

FILED
Court of Appeals
Division III
State of Washington
5/13/2020 4:24 PM

No. 36995-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JULIAN ALMAGUER,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

“The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965).

Charged with the crime of forgery, Julian Almaguer presented a defense of identity, contending the evidence did not prove beyond a reasonable doubt that he was the person who had tried to cash an altered check. At trial, the prosecution elicited from the teller that the perpetrator had been wearing a black flat-billed hat when he tried to cash the check. During closing argument, the prosecutor gave his personal opinion that “the defendant in court has had possession of that exact same hat, whether or not you’ve noticed.”

Mr. Almaguer objected. No hat had been admitted into evidence. There had been no testimony about any hat that was present in the courtroom. The court sustained the objection. But the bell had already been rung and could not be unheard.

Following the guilty verdict, Mr. Almaguer moved for a new trial based on the prosecutor’s misconduct. The court denied his motion, reasoning that there had been no misconduct or prejudice. Because the prosecutor’s misconduct deprived Mr. Almaguer of his right to a fair jury trial, this Court should reverse and order a new trial.

B. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Almaguer of his right to a fair trial as guaranteed by due process under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution. The trial court erred by denying Mr. Almaguer's motion for a new trial. RP 200, 229-39.

2. In denying the motion for a new trial, the court erred by finding that the hat which the prosecutor identified as being in Mr. Almaguer's possession at trial was the same hat that "had been discussed during the presentation of evidence." Finding of Fact (FF) III. CP 61.¹

3. The court erred by finding that the hat identified by the prosecutor as being in Mr. Almaguer's possession at trial "was discussed at trial very specifically." Conclusion of Law (CL) XI.² CP 62.

4. The court erred by making a finding that incorrectly implies that the prosecutor questioned Ms. Barney about what the defendant was wearing in court. CL XII. CP 63.

¹ A copy of the court's written findings and conclusions are attached in the appendix.

² Whether denominated a conclusion of law or a finding of fact, a finding of fact is reviewed as finding and a conclusion of law is reviewed as a conclusion. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). As this and other conclusions of law may be viewed as findings of fact, Mr. Almaguer assigns error to them.

5. The court erred by finding that the hat identified by the prosecutor as being in Mr. Almaguer's possession at trial "was a fact that had been put in evidence by the State during its direct examination."

Conclusion of Law (CL) XIII. CP 63.

6. The court erred by finding that the prosecutor's comments about the hat were a fair response to the defendant's arguments that his physical and facial features were different from the man identified as the perpetrator of the crime. CL XV; CP 63.

7. The court erred by finding that the prosecutor "was not arguing facts not in evidence as the hat had been a fact that had been submitted into evidence." CL XV; CP 63.

8. The court erred by finding that "the hat was in evidence and it was not error to discuss the hat in closing arguments." CL XIX; CP 63.

9. The court erred by finding that "the hat was only one piece of evidence that the jury saw, and that the defendant chose to bring it into the courtroom; that it is not often that defendants bring evidence into the court room." CL XX; CP 63.

10. In contravention of the rules of evidence, the trial court erred by overruling Mr. Almaguer's hearsay objection. RP 154-55.

11. In violation of article IV, section 16 of the Washington Constitution, the trial court erred by twice commenting on the evidence. RP 134-35, 153.

12. In violation of due process, as guaranteed under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, cumulative error deprived Mr. Almaguer of his right to a fair trial.

13. The court erred in calculating Mr. Almaguer's offender score as a "9+".

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is misconduct for a prosecutor to cite unadmitted or extrinsic evidence, or to give a personal opinion. During the prosecutor's rebuttal argument, the prosecutor argued that Mr. Almaguer had in his possession during trial the "exact same hat" as the one worn by the perpetrator. This purported hat was not admitted into evidence and there was no testimony about it. Did the prosecutor commit misconduct by citing extrinsic evidence and giving an improper personal opinion, requiring a new trial?

2. Absent an exception, hearsay is inadmissible. Testimony may be hearsay even if the witness does not directly repeat the out-of-court statement of the declarant. The teller testified that she called the maker of the check, and after speaking to her, concluded the check was fraudulent.

Was this statement hearsay where the inescapable inference from the testimony was that the maker of the check said to the teller that the check was fraudulent?

3. Judicial comments on the evidence are improper. A judge comments on the evidence by conveying an opinion about what the evidence shows or proved. During trial, two witnesses made in-court identifications of Mr. Almaguer as being the same person who presented the check. Both times, the prosecutor invited the court to comment that the witnesses had indeed identified Mr. Almaguer. In acceding to the requests, did the court comment on the evidence by expressing its opinion that the witnesses had identified Mr. Almaguer?

4. When viewed together, errors may cumulatively deprive a defendant of a fair trial. The prosecutor improperly invited the jury to consider unadmitted evidence to reject the defense of identity; the court twice commented on the evidence by opining that two witnesses had indeed identified Mr. Almaguer as the perpetrator; and the court improperly admitted hearsay testimony that indicated the maker of the check did not write out a check to Mr. Almaguer. Did any combination of these errors deprive Mr. Almaguer of a fair trial?

