potential jurors who could realistically be seated. Defense counsel advised the court that he did not know if Juror #36 was or was not qualified to serve on the jury. Later the same day, the trial court asked the parties to address whether Juror #36 should be excused or questioned further. Defense counsel advised: "I'll defer to the court . . . I don't really know. I think the presumption is that it's a good chance that she's not qualified." The State agreed. Juror #36 was never questioned. The trial court excused Juror #36. 3 RP 4-73.

In its opening statement, the State told the jury it anticipated that it would show that the Appellant registered to vote and filed his declaration of candidacy for Democratic Precinct Committee Officer (PCO), Precinct 22 “here in Ellensburg,” utilizing a false address: 1001 E 8<sup>th</sup> Ave. (#4), Ellensburg, Washington 98926. 4 RP 33.

At trial, Kittitas County Auditor Jerry Pettit testified about the functions of auditor. He testified about the Voter Registration Data Base maintained by the Washington Secretary of State’s Office to which all counties have access. He testified that a person can register to vote in person at the auditor’s office, by mail, or via the Washington Secretary of State website. He testified about all of the information a person who registers to vote must provide to include a residential address. He testified about the importance of providing a residential address. He testified that it is just as critical for a person filing for public office to provide the correct residential address to determine eligibility to campaign for that office. 4 RP 44-89.

Kittitas County Election Supervisor Sue Higginbotham testified that she was very familiar with the Appellant through the course of her 21 years of employment. She testified that, in her capacity of employment, she has access to the Washington Secretary of State Voter Registration database and the Washington Election Information database to search for

persons who have registered to vote and declared candidacy for public office in Kittitas County.

She testified that between April and May 2012, she received several calls from the Appellant, inquiring about what public offices were open for which he could file a declaration of candidacy. She testified that the Appellant told her that he may utilize the address of 1001 E 8<sup>th</sup> Ave. (#4) Ellensburg, Washington to register to vote and declare for public office. She testified that she subsequently searched the databases and discovered that a person by the name of Gene Camarata had electronically registered to vote and submitted a declaration of candidacy providing the address of 1001 E 8<sup>th</sup> Ave. (#4). 4 RP 96-138.

Kittitas County Assessor Marsha Weyand testified that in conducting a property search in Kittitas County, the Appellant did not own any property within the county. RP 140-147.

Kittitas Valley Fire and Rescue Captain Joel Delvo, who has lived in Kittitas County his entire life, testified that all of the residences in the block of 1001 E. 8<sup>th</sup> Ave., to include (#4), were burned to the ground as a part of a controlled burn in December 2008. 5 RP 150-162. He testified that following the controlled burn, the lot served as a parking area for the Kittitas County Fairgrounds. 5 RP 150-162.

Washington Secretary of State Elections Systems Specialist Nicholas Pharris testified that his office maintains both the voter registration and elections databases in Cheney, Washington. He testified that since 2008, a person has been able to register to vote and file a declaration of candidacy for public office, on-line, via the Washington Secretary of State website.

He testified that databases are linked to the Washington Department of Licensing in an effort to provide the most current information available. He testified about the actual on line forms which must be used. He testified that the program the Washington Secretary of State uses interfaces with each county's databases.

Mr. Pharris also showed the jury, in court, how a person would both register to vote and file a declaration of candidacy on-line via the Washington Secretary of State website. He testified that a person who both wants to register to vote and file a declaration of candidacy must input his residential address and certify that it is correct. Last, Mr. Pharris testified that a person can electronically register to vote and file a declaration of candidacy from anywhere but must file in a specific county.

4 RP 164-204.

Kittitas County Fairgrounds Director Lisa Young testified that the Kittitas County Fairgrounds owned the land on which 1001 E 8<sup>th</sup> Ave. (#4)

used to exist. She testified that the Appellant's address has never been a park or a shelter for homeless people with the exception of county emergencies. 5 RP 211-217.

Last, Kittitas County Sheriff's Commander Darren Higashiyama testified that he investigated the Appellant and focused his investigation on whether the address the Appellant provided still existed. Commander Higashiyama testified that he knew from his time as both a county resident and sheriff's deputy that the residence did not exist. He testified that, during the course of his investigation, he fielded several telephone calls from the Appellant in which the Appellant admitted that he had utilized 1001 E 8<sup>th</sup> Ave., (#4) to both register to vote and file his declaration of candidacy for PCO. 5 RP 36-80

The State introduced into evidence the Appellant's electronic on-line voter registration application and declaration of candidacy for PCO, the Appellant's Washington State Driver's License, the training burn packet showing the demolition of the Appellant's former residence, and photographs of the Appellant's residence being burned and what it looked like after the burn. Plaintiffs Exhibits 1 (A-C), 2 (A-B), 3 (A-C), 4 (A-D), 5, and 6 (A-C) to be filed with the Court of Appeals as part of the Clerk's Exhibit List 91.

