

FILED
May 26, 2016
Court of Appeals
Division III
State of Washington

COA NO. 33933-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TORRES,

Appellant.

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

The Honorable Michael McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The police officer made a warrantless entry into appellant's home, in violation of Article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

2. Appellant was seized by the police officer in violation of Article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

3. Appellant received ineffective assistance of counsel due to counsel's failure to move to suppress evidence based on the Article I, section 7 and Fourth Amendment violations.

4. The court erred in refusing to instruct the jury that the locomotive windows did not qualify as an "operating mechanism" for the offense of sabotaging rolling stock under RCW 81.60.080(1).

5. Prosecutorial misconduct violated appellant's due process right to a fair trial.

6. The court erred in imposing drug assessment and treatment as a condition of community custody.

7. The judgment and sentence contains a clerical error in listing the total amount of legal financial obligations owed.

Issues Pertaining to Assignments of Error

1. Whether the police officer's warrantless entry and seizure of appellant in her home violated the Fourth Amendment and article I, section 7 because no exception to the warrant requirement justified those actions, requiring suppression of the confession and reversal of the convictions?

2. Whether defense counsel was ineffective in failing to move to suppress the confession based on the officer's warrantless entry and seizure because there is a reasonable probability that motion would have been granted?

3. Whether the court erred in refusing the defense request to clarify that the locomotive windows did not constitute a part of its "operating mechanism" as that term is used in RCW 81.60.080(1), where such instruction was necessary to avoid misleading the jury on what evidence it could rely on to convict?

4. Whether the prosecutor committed misconduct in closing argument in contending the locomotive windows constituted part of the "operating mechanism," thereby misstating the law and misleading the jury on what evidence it could rely on to convict?

5. Whether the community custody condition requiring appellant to obtain a drug and alcohol evaluation/treatment is invalid

because only alcohol contributed to the offense, requiring remand to strike the drug portion of the condition?

6. Whether the judgment and sentence should be corrected to reflect the correct amount of legal financial obligations owing?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Amanda Torres with sabotaging rolling stock, second degree malicious mischief and second degree burglary. CP 6-7. A jury returned guilty verdicts. CP 32-34. The court imposed a first-time offender waiver sentence, consisting of 13 days confinement. CP 44. This appeal follows. CP 55.

2. CrR 3.5 Hearing

On July 7, 2014, Sergio Reyna, deputy sheriff for Yakima County, went to 3650 Branch Road in Wapato to investigate a claim of malicious mischief that occurred overnight or over the weekend. RP¹ 5-6, 14. He met with Mr. Shreves, who showed him the damage to a locomotive. RP 7. Shreves had no idea who committed the crime. RP 15. There was no physical evidence indicating who did it. RP 15. Shreves told Reyna that he found an identification card or driver's license where there were some

¹ The verbatim report of proceedings is referenced as follows: RP - four consecutively paginated volumes consisting of 10/27/15, 10/28/15, 10/29/15, 11/13/15.

skid marks next the gate that had been forced open. RP 7-8. The license belonged to Torres. RP 8. There was no evidence the license had been in the train. RP 16. There was no indication the skid marks next to the gate were involved in the incident. RP 16.

Reyna went to the address listed on Torres's license. RP 8-9. Reyna was simply going to ask Torres if she knew where her license was. RP 9. He knocked on the closed door of the residence. RP 9, 17. A "young" female answered the door. RP 9, 17-18. He did not know how old she was. RP 16. Reyna asked if Torres was home. RP 9. The female said she was. RP 9, 16. Reyna asked to speak to Torres. RP 17. The girl let him in and led him to a downstairs bedroom. RP 9, 16, 18. The girl identified Torres to the officer. RP 18. Torres and her boyfriend were sleeping on the bed in the room. RP 9, 24. Reyna knocked on a piece of wood. RP 9. Torres got up and Reyna "walked her out" to his patrol car. RP 9. He did not recall if she appeared to want to stay in the house. RP 12. But taking her outside was Reyna's decision. RP 24. He "escorted" her outside, and that he maybe did so "hands-on." RP 18-19. He agreed he "grabbed her elbow and led her out of the house." RP 19. Reyna brought her outside the residence because there were other people inside the house; he "just figured we'd have one-on-one conversation." RP 12.

Once outside in the patrol car, Reyna told her he found her ID and asked her where he would have found it. RP 19. She did not indicate where he would have found it. RP 19. She had no idea where she lost it. RP 20. He read her the Miranda² rights. RP 9-10. Torres answered his questions. RP 12. Reyna then arrested her and took her to jail. RP 22. The above factual recitation is taken from Reyna's testimony at the hearing.