5. Prior class C felony convictions do not count in an offender score if they washout, meaning the defendant has spent five consecutive

years in the community crime free since release from confinement. As part of its burden to prove criminal history, the prosecution has the burden to disprove washout. Mr. Almaguer's last previous felony offense was from 2007 and the forgery in this case was committed in 2016. The prosecution did not disprove washout for Mr. Almaguer's prior class C felony convictions. Did the court err by scoring these prior convictions, requiring resentencing?

D. STATEMENT OF THE CASE

Julian Almaguer was charged with one count of forgery. CP 1. The prosecution alleged that on June 14, 2016, at a Moneytree in Spokane, Mr. Almaguer tried to cash a check for \$156 that he knew to have been altered without the maker's authorization. CP 1; RP 122-23.

A jury trial was held nearly three years later. Mr. Almaguer presented a defense of identity, contending he was not the person who tried to cash the check and that the prosecution would not prove otherwise beyond a reasonable doubt. RP 123-24.

In support of its case, the prosecution called only two witnesses: the investigating law enforcement officer, Michele Kernkamp, and the teller at the Moneytree, Sara Barney. RP 125-157. The prosecution did not call maker of the check, Becky Nance, to testify. Ex. 1.

Ms. Barney testified that a man walked to her window, stating he needed to cash a check. RP 128-30, 149. The man presented a check made out by Becky Nance to Julian Almaguer for \$156. Ex. 1. The man presented a purported identification card with an issuance date of 2014 with the name of Julian Almaguer. RP 150-51; Ex. 2. Ms. Barney had the man fill out a “signature card.” RP 151. The man signed the card, but left the portion of the form where he was supposed to fill in his social security number blank. RP 151; Ex. 2.

Ms. Barney became suspicious of the check because it looked altered to her. RP 149, 154. The man claiming to be Julian Almaguer stated the check was for payment of work he had done for Ms. Nance. RP 149. She told the man she would need to contact the maker of the check. RP 154. The man stated that Ms. Nance’s phone number was disconnected. RP 154. Ms. Barney found a phone number for Ms. Nance and was able to reach her by phone. RP 154.

Over Mr. Almaguer’s hearsay objection, the court permitted Ms. Barney testify that based on her conversation with Ms. Nance, she concluded that the check was fraudulent. RP 154. She told the man she would be giving the check to the police. RP 155. The man left. RP 156. Ms. Barney recalled that the man was wearing a black flat-billed hat, basketball shorts, and a big sweatshirt. RP 150.

Seeing Mr. Almaguer in court, Ms. Barney testified that she believed the man she had seen in her store three years ago was in fact Mr. Almaguer, who was present in court. RP 153. In the presence of the jury, upon the prosecutor's request that the record reflect that Ms. Barney had in fact identified Mr. Almaguer in the courtroom, the court stated "the record will reflect the same." RP 153.

Officer Michele Kernkamp testified that she was assigned to investigate the case about a week after the incident. RP 127. Officer Kernkamp was also of the opinion that the check looked fraudulent. RP 132, 135. She spoke to Ms. Barney and watched a video recording from the Moneytree of the incident. RP 132. Officer Kernkamp, however, failed to secure a copy of the surveillance video. RP 132. While she obtained what she thought was a copy of the video on a CD, the CD was actually blank. RP 132.

During her investigation, Officer Kernkamp had been unable to contact Mr. Almaguer. RP 135. Based on her view of the video three years earlier, Officer Kernkamp opined that Mr. Almaguer was the same man as in the video she watched. RP 134-35. In the presence of the jury, upon the prosecutor's request that the record reflect that Ms. Kernkamp had in fact identified Mr. Almaguer in the courtroom, the court stated the "record would reflect the same." RP 135.

Mr. Almaguer exercised his right to remain silent and did not testify. RP 175-177.

Mr. Almaguer offered his Washington State identity card, issued in 2019, as evidence. RP 136. As defense counsel argued during closing arguments, the identification card showed that Mr. Almaguer was not the man in the Moneytree from three years earlier. RP 196-97. The card showed that Mr. Almaguer's signature was different than the one used by the man impersonating him. RP 196. The man depicted in the fake identification card with an issuance date of 2014 had heavier eyebrows than Mr. Almaguer, and different ears, nose, and neck. RP 196-97. While both men were bald, the structure of their heads were different. RP 197. In light of these differences and the three years between the witnesses seeing the perpetrator and Mr. Almaguer in court, defense counsel argued to the jury that the testimony from the two witnesses on identity were not credible. RP 199.

During the prosecutor's rebuttal, the prosecutor contested Mr. Almaguer's claim that the facial features in the two identification cards were different and argued they were the same person. RP 199-200. The prosecutor then expressed his personal opinion, based on unadmitted evidence, that Mr. Almaguer had the "exact same hat" in his possession as the hat that Ms. Barney had testified the man in the Moneytree had been

wearing three years earlier. RP 200. The court sustained Mr. Almaguer's objection. RP 200.

The jury convicted Mr. Almaguer. RP 206.

Based on the prosecutor's misconduct during closing argument, Mr. Almaguer moved for a new trial. RP 221-27; CP 32-34. The prosecutor argued he had not engaged in any misconduct, and that there had been no prejudice to Mr. Almaguer. RP 227-29. Defense counsel responded that there had been no testimony about a hat being in Mr. Almaguer's possession during the trial. RP 230.

The court denied Mr. Almaguer's motion. RP 239.