In addition, the State introduced several letters sent to and received from the Appellant none of which indicated the Appellant resided at 1001 E. 8<sup>th</sup> Ave. #4. Plaintiffs Exhibits 7-11 to be filed with the Court of Appeals as part of the Clerk's Exhibit List 91.

After the State rested its case, the Appellant brought motions for a directed verdict and judgment of acquittal arguing that the State had failed to prove that the Appellant was "in Kittitas County" when he electronically registered to vote and filed his declaration of candidacy. 5 RP 82.

Both sides presented their respective arguments to the court as both have made to this court, stated in both the Appellant's opening brief and the State's response which follows its statement of the case. 5 RP 82-107.

After hearing, at length from both sides, the trial court denied the Appellant's motions. 5 RP 107.

During closing arguments, the prosecutor argued the Appellant's acts of electronically submitting his application to register to vote and declaration of candidacy, via the Washington Secretary of State website, maintained in Cheney, constituted filing the same "in Kittitas County." 5 RP 151-170.

The jury deliberated. 5 RP 196.

During jury deliberation, the jury asked a question about whether the Appellant needed to be physically present “in Kittitas County.” 5 RP 197.

The trial court instructed the jury to refer and follow the jury instructions provided. 5 RP 199.

The jury found the Appellant guilty. 5 RP 205.

Following the jury’s finding of guilt, the Appellant brought a Motion for Judgment Notwithstanding the Verdict arguing the issues as presented in Appellant’s brief. 6 RP 3-24.

Similarly, the State responded as it did when it rested its case. 6 RP 3-24.

The trial court denied the Appellant’s motion. 6 RP 24.

This appeal followed.

### ARGUMENT

- 1. THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND THAT THE APPELLANT GENE CAMARATA KNOWINGLY PROVIDED A FALSE ADDRESS WHEN HE REGISTERED TO VOTE AND DECLARED HIS CANDIDACY FOR DEMOCRAT PRECINCT COMMITTEE OFFICER (PCO) BY USING HIS FORMER RESIDENTIAL ADDRESS [1001 E 8<sup>th</sup> Ave. (#4)] WHICH HAD BEEN BURNED DOWN BY THE FIRE DEPARTMENT FOUR YEARS EARLIER.**

Evidence is sufficient if a “rational fact finder could have found

the essential elements of the crime beyond a reasonable doubt.” State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010) (quoting State v. Wentz, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant, when challenging sufficiency of evidence, admits the truth of the State’s evidence and all reasonable inferences therein. Id. at 35. A distinction between direct and circumstantial evidence is not made; circumstantial evidence is considered “equally reliable” in determining sufficiency. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The court gives the fact finder deference to any issue of witness credibility, persuasiveness of evidence, or conflicting testimony. State v. Thomas, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). All evidence is viewed in the light most favorable to the state. State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

On a claim of insufficiency of the evidence, the reviewing court considers whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 29A.84.130 (1) or (2) provides that a person commits the crime of Violation of Voter Registration Law when he knowingly provides false information on an application for voter registration. RCW

29A.84.311 provides that a person commits the crime of Providing False Information on Declaration of Candidacy when he knowingly provides false information on his declaration of candidacy for public office.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when:

(H)e or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact. When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact. WPIC 10.02.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. WPIC 10.01.

RCW 29A.08.010 provides that:

The minimum information provided on a voter registration application must include name, residential address, date of birth, *a signature attesting to the truth of the information provided on the application*, and a check or indication in the box confirming the individual is a United States citizen (*italics added*). The residential address provided must identify the actual physical residence of the residence in Washington, as further defined in these jury instructions, with detail sufficient to allow the voter to be assigned to the property precinct and to locate the voter to confirm his residence for purposes of verifying qualification to vote under Article VI, Section 1 of the State Constitution. A residential address may be either a traditional address or a nontraditional address. A traditional address consists of a street number and name, optional apartment number or unit number, and city or town, as assigned by a local government, which serves to identify the parcel or building of residence and the unit if a multiunit residence. A nontraditional address consists of a narrative description of the location of the voter's residence, and may be used when a traditional address has not been assigned to the voter's residence.