Torres also testified at the hearing. She woke up to the sound of Reyna knocking, telling her he was a sheriff and that he was looking for Amanda Torres. RP 27. There was a curtain on the doorway. RP 36. It was around 8 in the morning. RP 35. Reyna announced "Sheriff's office. I need Amanda Torres to come out." RP 36. She stumbled out of bed in the clothes she slept in, without her shoes. RP 27. She came out of the bedroom because she was scared and didn't know what was going on. RP 36. She was "halfway asleep." RP 36. Reyna escorted her upstairs: "he had me by the arm, and he told me to go with him." RP 28. Torres thought she was under arrest, and felt she had no choice but to go with the officer. RP 28-29. He told her she had to go outside with him. RP 29.

Torres's aunt arrived as Reyna was taking Torres from the house. RP 30. The aunt wanted to know why the officer was in the house, who

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

let him in, and where his warrant was. RP 30. It was her aunt's house. RP 29. The girl who answered the door was her aunt's daughter-in-law. RP 29. She was 13 or 14 years old. RP 30.

Reyna interrogated Torres in the back of the patrol car, with the door closed. RP 32-33. Reyna shut the doors to the car when her boyfriend came out with shoes for Torres. RP 39. She denied knowing what he was talking about and said she wanted a lawyer. RP 31. She maintained Reyna did not read her the Miranda rights until she was at the jail. RP 33-34.

In rebuttal, Reyna testified that Torres never asked for an attorney when she was in the patrol car and that he read the Miranda rights without interruption. RP 41. He acknowledged closing the patrol car doors when her boyfriend came out with her shoes. RP 42. But the door was open when he asked her questions. RP 42-43. The court ruled her statements were admissible, crediting Reyna's testimony that he read her the Miranda warnings and finding Torres voluntarily spoke with him. RP 47-48.

3. Trial Evidence

The Yakima Central Railroad keeps a locomotive inside a fenced area with locked gates. RP 65-66, 106-07. On Monday, July 7, 2014, employee Shreves arrived to find garbage strewn about the locomotive, multiple broken windows, and a discharged fire extinguisher. RP 105-06,

110-11. The windows were ballistic glass that meets a certain federal standard. RP 77. Air gauges were also damaged. RP 74-76, 116, 118. As explained by Shreves, the air gauges "let us know how much air we have in our reserve tanks and how much air we have applied to the brakes, not just on the locomotive, but on the train cars themselves." RP 116. Not having air gauges would present a safety issue, and would affect the stopping of the locomotive and the train. RP 116-17. He identified the air gauge as part of the operating mechanism of the locomotive. RP 117. Shreves could not recall if the needle in the gauges had been damaged, as opposed to just the glass cover being cracked. RP 126-27. Owner Paul Didelius estimated the total repair cost to be over \$10,000. RP 84.

Didelius and Shreves insisted they would not operate a locomotive that was non-compliant with federal regulations. RP 72-73, 76, 85, 89, 121, 127-28. Didelius conceded he could have run the locomotive if needed or that it was potentially possible to do so. RP 93-94.

Shreves testified that he found driver's license on the ground, which was not there on July 3 when he last worked. RP 119, 133. Shreves gave the license to Officer Reyna, who was on the scene. RP 120.

Reyna was dispatched to the scene at 7:45 in the morning. RP 143, 163. He observed the state of the locomotive and surrounding area and took photos. RP 144-45. Reyna could see the glass was broken on top of

the gauges, but could not tell the extent of the damage. RP 171-72. He was unable to locate any latent prints. RP 152.

Reyna took Torres's ID from Shreves and drove to the address listed on the ID. RP 155. He arrived at 8:30. RP 164. He knocked on the door and asked a young lady that answered if he could speak to Torres. RP 157. She let him in and led him into a downstairs bedroom. RP 157. There was a curtain rather than a door on the doorway to the bedroom. RP 158. Reyna knocked on a piece of wood. RP 158. Torres was asleep; a male was in the bedroom with her. RP 158.

Reyna asked her to get up, told her why he was there, and "escorted" her outside to his patrol vehicle. RP 158. He read her the Miranda rights. RP 158. According to Reyna, Torres said she had "made a bad decision damaging the train," that "she was there with her friends drinking, and that she was going to take full responsibility for the damage." RP 159. Torres would not tell him the names of her friends, saying she wasn't "a snitch." RP 159-60. Reyna did not use the tape recorder in his glove box to record the interrogation. RP 166. He did not take notes. RP 169-70, 177. He arrested her and took her to jail. RP 162, 164. No more investigation was done. RP 165. At trial, Reyna testified from his report, and he did not write his report until sometime later in the day following the interrogation. RP 155, 159, 169-70.

Torres took the stand in her own defense. She testified Reyna came to her house. RP 189. She did not know where he found her ID card. RP 189. She denied damaging the train. RP 191. She was still halfway asleep when he took her by the arm and took her out to the patrol car. RP 191. She denied telling Reyna that she had damaged the train or that she was there drinking with friends. RP 191, 197.