Notwithstanding that the court had sustained Mr. Almaguer's objection during closing argument, the court ruled that the prosecutor had not committed misconduct. RP 235. The court reasoned that "the black flat-billed cap was in evidence and was mentioned," so there was no misconduct. RP 236.

At sentencing, the parties contested Mr. Almaguer's offender score. Mr. Almaguer contended his offender score was a 4 while the prosecution contended it was a "9+." RP 240, 245-46. The court assumed the prosecution was correct and scored Mr. Almaguer as a "9+." RP 257; CP 39. The court sentenced Mr. Almaguer to 26 months of confinement. CP 41.

E. ARGUMENT

1. The prosecutor committed serious misconduct that substantially prejudiced Mr. Almaguer's right to a fair trial by arguing to the jury that it should convict Mr. Almaguer based on extrinsic evidence.

a. It is misconduct to make arguments to the jury based on facts outside evidence. A jury's consideration of extrinsic evidence is both constitutional error and grave error under Washington common law.

Criminal defendants have a federal and state constitutional right to a fair trial by jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21-22. The jury's "verdict must be based upon the evidence developed at the trial." Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id.

Consistent with this rule, it is misconduct to invite the jury to consider evidence that has not been admitted at trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704-06, 286 P.3d 673 (2012); State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). "The long-standing rule is that consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced." Glasmann, 175 Wn.2d at 705 (cleaned up).

A jury's consideration of extrinsic evidence is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. State v. Pete, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004). It is constitutional error because it results in the deprivation of many constitutional rights, including confrontation, cross-examination, and assistance of counsel. Gibson v. Clanon, 633 F.2d 851, 854-55 (9th Cir. 1980).

When a prosecutor commits misconduct by inviting the jury to consider extrinsic evidence and the resulting prejudice requires nothing short of a new trial, the trial court is required to grant a defendant's motion for a new trial. CrR 7.5(a); Pete, 152 Wn.2d at 552.

b. By inviting the jury to consider a hat not admitted into evidence and giving his personal opinion that this was "the exact same hat" worn by the perpetrator three years earlier, the prosecutor committed serious misconduct.

The prosecutor committed the misconduct at issue during the rebuttal portion of his closing argument. Defense counsel had not said a word about any hat. No witness had ever identified any hat in the courtroom. And, there was no hat in evidence. Nonetheless, the prosecutor asserted that Mr. Almaguer had been in possession of "the exact same hat" as the one that the teller observed the perpetrator wearing three years earlier:

[PROSECUTOR]: . . . Ms. Barney, while she was up here speaking and talking about what Mr. Almaguer had worn that day, and she said that he had a black flat-billed cap. And the defendant in court has had possession of that exact same hat, whether or not you've noticed it.

[DEFENSE COUNSEL]: Your Honor, I object to that.

THE COURT: Sustained.

[DEFENSE COUNSEL]: That's inappropriate.

RP 200 (emphasis added).

Despite sustaining Mr. Almaguer's objection, the trial court found after the trial that the prosecutor had not committed misconduct. CP 64 (CL XXV). The court appears to have reasoned that hat was actually in evidence because Ms. Barney had testified about the perpetrator wearing a black flat-billed hat. This does not follow. Ms. Barney briefly testified that *the man she saw at the Moneytree three years ago* was wearing a "black flat-billed hat," along with "basketball shorts and a big sweatshirt."³ RP 150. She did not testify about any hat in the courtroom, let alone a hat in Mr. Almaguer's possession. As defense counsel argued during his motion

³ One of the court's findings misleadingly recounts that the prosecution asked Ms. Barney "what the defendant was wearing" and that Ms. Barney testified he was wearing a black flat-billed hat. CP 63 (CL XII). This testimony, however, was not about what Mr. Almaguer was wearing in court. RP 150. It was about what the man in the Moneytree had been wearing three years ago. RP 150. When asked what Mr. Almaguer was wearing in court, Ms. Barney only testified he had on a gray sweatshirt and said nothing about any hat. RP 134-35.

for a new trial, no witness was asked “Is [this hat here] the hat this guy was wearing?” “That never came up.” RP 230. The court’s findings explicitly stating or imply otherwise are not supported by the record and are erroneous. CP 61-34 (FF III; CL XI, XII, XVI, XIX, XX).

Whether or not Mr. Almaguer had a hat in his possession at some point during the trial is not evidence. As the court instructed the jury both orally and in writing, the evidence consisted of the testimony and the admitted exhibits. CP 12-13 (instruction 1); RP 179-81. Mr. Almaguer did not testify and no hat was admitted as an exhibit. The prosecutor’s assertions about a hat being present in the courtroom was not evidence because—as the court instructed the jury—the prosecutor’s statements are not evidence. CP 12-13 (instruction 1); RP 179-81. These standard jury instructions were proper and, as the law of the case, were binding upon the jury. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).⁴ Indeed, in a case where a trial court instructed the jury that “[t]he evidence includes what they witness in the courtroom,” our Supreme Court

⁴ As recounted by our Supreme Court, the Court held in 1896 that “whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.” Hickman, 125 Wn.2d at 102 n.2 (quoting Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)).

accepted the State's concession that this instruction was erroneous. State v. Barry, 183 Wn.2d 297, 300, 305, 352 P.3d 161 (2015).