RCW 29A.04.151 provides that:

“Residence” for the purposes of registering and voting means a person’s permanent address where he physically resides and maintains his abode. However, no person gains residence by reason of his presence or loses his residence by reason of his absence while (1) employed in the civil or military service of the this State or of the United States, (2) engaged in the navigation of the waters of this State or the United States or the high seas, (3) a student any institution of learning, or (4) confined in public prison.

RCW 29A.08.112 provides that

No person registering to vote, who meets all the qualifications of a registered voter in the State of Washington, shall be disqualified because he lacks a traditional residential address. A voter who lacks a traditional residential address will be registered and assigned to a precinct based on the location provided. A voter who resides in a shelter, park, motor home, marina, or other identifiable location that the voter deems to be his residence lacks a traditional address. A voter who registers under this section must provide a valid mailing address, and must still meet the requirement in Article VI, Section 1 of the State Constitution that he live in the area for at least 30 days before the election. A person who has a traditional residential address must use that address for voter registration purposes and is not eligible to register under this section.

Washington Constitution Article VI, Section 1 provides that all persons of the age of 18 years or over who are citizens of the United States and who have lived in the state, county, and precinct 30 days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, Section 3 of this Constitution, shall be entitled to vote at all elections.

RCW 29A.24.031 provides that the candidate must sign a declaration of a candidacy stating that the information provided on the form is true. In addition, in the case of a declaration of candidacy filed “electronically,” submission of the form constitutes agreement that the information provided with the filing is “true.”

In this case, the evidence was overwhelming that the Appellant registered to vote in Kittitas County and filed his declaration of candidacy for precinct committee officer for the 22<sup>nd</sup> precinct in Ellensburg utilizing a false residential address: 1001 E 8<sup>th</sup> Ave., #4.

The evidence was undisputed that the Appellant once resided at that address before the entire building, to include unit #4, was burned to the ground, as part of a controlled burn, and turned into a parking lot.

Yet, the Appellant peddles an absurd argument that the State failed to present sufficient evidence that the address cannot be proven false except by proving the person did not reside there for 30 days before voting. This argument might be persuasive if the Appellant had not listed his unit (#4) on both his application for voter registration and declaration of candidacy.

The Appellant also seems to ignore this court's ruling in Camarata v. Kittitas County, 186 Wn.App. 695 (2015) which addressed the same issue except within the context of a citizen's voter registration challenge to the Appellant's use of the address 1001 E 8<sup>th</sup> Ave., (#4).

In Camarata, Kittitas County Auditor Jerry Petite canceled Appellant Camarata's voter registration, finding that there was substantial evidence to support that the address, at which the Appellant registered,

was a vacant lot used for parking at the Kittitas County Fairgrounds. In supporting the auditor's findings of facts, this court found that:

**The 1001 E 8<sup>th</sup> Ave. (#4) address is not an address to which mail can be sent because the building was demolished and there is no longer an address designated as 1001 E 8<sup>th</sup> Ave. (#4).**

In Camarata's civil action, Mr. Camarata argued that the Auditor could not cancel his voter registration because he had a nontraditional residence, much like this case. However, as the court pointed out:

**Mr. Camarata did not actually register a nontraditional address; he registered a traditional address that did not exist. Moreover, Camarata did not reside there.**

Yet, in this case, the Appellant seems to want to ignore that he provided a non-traditional address by arguing that "1001 E 8<sup>th</sup> Ave." is an identifiable location. That is not in dispute. However, the Appellant seems to want to omit that he included his former unit (#4) – a unit to a building which was burned down years prior to Mr. Camarata's filings.

The Appellant argues that when he deemed his old address as his address it remained his residence for purpose of voter registration until a new residence is established, and, being homeless, he could register to vote at any address. This court found that those arguments are "wrong." This court held that a person who loses his residential status must meet one of the statutory exceptions.

It is ironic that the Appellant is asking this court to find that there was insufficient evidence to prove that he knowingly provided a false address in his application for voter registration and declaration of candidacy when this court has already addressed the issue.

While the civil and criminal venues are two different actions, with different standards of proof, the facts in evidence in both cases are identical, and the holding of this court in Camarata boils down to one simple precept:

The Auditor canceled Mr. Camarata's right to vote because he did not reside at 1001 E. 8<sup>th</sup> Ave. (#4). And the jury found Mr. Camarata guilty because the evidence showed that he alone knowingly provided an address he knew did not exist by all available evidence.