C. ARGUMENT

1. THE POLICE OFFICER VIOLATED TORRES'S CONSTITUTIONAL RIGHT TO PRIVACY IN ENTERING THE HOUSE WITHOUT A WARRANT AND SEIZING HER.

Deputy Reyna intruded into the home without a warrant to gain access to Torres, who was sleeping with her boyfriend in her downstairs bedroom. Reyna seized her in taking outside her home and placing her in his patrol car in order to interrogate her. The statements she made should have been suppressed because they are fruit of the poisonous tree. The officer violated her constitutional right to privacy in obtaining them. No exception to the warrant requirement justified the officer's actions. This manifest constitutional error can be raised for the first time on appeal. In the alternative, defense counsel was ineffective in failing to bring a suppression motion, which likely would have been granted based on prevailing law. Either way, the convictions must be reversed.

- a. **The officer's warrantless entry into the home is per se illegal and constitutes an error of constitutional magnitude that may be raised for the first time on appeal.**

The Fourth Amendment to the United States Constitution and Article I section 7 of the Washington Constitution prohibit unlawful searches and seizures. Article I, section 7 provides greater protection than the Fourth Amendment because it focuses on the disturbance of private affairs rather than unreasonable searches and seizures. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). As a general rule, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within a specific exception to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). "The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005).

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting United States v. U.S. District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)). "[A] citizen's privacy is most protected in his or her home, and any intrusion into the home without a warrant is per se

unreasonable." State v. Hatchie, 161 Wn.2d 390, 397, 166 P.3d 698 (2007).

Defense counsel did not challenge the legality of the warrantless entry into Torres's home and her warrantless seizure at the trial level. Manifest errors affecting a constitutional right, however, may be raised for the first time on appeal under RAP 2.5(a)(3). Search and seizure challenges fall under the rubric of the rule. State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011). Torres's claims of error under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution constitute issues of "constitutional magnitude." Jones, 163 Wn. App. at 360. An error is manifest if it has practical and identifiable consequences or causes actual prejudice to the defendant. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). The practical and identifiable consequence, and the actual prejudice to Torres, is that she could not have been convicted absent her incriminating confession, which should have been suppressed as fruit of the poisonous tree due to the constitutional violation.

b. The girl's apparent consent to enter the home was non-binding on Torres under the common authority doctrine.

Consent is an exception to the warrant requirement. State v. Ryland, 65 Wn. App. 806, 808, 829 P.2d 806 (1992) (" a warrantless arrest

based on a consensual entry is permitted under Payton and the relevant Washington authorities."). The State must establish an exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Deputy Reyna went to Torres's home, using the address listed on her identification card. RP 8-9. A girl of about 13 years of age answered the door in response to the officer's knocking. RP 9, 17-18, 30. She was the aunt's daughter-in-law. RP 29. Reyna testified she let him into the house. RP 9, 16, 18. Assuming *arguendo* the girl was a cohabitant, and further assuming a child can give lawful consent to enter and seize an adult, she had no authority to consent to the officer's entry because Torres was in the home at the time.

In search and seizure cases involving cohabitants, the Supreme Court has adopted the common authority rule. Morse, 156 Wn.2d at 7. Under the common authority doctrine, "[o]ne who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control." Id. at 4-5. Consent based on apparent authority is not an exception to the warrant requirement under article I, section 7 of the Washington State Constitution. Id. at 12. "When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained." Id. at 15.

Torres was present. But the officer made no attempt to obtain her consent prior to entering. Thus, even if the girl consented to the entry, the officer did not ensure that Torres validly consented, which is a prerequisite to a lawful, warrantless entry. As a result, the officer acted illegally in entering the house. State v. Williams, 148 Wn. App. 678, 689, 201 P.3d 371 (2009) (holding warrantless entry by police officers into defendant's hotel room was not justified by consent of another person in room).

- c. The police officer unlawfully seized Torres in violation of article I, section 7 and the Fourth Amendment because there is no such thing as a lawful Terry stop inside the home.**

One exception to the warrant requirement occurs where a police officer makes a brief investigatory seizure, commonly known as a Terry stop. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010).

An investigative detention constitutes a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." Harrington, 167 Wn.2d at 663 (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). An encounter between

a citizen and the police is not consensual unless a reasonable person under the circumstances would feel free to walk away. Harrington, 167 Wn.2d at 663.

Deputy Reyna seized Torres. She was asleep in her bedroom with her boyfriend when Reyna showed up at the doorway, knocked to wake her up, physically escorted her out of the house before she even had a chance to put her shoes on, and placed her in his patrol car to interrogate her. RP 9, 18-19, 24, 42, 157-58. Reyna was clear that it was his decision to remove her from the house. RP 24.