Apparently agreeing with the prosecutor that Mr. Almaguer actually had a hat in his possession in court, the court found that “the defendant choose to bring [the hat] into the court room; that it is not often that defendants bring evidence into the court room.” CP 63 (CL XX). But this “evidence” was not admitted as an exhibit. Mr. Almaguer did not testify, let alone testify while wearing this hat. Indeed, if this hat was actually evidence of a crime, it is odd that the prosecutor did not have Officer Kernkamp (who sat with the prosecutor during the trial) seize it as evidence that was in plain view.⁵ See State v. Morgan, 193 Wn.2d 365, 371-73, 440 P.3d 136 (2019) (police properly seized arson defendant's clothing at hospital without a warrant because clothing was evidence of crime and was in plain view).

The trial court reasoned that the prosecutor's argument was appropriate because defense counsel had argued during closing argument that Mr. Almaguer had different facial features than the man depicted in the identification presented at the Moneytree three years earlier. CP 63

⁵ Of course, the prosecutor would not then be able to sandbag the defense by bringing up the hat during the rebuttal portion of its closing argument.

(CL XV). Unlike a hat, one's face is not fungible and cannot be donned or doffed at will. The prosecutor's argument was not a proper response. See City of Seattle v. Pearson, 192 Wn. App. 802, 817-19, 369 P.3d 194 (2016) (trial court erred by ruling that defense counsel "opened the door" to irrelevant and prejudicial testimony).

Any hat in Mr. Almaguer's possession during the trial was extrinsic evidence and could not be considered by the jury. The prosecutor committed misconduct by arguing otherwise. Glasmann, 175 Wn.2d at 704-06.

The prosecutor committed further misconduct by giving his personal opinion outside the evidence that this was the "exact same hat" worn by the perpetrator three years earlier. It is improper for prosecutors to give their personal opinions, including on guilt. State v. Lindsay, 180 Wn.2d 423, 434, 438 326 P.3d 125 (2014); Glasmann, 175 Wn.2d at 706-07. Setting aside that consideration by the jury of any hat was improper, there was no evidence to support the prosecutor's contention that this was the "exact same hat." The prosecutor's personal opinion was outside the evidence and was a personal expression by the prosecutor that he believed Mr. Almaguer was guilty.

This Court should hold the prosecutor committed serious misconduct.

c. The prosecutor's invitation to the jury to consider extrinsic evidence seriously undermined Mr. Almaguer's defense of identity and he is entitled to a new and fair trial.

In the alternative, the court ruled that any misconduct by the prosecutor was “likely harmless error.” CP 64 (CL XXV). Under our Supreme Court’s decision in Pete, this conclusion is incorrect. 152 Wn.2d 546.

In Pete, a case involving a prosecution for robbery, the jury inadvertently received two documents in the jury room which were not admitted into evidence. 152 Wn.2d at 550. One was a police report recounting statements the defendant made. Id. The second was a written statement by the defendant. Id. The defendant moved for a new trial, arguing this error entitled him to a new trial. Id. The trial court denied the motion, reasoning the error was harmless because the documents were quickly retrieved by the bailiff once it was learned they were in the jury room; the jury had been instructed to disregard the documents; and the statements were exculpatory. Id. at 551. This Court affirmed the denial of the defendant’s motion. Id. at 552. Our Supreme Court reversed.

The Supreme Court reasoned that the documents were not entirely exculpatory and inculpated the defendant. Id. at 554. The documents undermined the defendant’s defense that he had not been involved in the robbery. Id. at 554-55. That other evidence tended to show guilt—

including eye-witness testimony from two police officers that they observed the defendant in the act of robbing the victim—did not make the error harmless. Id. at 554-55. The documents seriously undermined the defendant’s defense of general denial, requiring a new trial. Id. That the jury had been instructed to disregard the documents also did not matter. Id. at 555. The Court noted that under its “long standing rule,” a new trial was required because there was “a reasonable ground to believe that the defendant may have been prejudiced” by the extrinsic evidence. Id. at 555 n.4.

The same reasoning applies in this case. Mr. Almaguer’s defense was one of identity. To be sure, there was testimony identifying Mr. Almaguer as the perpetrator of the forgery. But there was reason for the jury to find this testimony not credible given the passage of time. Three years elapsed between Ms. Barney seeing the man in the Moneytree and Mr. Almaguer in court. Similarly, three years elapsed between Officer Kernkamp watching the (now lost) video depicting the man and seeing Mr. Almaguer in court. And as defense counsel argued, Mr. Almaguer’s facial features were different than the man depicted in the (fake) identification presented at the Moneytree.

As in Pete, whether there was sufficient evidence to prove guilt is not the question. The prosecutor’s claim that Mr. Almaguer had in his

possession the “exact same hat” as the man in the Moneytree seriously undermined Mr. Almaguer’s defense of identity.

That Mr. Almaguer’s objection to the misconduct was sustained does not remedy the prejudice. Similar to Pete, any instruction was insufficient to cure the resulting prejudice. 152 Wn.2d at 555; see also State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956) (“If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and the mandatory remedy”); State v. Escalona, 49 Wn. App. 251, 256, 742 P.2d 190 (1987) (mistrial required because trial court’s instruction could not cure prejudice caused by prosecutorial misconduct). The prosecutor’s improper personal opinion that Mr. Almaguer was guilty was likely highly persuasive with the jury. Glasmann, 175 Wn.2d at 706-07 (recognizing persuasive power of a prosecutor’s improper personal opinion on the jury).