Therefore, the Appellant's challenge for insufficiency of evidence in his criminal case should also be denied.

**2. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO FIND THAT THE APPELLANT KNOWINGLY PROVIDED A FALSE RESIDENTIAL ADDRESS ON HIS APPLICATION FOR VOTER REGISTRATION AND DECLARATION OF CANDIDACY "IN KITTITAS COUNTY" REGARDLESS IF THE APPELLANT WAS PHYSICALLY IN "KITTITAS COUNTY" BECAUSE THE SECRETARY OF STATE AUTHORIZES A PERSON TO REGISTER TO VOTE AND DECLARE HIS CANDIDACY FOR PUBLIC OFFICE ELECTRONICALLY VIA THE WASHINGTON SECRETARY OF STATE WEBSITE**

**IN OLYMPIA WHICH THEN FEEDS THE  
INFORMATION TO THE SPECIFIC  
JURISDICTION WHERE THE PERSON INTENDS  
TO REGISTER TO VOTE AND DECLARE HIS  
CANDIDACY FOR PUBLIC OFFICE.**

RCW 29A.08.123 provides that a person who has a valid Washington state driver's license or state identification card may submit a voter registration application “**electronically on the secretary of state's web site.**” Subsection (4) provides that a voter registration application submitted “electronically” is otherwise considered a registration by mail.

RCW 29A.24.040 provides that a candidate for public office may file his declaration of candidacy for an office “by **electronic** means on a system specifically designed and authorized by a filing officer to accept filings.”

RCW 29A.08.125 provides that the Office of the Secretary of State shall maintain “a statewide voter registration database . . . This database must be a centralized, uniform, interactive **computerized statewide** voter registration list that contains the name and registration information of every registered voter in the state.” Subsection (13) provides that “(e)ach county auditor shall allow **electronic** access and information transfer between the county's voter registration system and the official statewide voter registration list.” The Office of the Secretary of State is located in Olympia, Washington.

RCW 29A.04.025 defines the “county auditor” as the one who has the “overall responsibility to maintain voter registration and to conduct state and local elections in a charter county.”

It is clear that the completion of the voter registration process and declaration of candidacy for public office occurs in the auditor’s office in the county *in* which the applicant and/or declarant intends to vote and/or declare his candidacy for public office. Therefore, in this case, the Appellant’s acts of registering to vote and declaring his candidacy for Democrat Precinct Committee Officer occurred *in* Kittitas County, regardless of where the Appellant’s computer was physically located when he pressed “send.”

It is analogous to purchasing a product from an on-line retailer, like Amazon. A customer pays tax based upon the tax rate at the shipping destination not from where the product was shipped nor to where the customer was located at the time he made the on-line purchase.

In the case of voter registration and declaring for public office, if the element “in Kittitas County” had to refer to the location of the voter and candidate as opposed to the location of the particular Auditor’s office, *in* the county of origin, then a voter and candidate could immunize himself from voter fraud prosecution by simply registering to vote and declaring his candidacy for public office from another state or country.

However, the legal reality of the Secretary of State's *website* encompasses the fact that a person registering to vote and declaring his candidacy for public office may in fact do so from another state or country.

The Appellant unduly relies on State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) to argue that there was insufficient evidence to prove that the Appellant was "in Kittitas County" when he registered to vote and declared his candidacy for PCO.

However, Hickman is totally distinguishable from this case. In Hickman, the defendant was prosecuted for insurance fraud "in Snohomish County" after the defendant made a telephone call from Hawaii to his insurance company in King County regarding a vehicle that was located in Snohomish County. Clearly, the actual fraud occurred in Hawaii. The vehicle was only located in Snohomish county.

In this case, the Appellant knowingly committed his fraud "in Kittitas County" where he intended to register to vote and declare his candidacy for public office regardless of where in the world he actually was when he registered to vote and declared his candidacy for public office. It is undisputable that voting and running for public office are inherently geographic specific, breaking down by county.

The Appellant is anchored to the idea that the element requires the State to prove that the Appellant was physically “in Kittitas County,” akin to pre-internet crimes and more common law crimes like burglary, rape, and robbery. Ironically, the common law crime of burglary highlights the residential component as much as the residential component to register to vote and declare for public office. The Appellant’s argument simply does not keep pace with changing technology that our Legislature clearly embraced when it provided that an eligible Washington resident could register to vote and declare candidacy for public office electronically, on-line, via the Washington Secretary of State’s website, maintained in Cheney, *in the county* in which the resident intends to vote and declare his or candidacy for public office.