This was no mere social contact. Deputy Reyna went to the home for the express purpose of investigating the crime associated with the damaged locomotive. See Harrington, 167 Wn.2d at 664 (mere social contact between a police officer and a citizen "does not suggest an investigative component."). After rousting her from the privacy of her bedroom, he physically directed her outside, removing her from the protective sanctity of her home. See State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (show of authority constituting seizure includes "some physical touching of the person of the citizen."). Under the circumstances, a reasonable person in Torres's situation would not feel free to terminate her encounter with the police officer and leave.

The officer's seizure of Torres was unjustified because the Terry stop exception does not apply inside the home. Terry contemplates a seizure in public. See Terry, 392 U.S. at 9, 12-13 (discussing "street encounters"); United States v. Winsor, 846 F.2d 1569, 1576 (9th Cir. 1988) ("the Supreme Court has defined a minimally intrusive *seizure* as one that occurs in public and is brief"); State v. Belanger, 36 Wn. App. 818, 820, 677 P.2d 781 (1984) ("not every public street encounter between a citizen and the police rises to the stature of a seizure. Law enforcement officers do not 'seize' a person by merely approaching that individual on the street or in another public place, or by engaging him in conversation.").³

This makes sense because "[c]onstitutional protections of privacy are strongest in the home." State v. Ruem, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013). For this reason, "searches and seizures in public places are treated differently than searches and seizures occurring in the home." State v. Young, 123 Wn.2d 173, 189, 867 P.2d 593 (1994). "[T]he Fourth

³ See also State v. Wheeler, 43 Wn. App. 191, 197, 716 P.2d 902 (1986) ("In a typical street encounter Terry does not permit a frisk based simply on a 'generalized suspicion' that a suspect is dangerous."), aff'd, 108 Wn.2d 230, 737 P.2d 1005 (1987); Armenta, 134 Wn.2d at 11 ("a police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention."); Harrington, 167 Wn.2d at 665 ("effective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the streets.").

Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." State v. Holeman, 103 Wn.2d 426, 429, 693 P.2d 89 (1985) (quoting Payton, 445 U.S. at 590). The rule protects against intrusions into the home, no matter what the nature of that intrusion — investigation, search or seizure. Payton, 445 U.S. at 589-90; Holeman, 103 Wn.2d at 429.

In light of such considerations, "in the absence of exigent circumstances, the government may not conduct the equivalent of a Terry stop inside a person's home." Moore v. Pederson, 806 F.3d 1036, 1039 (11th Cir. 2015), cert. denied, 15-1113, 2016 WL 853269 (U.S. May 16, 2016); accord United States v. Martinez, 406 F.3d 1160, 1165 (9th Cir. 2005) ("Certainly, the usual rules pertaining to Terry stops do not apply in homes.").

The twin rationales for a brief investigatory detention — the evasive nature of the activities police observe on the street and the limited nature of the intrusion — are inapplicable to an encounter at a suspect's home. United States v. Washington, 387 F.3d 1060, 1067 (9th Cir. 2004). "The reasons that gave rise to the rule in Terry are simply not applicable to a warrantless entry to seize a person within his home." LaLonde v. County of Riverside, 204 F.3d 947, 953-54 (9th Cir. 2000).

Payton held warrantless seizures of persons in their homes, absent exigent circumstances, violate the Fourth Amendment, even where probable cause exists to believe a person has committed a crime. Payton, 445 U.S. at 589-90. It would defy reason to hold "a warrantless in-home seizure is authorized to further an investigation, but that either a warrant or exigent circumstances are necessary when officers have the probable cause and intent to arrest." United States v. Saari, 272 F.3d 804, 809 (6th Cir. 2001). If probable cause to arrest is insufficient to permit a warrantless seizure in the home, reasonable suspicion of criminal activity must also be insufficient to justify a seizure. Less evidence of criminal activity does not provide the police with greater authority. The Terry stop exception could not justify Deputy Reyna's seizure of Torres as a matter of law.

d. The Terry stop was unconstitutional because the police officer lacked reasonable suspicion to seize Torres inside her home.

Even if the officer obtained valid consent to enter the home, and even if the law permitted a Terry stop inside the home as a general matter of law, the officer's seizure in this case was still unconstitutional because it was unsupported by reasonable suspicion.