This is particularly true because the misconduct came during rebuttal and Mr. Almaguer had no opportunity to respond. Lindsay, 180 Wn.2d at 443 (recognizing that misconduct during rebuttal is more likely to cause prejudice). As defense counsel explained in support of the motion for a new trial, he had no opportunity to rebut the prosecutor and show the jury that it was a different hat. RP 230. He had no opportunity to cross-

examine a witness about the hat because the case was over. RP 226. It was a complete surprise. RP 226.

Notwithstanding the court sustaining the objection, the jury could not now decide the case fairly. See State v. Newton, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.”) (quoting Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring)). Because there is a reasonable ground to believe that Mr. Almaguer may have been prejudiced by the prosecutor’s misconduct in citing extrinsic evidence, the trial court was obligated to grant Mr. Almaguer a new trial. Pete, 152 Wn.2d at 555 and n.4. Mr. Almaguer is entitled to new and fair trial.

2. The court erred by overruling Mr. Almaguer’s objection to hearsay evidence from the maker of the check that established the check was fraudulent.

a. Absent an exception, the admission of hearsay is evidentiary error.

In general, hearsay is inadmissible under the rules of evidence. ER 802. Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” ER 801(c). This rule is one of substance, rather than form. Thus, inadmissible hearsay “is not made admissible by allowing the

substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001) (overruled on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 499 n.1, 81 P.3d 157 (2003)).⁶ Whether or not the statement is hearsay is a question of law reviewed de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

b. In disregard of the rule that hearsay is inadmissible, the court permitted the teller to testify that she concluded the check was fraudulent after speaking to the maker of the check.

During Ms. Barney's testimony, Ms. Barney testified that she found the phone number for Ms. Nance, the maker of the check, and called her. RP 154. Over Mr. Almaguer's hearsay objection, the prosecution was permitted to elicit that, based on her conversation with Ms. Nance, Ms. Barney concluded the check was fraudulent:

[PROSECUTOR]. Okay. And so based on talking to her, based on your concerns about the check and based on Mr. Almaguer saying you weren't going to be able to get ahold of her, what was your opinion about this check?

[DEFENSE COUNSEL]: Objection, your Honor. It would require her to rely upon what would be hearsay in this case, the check person that she called.

THE COURT: Any response from the State?

⁶ While Rangel-Reyes stated that Martinez was overruled (on other grounds), only higher appellate courts overrule opinions by the Court of Appeals. In re the Pers. Restraint of Arnold, 190 Wn.2d 136, 153, 410 P.3d 1133 (2018).

[PROSECUTOR]: I'm asking her based on her investigation what is her opinion of this check.

[DEFENSE COUNSEL]: Which is partially based upon evidence which is not before the Court and which isn't going to be before the Court if that person doesn't testify.

THE COURT: Overruled. She can answer.

[PROSECUTOR:] So based on your investigation, what was your opinion concerning this check?

A. Based on my investigation, I concluded that it was a fraudulent check.

RP 154-55.

Although Ms. Barney not directly repeat what Ms. Nance said to her about the check or Mr. Almaguer, the inescapable inference—the one that the prosecutor wanted the jury to draw—was that Ms. Nance said the check was fraudulent and that she did not authorize payment to Mr. Almaguer. Mr. Almaguer's hearsay objection should have been sustained.

This analysis is supported by State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991). There, this Court held the trial court erred in overruling a hearsay objection made during a police officer's testimony. Johnson, 61 Wn. App. at 546-47. The prosecutor was permitted to ask the officer if he had "reason to suspect that [the defendant] was involved with the trafficking at [a] residence?" Id. at 544. After the trial court ruled this did not call for hearsay, the officer answered, "That was my information,

yes.” Id. Citing several cases holding an officer’s testimony about an informant or witness’s statement is hearsay if “the statement led police to investigate or arrest the defendant,” this Court held the challenged testimony was hearsay. Id. at 546-47.

In support of this conclusion, the Court quoted favorably from a Florida court decision, which held that where

the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant’s guilt, the testimony is hearsay, and the defendant’s right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

Id. at 547 (quoting Postell v. State, 398 So. 2d 851, 854 (Fla. Dist. Ct. App. 1981)) (emphasis added).

This Court applied Johnson in State v. Hudlow, 182 Wn. App. 266, 331 P.3d 90 (2014). There, this Court reasoned that testimony from a detective improperly incorporated hearsay from an informant despite the questions being framed in a manner to avoid direct statements about what the informant said to the detective. Hudlow, 182 Wn. App. at 277-81.

Here, Ms. Barney, although not a law enforcement officer, was conducting an investigation into whether the check was fraudulent. Under the guise of giving her opinion, she was permitted to testify that she concluded that the check was fraudulent after speaking to Ms. Nance. She

was a conduit for conveying to the jury that Ms. Nance said the check was not legitimate. Mr. Almaguer's hearsay objection should have been sustained.

c. The admission of the inadmissible hearsay evidence was prejudicial, requiring reversal.

When a trial court commits an erroneous evidentiary ruling, the appellate court will reverse if the error materially affected the outcome of the trial. Pearson, 192 Wn. App. at 819. The court analyzes whether there is a reasonable probability of a different result had the error not occurred. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). The appellate court "measure[s] the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence." Barry, 183 Wn.2d at 303.