For example Division III’s electronic portal to file this responsive brief. This State actor could file this brief from anywhere in the world. Therefore, hypothetically, if there was a crime for filing a “false brief,” could Division III ever prosecute the crime if it had to prove where the state actor physically was when he pressed “send” versus just proving that the state actor filed the brief *in Division III*?

Ironically, the Appellant’s fraud would have never been discovered in any other county except in Kittitas County because that is where he registered to vote and declared his candidacy for public office and because

the Secretary of State's Office in Olympia does not screen for voter fraud. It falls on each individual elected Auditor, *in* each county, to raise the issue.

Therefore in prosecuting voter fraud case, it is necessary to include the county in which the crime occurred.

**3. THE PROSECUTOR DID NOT COMMIT FLAGRANT PREJUDICIAL MISCONDUCT BY ARGUING IN CLOSING THAT THE STATE DID NOT NEED TO PROVE THAT THE APPELLANT WAS PHYSICALLY "IN KITTITAS COUNTY" WHEN HE REGISTERED TO VOTE AND DECLARED HIS CANDIDACY FOR PUBLIC OFFICE ELECTRONICALLY, VIA THE SECRETARY OF STATE WEBSITE IN OLYMPIA, BECAUSE AS ARGUED ABOVE, THE PROSECUTOR'S ARGUMENT WAS GROUNDED IN LAW, AND THE TRIAL COURT HAD ALREADY ADDRESSED THE ISSUE AFTER THE APPELLANT MOVED FOR A DIRECTED VERDICT AND JUDGMENT OF ACQUITTAL – BOTH OF WHICH WERE DENIED AFTER EXTENSIVE ARGUMENT BY BOTH SIDES AND QUESTIONING FROM THE TRIAL COURT.**

To establish that the prosecutor has committed misconduct during closing argument, the defendant must show that the prosecutor's remarks were both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). A prosecuting attorney commits misconduct by misstating the law. State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008). If it is found that the prosecutor has misstated the law, then the court must

determine whether the defendant was prejudiced under one of two standards of review. “If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” In the case of an objection, then the standard for review is whether there was a substantial likelihood that the misconduct affected the jury verdict.

In this case, the Appellant objected. However, the question is whether the prosecutor’s remarks were improper *if* he misstated the law. Clearly, there is no way that the prosecutor’s remarks were improper because, as argued above, it is the State’s position that the laws criminalizing voter registration and election fraud encompass that the crimes occur *in the county in which the offender registers to vote and declares his candidacy* for public office, regardless of where the offender is physically at when he electronically files. In addition, the trial court had already denied the Appellant’s motion for a directed verdict and judgment of acquittal based upon the same arguments the Appellant makes this appeal.

Therefore, even if this court held that the State had to prove that the Appellant was physically “in Kittitas County,” then this court would invariably have to find that the trial court had improperly denied the Appellant’s motions and thereby improperly permitted the prosecutor to argue the venue element as argued above. To state the obvious, if the trial

court had granted the Appellant's motions, the prosecutor would have never been able to give his closing statement.

The Washington Supreme Court's recently addressed prosecutorial misconduct in State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015). In Allen, the Washington Supreme Court reversed Allen's convictions for being an accomplice the murder of four police officers after the prosecutor, in closing, totally misstated the accomplice liability statute and admitted the same in its briefing to the court.

In this case, the State is not admitting that it misstated the law regarding where a person must register to vote and declare his candidacy for public office. The State has argued that a person who chooses to register to vote and declare his candidacy for office electronically, via the Washington Secretary of State website, from a computer located outside this state, is registering to vote and declare his candidacy in the county in which the person intends to vote and run for public office.

The State concedes that the jury obviously reached the same conclusion about the law after hearing arguments from both sides, evidenced by its question regarding venue. Therefore, the State would also have to concede that the prosecutor's arguments had a substantial likelihood of affecting the jury's verdict. However, the State would not concede that it then follows that the State committed prosecutorial

misconduct in making the argument because it was permissible argument. Again, the State would have never been able to argue its case in closing, as it did, if the court had granted the Appellant's motion to dismiss the case.

Instead, the State urges this court to view the jury's verdict, finding the Appellant guilty, as proof positive of the correct interpretation of our State's laws governing voter registration and declarations of candidacy for public office, and sustain the jury's convictions.