"The State must show by clear and convincing evidence that the Terry stop was justified." Doughty, 170 Wn.2d at 62. "A Terry stop

requires a well-founded suspicion that the defendant engaged in criminal conduct." Id. It must be justified at its inception. Armenta, 134 Wn.2d at 15. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Doughty, 170 Wn.2d at 62 (quoting Terry, 392 U.S. at 21). The reasonable suspicion standard "requires that the suspicion be grounded in 'specific and articulable facts.'" State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (quoting Terry, 392 U.S. at 21). "However, because article I, section 7 provides for broader privacy protections than the Fourth Amendment, our state constitution generally requires a stronger showing by the State." Z.U.E., 183 Wn.2d at 618. Intrusions into the home require the greatest justification. "[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection." Hatchie, 161 Wn.2d at 397-98 (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

"The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Jones, 117 Wn. App. 721, 728, 72 P.3d 1110 (2003), review denied, 151 Wn.2d 1006 (2004). Hunches do not warrant police

intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63.

Neither do innocuous facts. Armenta, 134 Wn.2d at 13.

Deputy Reyna went over to her house because Torres's identification card was found on the ground, outside the bullpen gate. RP 7-9. Before going over, the railroad employee told Reyna that he had no idea who committed the crime. RP 15. There was no physical evidence indicating who did it. RP 15. There was no evidence the license had been in the train that was damaged. RP 16. There was no indication the skid marks next to the gate were involved in the incident. RP 16. No specific, articulable facts showed how Torres's ID ended up on the ground outside the gate. Before Reyna seized Torres and interrogated her, there was no specific, articulable evidence that Torres had been inside the locomotive and damaged it. But acting on a hunch that Torres was involved in the criminal activity based on the ID outside the gate, Reyna intruded into the home and seized Torres. Reyna admitted he went over to her house to ask her if she knew where her license was. RP 9.

Under these circumstances, Reyna's investigative seizure inside the home was unjustified. The specific and articulable facts known to Reyna did not reasonably warrant an intrusion into the home — an area deserving of the highest protection against warrantless intrusion.

e. The exclusionary rule mandates suppression of the incriminating statements.

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). "If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality." Harrington, 167 Wn.2d at 664. Evidence derived from an unlawful seizure, including inculpatory statements of the defendant, must be suppressed under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Torres's statements to the police officer must be suppressed. They are the direct result of the officer's unlawful entry and seizure. The convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove guilt beyond a reasonable doubt once the unlawfully obtained evidence is excluded. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

f. Defense counsel was ineffective in failing to make a suppression motion.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where the attorney's performance was deficient and the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. To determine whether counsel was ineffective, "we look at the record and assess the chances that a suppression motion would have succeeded." State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006).

Reasonable attorney conduct includes a duty to research the relevant law. Kyлло, 166 Wn.2d at 862. The relevant law is that it is per se unlawful for a police officer to enter someone's home without a warrant and seize that person. As argued, the officer's actions were not justified by any exception to the warrant requirement. Torres's statements to the officer were the most important evidence the State offered yet counsel did

not challenge their admissibility despite the illegality of the officer's actions in securing those statements. "A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision." State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." Meckelson, 133 Wn. App. at 433; see also State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (defense counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial). Torres has established deficient performance.

To establish prejudice, Torres need only show "a reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629, 980 P.2d 282 (1999). A motion to suppress evidence based on the illegality of the warrantless entry and seizure would likely have succeeded for the reasons set forth above. "[B]oth Strickland prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded." Horton, 136 Wn. App. at 36. Reversal of the convictions is required because Torres has established both deficient performance and prejudice.

2. THE COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY THAT WINDOWS WERE NOT PART OF THE OPERATING MECHANISM, AND THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN ARGUING THEY WERE.

The court's failure to clarify that the locomotive windows did not qualify as a part of the "operating mechanism" under RCW 81.60.080(1), as well as the prosecutor's closing argument, misled the jury into believing it could convict Torres on the basis that she damaged the windows. Reversal of the "sabotaging rolling stock" conviction is required as a result.

a. The court refused the defense request to clarify the issue.

RCW 81.60.080(1) provides "Any person or persons who shall willfully or maliciously, with intent to injure or deprive the owner thereof, take, steal, remove, change, add to, alter, or *in any manner interfere with* any journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose, or *any other part of the operating mechanism* of any locomotive, engine, tender, coach, car, caboose, or motor car used or capable of being used by any railroad or railway company in this state, is guilty of a class C felony[.]" (emphasis added).

During the course of discussing how the jury would be instructed on this offense, the court acknowledged the argument that the windows aren't an "operating mechanism" but the gauges are. RP 214. Defense

counsel believed it necessary to advise the jury that the windows don't help the locomotive "motivate," referencing his argument that an operating mechanism is that which is necessary for the train to travel. RP 212-14. The court responded, "I don't think so." RP 214. The court said there was testimony that the gauges were an "operating mechanism." RP 214. There was testimony that the windows are a necessary part of a locomotive, "and I think you are right, I don't think the jury's going to decide this case on the basis of whether the windows are an operating mechanism or not."⁴ RP 214-15. The court then asked whether there were any other exceptions to the instructions, and counsel answered no. RP 215. The definition and "to convict" instructions for the crime of sabotaging rolling stock tracked the language in the statute, requiring interference with "any part of the operating mechanism." CP 14-15.