Here, there is a reasonable probability of different result but for the error. Ms. Nance did not testify. Without her testimony or the improper hearsay evidence, there was no evidence to show that Ms. Nance did not actually write the check to Mr. Almaguer or that any alterations to the check were without her authorization. This was essential for the prosecution to meet its burden to prove forgery as charged under RCW 9A.60.20(1)(b), which required proof that the check had been falsely

made, completed, or altered. CP 21 (instruction 8).⁷ In other words, he could not be convicted of forgery unless it was proved beyond a reasonable doubt that he lacked authority to sign the check. State v. Soderholm, 68 Wn. App. 363, 375-76, 842 P.2d 1039 (1993). While an error may still be harmful even if sufficient evidence remains, without the improperly admitted evidence, the prosecution would not have met its burden of proof. Thus, Mr. Almaguer more than establishes a reasonable probability of a different result absent the error. This Court should reverse.

3. In violation of the state constitution, the court commented on the evidence by expressing its opinion that the witnesses in fact identified Mr. Almaguer as the perpetrator of the forgery.

a. The Washington Constitution forbids judicial comments on the evidence.

“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. IV, section 16. “A judge is prohibited by article IV, section 16 from ‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” State

⁷ Accord 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 130.03 (4th Ed).

v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006), quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

“[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). In other words, “if the trial judge conveys to the jury his personal opinion regarding the truth or falsity of any evidence introduced at the trial he has violated the constitutional mandate.” State v. Bogner, 62 Wn.2d 247, 250, 382 P.2d 254 (1963). A claimed violation of article IV, section 16 is an issue of manifest constitutional error that is properly raised for the first time on appeal. Levy, 156 Wn.2d at 719-20.

b. The court commented on the evidence by telling the jury that both witnesses in fact identified Mr. Almaguer

Both Ms. Barney and Officer Kernkamp identified Mr. Almaguer as being the same person who had tried to cash the forged check at the Moneytree three years earlier. RP 134, 153. During both witnesses’ testimony, the prosecutor invited the court to comment that each witness had in fact identified Mr. Almaguer as the perpetrator. RP 134-35, 153. The court accepted the invitation both times, commenting to the jury that the witnesses had in fact identified Mr. Almaguer:

[PROSECUTOR]. Okay. And so based on that, do you believe Mr. -- that individual is in the courtroom today?

[OFFICER KERKAMP]. I do, yes.

[PROSECUTOR]. Where is he sitting, just for the record?

A. Just to your right.

[PROSECUTOR]. What is he wearing?

[OFFICER KERKAMP]. Gray sweatshirt or type of sweatshirt.

[PROSECUTOR]: Your Honor, I'd ask the record to reflect that she's identified Mr. Almaguer in the courtroom.

THE COURT: The record would reflect the same.

RP 134-35 (emphasis added).

[PROSECUTOR]. Okay. Have you had the opportunity to see Mr. Almaguer today?

[MS. BARNEY]. Yes.

[PROSECUTOR]. Okay. And do you believe that's the same individual?

[MS. BARNEY]. Yes.

[PROSECUTOR]. Okay. And where is Mr. Almaguer sitting in the courtroom?

[MS. BARNEY]. Right there.

[PROSECUTOR]. Okay.

[PROSECUTOR]: Your Honor, I'd ask the record to reflect that she has identified Mr. Almaguer.

THE COURT: The record will reflect the same.

RP 153 (emphasis added).

By stating that the record would “reflect” that each witness in fact identified Mr. Almaguer in court, the court commented on the evidence. The statements conveyed to the jury the judge’s personal opinion that the two witnesses had identified Mr. Almaguer as the perpetrator. But whether either witness had identified Mr. Almaguer through their testimony was an issue of fact for the jury, not an issue of law for the court to declare. The “trial judge charged the jury with a fact and expressly conveyed his opinion regarding the evidence.” State v. Lane, 125 Wn.2d 825, 839, 889 P.2d 929 (1995). These were comments on the evidence. See State v. James, 63 Wn.2d 71, 76, 385 P.2d 558 (1963) (court commented on evidence and approved of credibility of witness by telling jury that witness would be discharged once he testified fully as to all material matters within the witness’s knowledge).

With little analysis, this Court rejected a similar argument in State v. Jones, 171 Wn. App. 52, 286 P.3d 83 (2012). There, after the prosecutor asked that the record reflect the witness identified the defendant in court, the trial judge to said, “So shall it reflect.” Jones, 171 Wn. App. at 54-55. In concluding this was not a comment on the evidence, this Court reasoned “the trial court simply stated for the record a fact that had just

occurred at trial, namely that Officer Telford had identified Jones in court as the driver of the vehicle he stopped.” Id. at 55.

But when a judge conveys his or her opinion of the evidence, this is a comment on the evidence. For this reason, this Court has held that it is a comment on the evidence to answer a jury’s question about what the evidence did or did not prove. State v. Ratliff, 121 Wn. App. 642, 647, 90 P.3d 79 (2004). If the jury had asked if Ms. Barney or Ms. Kernkamp had identified Mr. Almaguer in court as the defendant, it would be a comment on the evidence for the trial court to answer. Logically, the same is true when a judge states in open court in front of the jury that the witness just identified the defendant as the perpetrator.