**4. THE APPELLANT'S PUBLIC RIGHT TO TRIAL WAS NOT VIOLATED BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR FOLLOWING THE WASHINGTON SUPREME COURT'S DECISION IN STATE V. LOVE, NO. 89619-4 (JULY 16, 2015).**

The Appellant argues that his public right to trial was violated because the trial court conducted peremptory challenges at sidebar. In support of his position, the Appellant argued that Division II's holding in State v. Anderson, 187 Wn.App. 706, 350 P.3d 255 (2015), holding that for cause challenges conducted at sidebar violated the public right to a trial, should be extended to peremptory challenges.

The Appellant filed his opening brief on July 8, 2015. However, on July 15, 2015, the Washington Supreme Court held that the public right to trial is not violated when for cause challenges and peremptory challenges

conducted are conducted at a sidebar in open court. State v. Love,  
Supreme Court of Washington, No. 89619-4 (July 16, 2015).

Therefore, this issue seems to have been rendered moot.

**5. APPELLANT’S CLAIM THAT THE TRIAL COURT  
ERRED, DURING IN JURY SELECTION, IN  
EXCUSING A JUROR WHO REPORTED TO THE  
BAILIFF THAT SHE WAS A CONVICTED FELON  
WITHOUT INQUIRING WHETHER HER CIVIL  
RIGHTS HAD BEEN RESTORED IS NOT SUBJECT TO  
REVIEW BECAUSE THE APPELLANT DID NOT  
PRESERVE THE ISSUE FOR APPEAL WHEN HE  
AGREED THAT THE JUROR WAS PROBABLY NOT  
QUALIFIED TO SIT ON THE JURY AND  
ULTIMATELY DEFERRED TO THE COURT.**

The 6<sup>th</sup> Amendment of the U.S. Constitution provides that “(i)n all  
criminal prosecutions, the accused shall enjoy the right to a speedy and  
public trial, by an *impartial jury* . . . (emphasis added).”

Article I, Section 22 of Washington State Constitution provides that  
in criminal prosecutions, the accused shall have the right “to have a  
speedy public trial by an *impartial jury of the county in which the offense  
is charged to have been committed*.”

RCW 2.36.070 provides that a person shall be competent to serve as  
a juror in the State unless that person “(h)as been convicted of a felony  
and has not had his or her civil rights restored.”

RCW 2.36.080 provides that “(i)t is the policy of this state all persons selected for jury service be selected at a random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity . . . to be *considered* for jury service . . . “

RCW 2.36.100 provides that “(e)xcept for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court . . .”

CrR 6.4 provides that any party may challenge a juror for cause.

Specific grounds for a challenge must be given or it is deemed waived. State v. Lewis, 9 Wn.App. 839, 515 P.2d 548 (1973). A trial court’s refusal to sustain a proper challenge for cause is only prejudicial if the party must then use one of its peremptory challenges. State v. Patterson, 183 Wn.2d 239, 48 P.2d 193 (1935).

Recently, this court addressed the reverse situation in State v. Cleary, 166 Wn. App. 43 (2012 Division III). In Cleary, the defendant chose not to ask two jurors, who admitted to be convicted felons, if they were still on Department of Corrections Supervision. The trial court made it a point to ask defendant’s counsel if he “wanted to follow up with anything.”

Defense counsel advised the court that he was prepared to proceed. The trial court then asked: "Are you ready to call in the jury, then, Counsel? Is that all right with you? Defense counsel replied: "Yes, your Honor."

Cleary argued, for the first time on appeal, that she was entitled to a new trial because there was no showing that the jurors' civil rights had been restored. In making that argument, Cleary argued that the failure constituted manifest constitutional error that could be argued for the first-time on appeal under the 6<sup>th</sup> Amendment to the U.S. Constitution and Washington State Constitution Article I, Section 22 guaranteeing criminal defendants an impartial jury.

This court held that no manifest constitutional error could be found in the absence of a record to conclude that the jurors were unqualified. In addition, this court found, any error, even assuming error, was invited.

Both Cleary and this case demonstrate that an appellant court cannot divine the intent of the accused unless the accused preserves the issue on appeal. In Cleary, the defendant had no objection to seating two jurors who admitted on their respective questionnaires to being convicted felons without following up to determine if one or both had their civil rights restored per RCW 2.36.070.

In this case, the Appellant deferred to the court to excuse a juror who told the bailiff that she was a convicted felon rather than inquire of the juror if she had her civil rights restored.