During closing argument, the prosecutor addressed this charge by pointing out the gauges as well as the "special windows" were destroyed. RP 232-33. The prosecutor specifically referred to the windows as being part of the operating mechanism. RP 234-35. At this point, defense counsel interjected: "I'm sorry, I thought the Court ruled that operating mechanism meant something different from what Counsel's talking about."

⁴ This response is hard to understand because counsel requested the clarifying instruction precisely because he was worried the jury would view the windows as part of the operating mechanism.

RP 235. The court said, "Oh, I didn't rule." RP 235. Counsel said he misunderstood. RP 235. The prosecutor then referenced the testimony that the air gauges were broken. RP 235. Later, the prosecutor described the damage to the windows as making the locomotive "inoperable, basically." RP 239. Defense counsel, in his closing argument, offered that windows were not an operating mechanism. RP 246-47. In rebuttal argument, the prosecutor stressed that the windows were an operating mechanism. RP 264.

b. As a matter of statutory interpretation, windows are not part of the "operating mechanism" of a locomotive under RCW 81.60.080(1).

"The meaning of a statute is a question of law, reviewed de novo." State v. Hodgins, 190 Wn. App. 437, 443, 360 P.3d 850 (2015). The statute does not define the term "operating mechanism" as used in RCW 81.60.080(1). "When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition." Tingey v. Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). The word "operating" means "engaged in some form of operation." Webster's Third New Int'l Dictionary, 1581 (1993). The term "mechanism" means "a piece of machinery." Id. at 1401. A window is not a piece of machinery, nor is a window used to make a locomotive operate, i.e., start, roll on the tracks, and stop.

Under the interpretive canon known as *noscitur a sociis*, "the meaning of words may be indicated or controlled by those with which they are associated." State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (quoting State v. Jackson, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). It is appropriate to consider the meaning naturally attaching to words from the context, and to adopt the sense that best harmonizes with the context. Jackson, 137 Wn.2d at 729. It follows that "general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms." State v. Larson, 184 Wn.2d 843, 849, 365 P.3d 740 (2015) (quoting Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000)).

So the general phrase "any other part of the operating mechanism" in RCW 81.60.080(1) must refer to things similar in nature to those parts of the operating mechanism specified in the statute. A number of the specified items are technical to the train field. RCW 81.60.080(1). It is therefore appropriate to consult a technical dictionary. See Tingey, 159 Wn.2d at 658 ("When a technical term is used in its technical field, the term should be given its technical meaning by using a 'technical rather than a general purpose dictionary' to resolve the term's definition.").

A survey of the specified terms confirms that windows were not meant to be included as part of any "operating mechanism" as that term is used in the statute. For example, the "triple valve" is an "air brake." Locomotive Cyclopedia of American Practice, 91 (6th Ed. 1922). "Packing" is "[a] device or arrangement for making a steam-tight fitting on the piston rod and valve stem where they pass through their stuffing boxes on cylinder and steam chest, respectively. Also used on air pump piston rods and throttle rods." Id. at 64. "Waste" is defined as "[t]he spoiled bobbins of cotton or woolen mills, used for wiping machinery and for Journal Packing." Id. at 96.⁵ A "journal bearing" is "[a] block of metal, usually some kind of Brass or Bronze, which see, in contact with a journal, on which the load rests. In locomotive building the term when unqualified means an engine or truck axle journal bearing." Id. at 56. "Brass" is "[a]n alloy of copper and zinc, commonly used to designate a journal bearing." Id. at 23.

From this, it is apparent the specified parts of the "operating mechanism" are things that make the train move, or, in the case of brake-

⁵ A "journal" is "[t]hat part of an axle or shaft on which the journal bearing or brass rests." Id. at 56. "Journal packing" is "[w]aste, wool or other fibrous material saturated with oil or grease, with which a journal box is filled to lubricate the journal." Id. at 57. A "journal box" is "a cast of malleable iron or cast steel box or case which encloses the journal of a truck axle, the journal bearing and key, and which holds the packing for lubricating the journal." Id. at 56-57.

related items, slow down and stop. Windows, even special ballistic grade windows, are intrinsically different because they perform neither of these functions. Windows are not comparable to the parts of the operating mechanism specified in the statute. Under the *noscitur a sociis* interpretive canon, the train windows do not qualify as part of the "operating mechanism" of a locomotive as a matter of law.

c. The court needed to clarify the law by instructing the jury that the windows did not qualify as part of the operating mechanism.