Further, Jones is materially distinguishable. In Jones, the defendant was arrested on the scene for possessing a stolen car. 171 Wn. App. at 53. There was no defense of identity to the charge of possession of a stolen vehicle. Id. Here, the defense was identity. Whether there is a comment on the evidence “depends upon the facts and circumstances of each case.” State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980). Under the facts and circumstances of this case, where identification was contested and was the defense, the court’s statements to the jury that the two witnesses had identified Mr. Almaguer were comments on the evidence. See id. 713-14 (jury instruction held to be a comment of the evidence

under the facts and circumstances of the case and distinguishing Supreme Court case rejecting argument that an identical instruction commented on the evidence).

Regardless, as a Court of Appeals' decision, this Court is not bound by Jones and is free to disagree with it. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018); Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015). Because Jones's analysis of the issue is cursory and reaches the incorrect conclusion, this court should not follow it.

c. The prosecution cannot meet its burden to affirmatively prove no prejudice could have resulted from the judicial comments.

“A judicial comment is presumed prejudicial and is not prejudicial only if the record affirmatively shows no prejudice could have resulted.” State v. Sinrud, 200 Wn. App. 643, 651, 403 P.3d 96 (2017). “Even if the evidence commented upon is undisputed, or ‘overwhelming,’ a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.” State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963). In other words, if it is “conceivable” that the jury could have reached a contrary conclusion absent the judicial comment, reversal is required. Jackman, 156 Wn.2d at 745. The prosecution bears the burden to show that Mr.

Almaguer was not prejudiced. State v. Boss, 167 Wn.2d 710, 721, 223 P.3d 506 (2009). The prosecution cannot meet its extremely high burden.

Mr. Almaguer's defense was identity and identity was hotly contested. Mr. Almaguer argued the two witnesses who identified him in court were not credible given the three years that had elapsed since the events at issue and that his facial features were different from the man depicted in the identification card presented three years earlier at the Moneytree. The court's comments conveyed the court's opinion that the witnesses had in fact identified Mr. Almaguer as the perpetrator. If there was any doubt expressed by either witness in their demeanor or tone of voice when they identified Mr. Almaguer in court, the jury conceivably could have excused the lack of confidence by the witnesses given the court's judicial comments endorsing their identifications. Given that the tone and demeanor of the witnesses cannot be reviewed on appeal, the prosecution cannot meet its burden to prove no prejudice resulted to Mr. Almaguer. See State v. Maupin, 128 Wn.2d 918, 929-30, 913 P.2d 808 (1996) ("[a]n appellate court ordinarily does not make credibility determinations."). But for the judicial comments, the jury could have found reasonable doubt on whether the prosecution proved identity and acquitted Mr. Almaguer. This Court must reverse.

4. Cumulative error deprived Mr. Almaguer of a fair trial.

Due process entitles criminal defendants to a fair proceeding. U.S. Const. amend. XIV; Const. art. I, § 3. An accumulation of errors may deprive a defendant of this right. Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 93 S. Ct. 1038, 1043, 35 L. Ed. 2d 297 (1973). Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair trial, even if each individual error is harmless by itself. State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383 (2018).

There is a reasonable probability that the cumulative effect of any combination of the errors materially affected the outcome. The prosecution committed serious misconduct in citing extrinsic evidence to the jury during the rebuttal portion of his closing argument. The court failed to exclude hearsay that was key to the prosecution's case. And the court commented on the evidence, which affected the jury's decision on whether the prosecution proved identity beyond a reasonable doubt. Reversal is required.

5. The prosecution did not meet its burden to prove Mr. Almaguer's offender score, requiring a new sentencing hearing.

- a. Prior convictions that have washed out do not count when calculating an offender score. The prosecution has the burden to prove prior convictions have not washed out.*

Under the Sentencing Reform Act, the standard range sentence is determined by the offender score and offense seriousness level. RCW 9.94A.510, 530(1). The offender score is the total sum of points accrued from prior convictions rounded down to the nearest whole number. RCW 9.94A.525. Prior convictions “washout” and do not count in a person’s offender score if the person has spent the requisite amount of time in the community without committing another crime that results in a conviction. RCW 9.94A.525(2)(b), (c). For prior class C felony convictions, the washout period is five years. RCW 9.94A.525(2)(c).

The prosecution bears the burden of proving a defendant’s criminal history by a preponderance of the evidence. State v. Cate, 194 Wn.2d 909, 912-13, 453 P.3d 990 (2019). An unsupported summary of a defendant’s criminal history is insufficient to satisfy the prosecution’s burden. Id. at 913. A certified copy of a judgment is the best evidence of a prior conviction, although other official documents may be satisfactory. State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

Consistent with these rules, the prosecution's burden of proof includes submission of evidence negating the possibility of washout. State v. Cross, 156 Wn. App. 568, 586-87, 234 P.3d 288 (2010); State v. Shelley, noted at 187 Wn. App. 1040 (2015) (unpublished).⁸

b. The prosecution failed to meet its burden to prove that Mr. Almaguer's prior class C felony convictions did not wash out. Remand for a new sentencing hearing is required.