Therefore, in both cases, in the absence of a record, this court cannot conclude whether the jurors were qualified or unqualified to serve on the respective juries. In addition, the fact that this juror was down the list of potential jurors made it less likely, at the time, that she would be picked. While the last juror to be picked was No. 39, it was reasonable for the parties to presume that Juror #36 would not be selected.

The Appellant argues that excusing Juror #36 permitted Juror #37, who the Appellant speculates had a bias against him, to be seated in the absence of any more peremptory challenges.

However, this is speculative. The fact that Juror #37 said he knew the auditor and had concerns that he could be fair but would “do (his) best” only calls for speculation as to whether Juror #37 was more partial to the state or defense. Juror #37 could have personally known the auditor but hated him and therefore was biased against the state. It is unknown.

Appellant relies on State v. Tingdale, 117 Wn.2d 595, 817 P.2d 850 (1991). However, Tingdale is distinguishable on the facts. In Tingdale, the court clerk excused three persons from the jury panel before they even

stepped foot in the courthouse. In this case, Juror #36 reported for juror duty. She then disclosed to the bailiff that she was a convicted felon.

The trial court, the prosecutor, and the defense attorney, with Appellant present, then discussed on the record, whether Juror #36 should be excused. These facts are categorically different than a court clerk excusing three potential jurors without the parties and trial court ever being involved in the process.

Last, as both the United States and Washington constitutions make abundantly clear, the accused enjoys the right to have his case heard by an "impartial jury" not an "impartial juror." Therefore, there are no constitutional implications in this case. In addition, given that the jurors in both Cleary and this case made admissions to being convicted felons, there is no ability to gauge each potential juror's impartiality or disqualification, under Washington law, without further inquiry. Therefore, the accused, who is an integral part of the jury selection process, must make a record to preserve the issue on appeal.

If the accused does not make a record as to his position on a particular juror and thereby preserve the issue on appeal, then it creates a "damned if you do (permit felons to serve on a jury), damned if you don't (permit felons to serve on a jury)." In any case on appeal, the appellant could take either position just to create an issue on appeal.

Therefore, the Appellant's claim of error, even assuming error, constitutes invited error and should be categorically denied.

**A. NEITHER THE APPELLANT NOR JUROR #36'S CONSTITUTIONAL RIGHTS WERE IMPLICATED BECAUSE THE APPELLANT FAILED TO PRESERVE THE ISSUE ON APPEAL.**

As stated in Cleary, courts have rejected arguments that *including* convicted felons on juries violate a large number of constitutional rights. Coleman v. Calderon, 150 F.3d 1105, 1117 (9<sup>th</sup> Cir. 1998) (concluding that a felon serving on a jury in violation of state statute did not violate the Sixth Amendment or the Fourteenth Amendment due process clause) reviewed on other grounds, 525 U.S. 141, 119 S.Ct. 500 (1998); U.S. v. Uribe, 890 F.2d 554 (1<sup>st</sup> Circuit 1989) (“the statutory violation – allowing a convicted felon to serve – did not implicate the fundamental fairness of the trial or the defendant’s constitutional rights”); U.S. v. Humphreys, 982 F.2d 254, (8<sup>th</sup> Circuit 1992) (“The Sixth Amendment right to an impartial jury does not require an absolute bar on felon-jurors... The guarantee of an impartial jury (protects) against juror bias. A per se rule would be appropriate only if one could reasonably conclude that felons are always biased against one party or another.”)(quoting U.S. V. Boney 298 U.S. App. D.C. 149, 158, 977 F.2d 624 (1992).

Similarly, courts have also rejected arguments that *excluding* convicted felons from serving on jurors violates a large number of constitutional rights. See, e.g., *Rubio v. Superior Court*, 24 Cal. 3d 93 , 97, 154 Cal. Rptr. 734 , 593 P.2d 595 (1979); *United States v. Greene*, 995 F.2d 793, 795-96 (8th Cir. 1993) (agreeing with other appellate courts "that the exclusion from juror eligibility of persons charged with a felony is rationally related to the legitimate governmental purpose of guaranteeing the probity of jurors" (citing cases)); *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) ("We agree with those courts that excluding convicted felons from jury service does not violate the constitutional guarantee of equal protection. The government has a legitimate interest in protecting the probity of juries. Excluding convicted felons from jury service is rationally related to achieving that purpose." Emphasis added.). See also 53 Am. U. L. Rev. 65 (2003); 73 Alb. L. Rev. 1379 (2010); 98 Minn. L. Rev. 592 (2013).