"[T]he chief objects contemplated in the charge of the judge are to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relation of the particular evidence adduced to the particular issues involved." State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). "The instructions to be given in a particular case are governed by the facts in the case; instructions which are overly broad or which allow the jury to speculate as to the facts are improper." Harris v. Robert C. Groth, M.D., Inc., 99 Wn.2d 438, 447, 663 P.2d 113 (1983).

A trial court's refusal to give an instruction is reviewed for abuse of discretion. A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 516, 105 P.3d 400 (2004). A court must exercise its discretion to clarify the law if the meaning of an instruction is unclear and potentially misleading under

the facts of a given case. State v. Young, 48 Wn. App. 406, 415, 417, 739 P.2d 1170 (1987); Keller v. City of Spokane, 146 Wn.2d 237, 250-51, 44 P.3d 845 (2002). "Instructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is." State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).

Jury instructions satisfy a defendant's right to a fair trial if they accurately inform the jury of the applicable law and are not misleading. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). As set forth in section C.2.b., supra, the windows are not part of the "operating mechanism" as that term is used in RCW 81.60.080(1). Based on the evidence and argument at trial, the failure to so instruct was misleading to the jury because it allowed them to rely on the damaged windows to convict.

"Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." State v. Clausen, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). An instructional error is harmless only if "the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the

error." Young, 48 Wn. App. at 417. The prosecutor's argument that the jury could view the damaged windows as part of the operating mechanism and could convict on that basis increases the likelihood that it did just that. RP 235, 239, 264; cf. In re Pers. Restraint of Sarausad, 109 Wn. App. 824, 844, 39 P.3d 308 (2001) (court did not abuse discretion in refusing proposed instruction on accomplice liability where the instructions were sufficient "and nothing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court.").

Evidence of guilt was not otherwise overwhelming. The air gauges were damaged. But there was testimony that the glass of the gauges was cracked, while the needles inside may have been undamaged. RP 126-27, 171-72. In other words, cosmetic damage. No one inspected the gauges to determine whether they still functioned properly. From this, a reasonable juror could conclude the State failed to prove beyond a reasonable doubt that the gauges were "interfered with" within the meaning of the law, leaving the damaged windows as an improper basis to convict.

Defense counsel argued the windows could not be considered part of the operating mechanism. RP 246-47. But that did not cure the problem. "A jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d

1325 (1995). "[L]awyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). The instructional error requires reversal of the conviction.

d. The prosecutor committed prejudicial misconduct in misstating the law on whether windows constitute part of the operating mechanism of the locomotive.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). If prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. State v. Fisher, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009).

A prosecutor may not misstate the law and thereby mislead the jury. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). In Gotcher, the prosecutor improperly argued in rebuttal that mere possession of a switchblade permitted the jury to find the defendant was armed with a

deadly weapon within the meaning of the first degree burglary statute. Gotcher, 52 Wn. App. at 354-55. The trial court overruled defense counsel's objection, stating, "[t]he jury has been instructed. They can read the instructions again if they have any doubt about it." Id. at 352. During deliberations, the jury, in response to the prosecutor's improper argument, sent two inquiries to the court asking for clarification of the deadly weapon element. Id. The trial court answered by directing the jury to read the instructions. Id. The Court of Appeals held it was error to overrule the objection and to not clarify the law to the jury at that time. Id. at 355. Simply referring the jury to the instructions was insufficient because those instructions, although standard Washington Pattern Jury Instructions, were confusing as to whether possession of a switchblade knife was sufficient to find the defendant "armed with a deadly weapon." Id. The Court of Appeals reversed the conviction because there was no way of knowing whether the jury applied the proper law in finding the defendant guilty. Id. at 356.

In Torres's case as well, the prosecutor misstated the law on what evidence the jury could rely upon to convict. Although the jury did not make an inquiry during deliberations as in Gotcher, there is a reasonable probability that the misconduct affected the verdict because the prosecutor emphatically argued the point to the jury. Prosecutors, in their quasi-

judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). And the court, by announcing it had not ruled against the prosecutor's argument, sent a signal to the jury that the prosecutor's argument was proper.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The impropriety is established: misstating the law and misleading the jury. Turning to prejudice, reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 710, 286 P.3d 673 (2012). Rather, standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Glasmann, 175 Wn.2d at 711.

As in Gotcher, there is no way of knowing whether the jury applied the proper law in convicting Torres. Specifically, there is no way of knowing whether one or more jurors relied on the damage to the windows as the basis to convict. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

3. THE COURT FAILED TO FOLLOW STATUTORY REQUIREMENTS IN IMPOSING DRUG EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered: "Report no later than the next business day after sentencing or release from jail to a Washington State approved alcohol/drug assessment facility for evaluation. Cooperate fully with the facility and immediately enter into and complete any recommended treatment program by the end of supervision." CP 46. This condition must be clarified to reflect that the assessment and any recommended treatment must be limited to alcohol, as opposed to drugs.

A court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act (SRA) by imposing an unauthorized community custody condition is an issue of law reviewed de novo. State v. Warnock, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013); State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). An erroneously imposed sentence may be challenged for the first time on appeal. State v. Munoz-Rivera, 190 Wn. App. 870, 890, 361 P.3d 182 (2015).

As a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or

counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d). At sentencing, the State noted Torres was drinking at the time of the offense and so recommended "drug and alcohol evaluation treatment." RP 293. The State also commented "she's had other issues involving controlled substance or alcohol, based on a potential juror who may have known her." RP 293-94. Defense counsel responded, "my understanding is alcohol has been the only substance that's been an issue with her." RP 295. The State said she had a prior controlled substance violation. RP 296-97. Defense counsel said there were no convictions. RP 297. The court concluded the discussion by stating "so you need to not drink, okay. And I think you need treatment in that regard." RP 297.

Alcohol and drugs are not interchangeable terms in the sentencing context. Warnock, 174 Wn. App. at 613-14 (recognizing a difference between controlled substances and alcohol in holding alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody), overruled on other

grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Because there is no evidence that substances other than alcohol contributed to Torres's offense, evaluation and treatment must be restricted to alcohol. Munoz-Rivera, 190 Wn. App. at 893. The remedy is to remand with directions to amend the judgment and sentence to impose only an alcohol assessment and to comply with any recommended alcohol treatment. Id. at 894; Warnock, 174 Wn. App. at 614; see also State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014) ("Evidence at trial suggested that Kinzle was drinking alcohol shortly before the charged incidents. But here, as in Warnock, there is no evidence that a substance other than alcohol contributed to Kinzle's offense. We remand with directions to amend the judgment and sentence to impose evaluation and recommended treatment only for alcohol.").

4. A CLERICAL ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.

The judgment and sentence lists a total of \$15,471.22 in legal financial obligations (LFOs).⁶ CP 46. This is a clerical error. Restitution

⁶ RCW 9.94A.760(1) provides: "Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the

was not determined at the time of sentencing, but rather set for determination at a future hearing. RP 298. The restitution amount originally written into the judgment and sentence (\$14,671.22) was crossed out and the handwritten statement "to be set at restitution hearing" inserted. CP 46. The only amounts determined at sentencing were the \$500 crime penalty assessment, \$200 criminal filing fee and \$100 DNA fee, for a total of \$800. That is the amount that should have been listed under the total. Subsequent to sentencing, the court entered a restitution order in the amount of \$9,943.01. CP 62.

The clerical error listing the LFO total as \$15,471.22 in the judgment and sentence should be corrected. See In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remanding to trial court for correction of the scrivener's errors in the judgment and sentence); State v. Naillieux, 158 Wn. App. 630, 646-47, 241 P.3d 1280 (2010) (same). The judgment and sentence should be corrected to either (1) reflect a total of \$800 in fees that was actually imposed at sentencing or (2) reflect a total of \$10,743.01 (restitution amount of \$9,943.01 + \$800 in fees).

separate assessments made for restitution, costs, fines, and other assessments required by law."

A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998). Consistent with this mandate, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). Correction of the judgment and sentence to accurately reflect the amount owing ensures those tasked with overseeing LFO repayment will not labor under a misapprehension of what is owed.

5. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

If the State substantially prevails on appeal, Torres requests that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoument of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Sinclair recognized the concerns expressed in

Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

At sentencing, defense counsel noted Torres "owes a lot of money on the old DUI's, hasn't been able to pay that off, and has some large medical bills which are hanging over her head, and there are no assets to cover those bills." RP 284. The trial court did not impose any discretionary LFOs, striking the pre-printed court-appointed attorney recoupment. RP 298-99; CP 46.

Torres qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. CP 53-54, 57. Her declaration in support of her motion to appeal at public expense shows she has no money in the bank, she's on food stamps, and she already owes about \$5000 in DUI LFOs and \$3000 in medical bills. CP 58-61. Importantly, there is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). She already has more than \$10,000 in LFOs hanging around her neck. See Blazina, 182 Wn.2d at 838 (defendant's other debts factor into ability to pay). And those LFOs are subject to an astronomical 12 percent annual interest rate. Id. at 836. Under these circumstances, this Court should soundly exercise its discretion by denying any request for appellate costs.

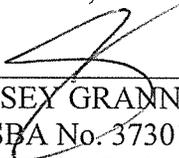
D. CONCLUSION

For the reasons set forth, Torres requests reversal of the convictions and correction of the judgment and sentence.

DATED this 25th day of May 2016

Respectfully Submitted,

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State v. Amanda Torres

No. 33933-5-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 25th day of May, 2016, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 25th day of May, 2016.

x  _____