Several appellate courts have held, that the *exclusion* from juror eligibility of persons charged with a felony is rationally related to the legitimate governmental purpose of guaranteeing the probity of jurors. See, e.g., *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979); *United States v. Test*, 550 F.2d 577, 594 (10th Cir. 1976) (*en banc*); and *United States v. Lewis*, 472 F.2d 252, 256 n.4 (3d Cir. 1973); see also H.R. Rep.

No. 1076, 90th Cong., 2d Sess., *reprinted in 1968 U.S. Code Cong. and Admin. News* 1792, 1796. The trial court in this case found that the exclusion was "rationally related to the purpose of trying to achieve a reputable and reliable jury ... whose judgment society can respect."

In Munn v. State, 263 Ga.App. 821, 823, 589 S.E.2d 596 (2003), Munn claimed the trial court erred in *excusing* for cause a juror who was a convicted felon. The juror stated that he was convicted of manslaughter and was sentenced to ten years to serve five after a plea bargain. Munn argued on appeal that the court should have determined whether the *juror's civil rights* had been restored before dismissing him, just like in this case.

The court held that a criminal "defendant has no vested interest in a particular juror but rather is entitled only to a competent and impartial jury. Thus, even assuming that the trial court wrongfully dismissed the prospective juror, the error affords no ground for appeal if, in the end, [the defendant's] case was heard by a competent and unbiased jury." (Citation and punctuation omitted.) Wagner v. State, 253 Ga. App. 874, 880 (560 S.E.2d 754) (2002); Scott v. State, 219 Ga. App. 906, 907 (1) (467 S.E.2d 348) (1996).

In this case, no constitutional right can be implicated because, assuming Juror #36 was qualified to serve as a juror by RCW 2.36.070,

the disqualification criteria is by state statute not by the state or federal constitutions. In addition, other than the Appellant speculating that Juror #37 was biased against him, there is no evidence that his case was not heard by a competent and unbiased *jury*.

By extension, Juror #36 cannot argue that her “constitutional right to unbiased jury selection procedures” was violated when the Appellant failed, like in Clery, to inquire further of Juror #36 to determine if she was qualified to serve under state law.

Again presuming Juror #36 was qualified to serve as a juror, there is no stating she would have been selected as a juror. The bottom line is that the Appellant deferred to the trial court to determine whether she was qualified to serve on the jury rather than demand that the trial court question Juror#36 to determine if her civil rights had been restored.

### **CONCLUSION**

Based upon the foregoing legal analysis, the State respectfully requests that this court affirm the jury’s verdict finding the Appellant guilty for providing false information on his application for voter registration and declaration of candidacy for public office “in Kittitas County” because the traditional address the Appellant provided was non-existent, and the Appellant did not meet the exceptions for having a non-traditional address. In addition, the State did not commit prosecutorial

misconduct when it asked the jury to find the Appellant guilty of committing the crimes “in Kittitas County” because that is where the evidence showed the Appellant registered to vote and declared his candidacy for public office. Last, neither the Appellant nor Juror #36’s constitutional rights were implicated when the Appellant deferred to the court to decide whether to excuse Juror #36 after she reported to the bailiff that she was a convicted felon.

Dated this 8<sup>th</sup> day of September 2015.

Respectfully submitted,

GREG ZEMPEL  
Kittitas County Prosecuting Attorney

  
Chris Herion WSBA #30417  
Kittitas County Deputy Prosecutor

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,	)	Court of Appeals No. 32960-7-III
Respondent.	)	
	)	
GENE ANGELO CAMARATA,	)	AFFIDAVIT OF SERVICE
Appellant.	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss.  
 County of Kittitas )

The undersigned being first duly sworn on oath, deposes and states:

That on the 8<sup>th</sup> day of September, 2015, affiant an electronic copy directed to:

Renee Townsley	Eric J. Nielsen,
Court of Appeals	Nielsene@nwattorney.net
Division III	Jennifer J. Sweigert
500 N. Cedar Street	Sweigertj@nwattorney.net
Spokane, WA 99210	

containing copies of the following documents:

- (1) Affidavit of Service
- (2) Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 8<sup>th</sup> day of September, 2015, by THERESA BURROUGHS



Lorraine A Hill

NOTARY PUBLIC in and for the State of Washington.

My Appointment Expires: 09-10-17