The parties contested Mr. Almaguer's offender score. The prosecution contended it was a "9+" and produced a document recounting its understanding of Mr. Almaguer's felony criminal history. RP 240; CP 51-52. Mr. Almaguer did not contest this criminal history, but he contended that the prosecution had failed to show that his prior class C felony convictions had not washed out. RP 244, 247-49. Based on the lack of proof on washout, he contended he should be scored as a 4. RP 240.

After hearing argument from the parties, and despite the absence of factual support, the court assumed that the prosecution was correct its contention the prior class C felony convictions had not washed out and scored Mr. Almaguer as a "9+." RP 256-57; CP 39. As forgery has a seriousness level of one, this produced a standard sentencing range of 22 to 29 months. RCW 9.94A.510, 515. The sentencing range with a score of

⁸ Cited as persuasive authority only. GR 14.1(a).

4 would have resulted in a range of 3 to 8 months. RCW 9.94A.510. The court sentenced Mr. Almaguer to 26 months of confinement. CP 41.

Mr. Almaguer's last felony convictions were from January 24, 2007. CP 51. He was sentenced on these offenses on April 10, 2008. CP 51. The record does not contain evidence showing how long Mr. Almaguer's sentences were or when he was released into the community. Given that the crime in this case occurred in 2016, Mr. Almaguer may have resided in the community for five consecutive years crime-free. The prosecution did not prove otherwise. Accordingly, the prosecution did not meet its burden of proof and Mr. Almaguer's 11 prior class C felony convictions washed out. Mr. Almaguer's offender score on the forgery would have been properly calculated as 4. See RCW 9.94A.030(34), .530(7).⁹

Accordingly, this Court should reverse and remand for a new sentencing hearing. Cate, 194 Wn.2d at 914.

⁹ The summary shows that Mr. Almaguer has 6 prior felony convictions for burglary, which are not class C felonies. CP 51; RCW 9A.52.020, .030. Three of these count as half a point because they are juvenile nonviolent felony convictions. CP 51; RCW 9.94A.530(7). The others count as one point each. RCW 9.94A.530(7). Rounded down from 4 and half, the total score is 4.

F. CONCLUSION

The prosecutor committed serious misconduct by inviting the jury to consider extrinsic evidence. For this and the other reasons advanced, this Court should reverse and remand for a new trial. Alternatively, the Court should remand for a new sentencing hearing.

Respectfully submitted this 13th day of May, 2020.



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Washington Appellate Project – #91052
Attorney for Appellant

Appendix

CN: 201601025138

SN: 50

PC: 4

FILED

AUG 07 2019

Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

.IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)	
)	
Plaintiff,)	No. 16-1-02513-8
)	
v.)	PA# 16-9-61679-0
)	RPT# 2016-00215200
JULIAN ALMAGUER)	RCW 9A.60.020(1)(B)-F (#38505)
MM 01/09/75)	
)	FINDINGS OF FACT AND
Defendant(s).)	CONCLUSIONS OF LAW REGARDING
)	DEFENSE MOTION FOR A NEW TRIAL

THIS MATTER having come on for sentencing on July 26, 2019, and the defendant, JULIAN ALMAGUER, having been present as well as counsel for defendant, JOHN HUNT WHALEY, and counsel for the State of Washington, MICHAEL A. JOLSTEAD JR., Deputy Prosecuting Attorney. Defendant brings a motion for a new trial and the Court having received briefing and hearing from the above, the Court now makes the following

FINDINGS OF FACT

- I. The defendant Julian Almaguer was charged with the crime of forgery on July 1, 2016.
- II. This matter went to jury trial on May 5, 2019.
- III. That during closing arguments the State made mention of a Black billed hat which was in the possession of the defendant during trial and which had been discussed during presentation of evidence.
- IV. That the defense did object to the mention of the hat and the Court did sustain the objection.
- V. That following the close of evidence the Defendant was convicted of the charged crime.

- VI. That sentencing was set out to June 6, 2019.
- VII. That on June 6, 2019 sentencing was continued to July 26, 2019 due a medical need by Mr. Almaguer.
- VIII. That on July 25, 2019 the Defendant did file a motion requesting a new trial based on CrR 7.5 (1), (2), (4), and (8).
- IX. That due to the late nature of the motion the State was unable to brief the issue as presented.
- X. That both parties were able to adequately argue the motion prior to sentencing.
- XI. The Trial Court did review the trial transcript prior to the hearing.

CONCLUSIONS OF LAW

- I. The question of whether a new trial should be granted is a factual determination that is in the sole discretion of the trial judge.
- II. That motions for a New trial are governed by CrR 7.5.
- III. That Defendant brings this motion under CrR 7.5 (1), (2), (4), and (8).
- IV. That under CrR 7.5 the motion should have been brought within 10 days of the verdict or decision.
- V. That the Court has discretion to extend time to hear the motion after those ten days have expired.
- VI. The Court, to secure justice, has allowed extension of the time frame so that the motion can be heard.
- VII. That the trial transcript provided to the Court was an accurate representation of the trial that was conducted on May 5, 2019.
- VIII. At trial the State mentioned the defendant's black flat billed hat during closing and the Defense objected which was sustained by the Court.
- IX. There are many reasons for an objection to be sustained; not necessarily prosecutorial misconduct.
- X. That the identity of the defendant was in question for this case.
- XI. That the hat was discussed at trial very specifically.

- XII. That on pg. 36 of the trial transcript the State questioned Mrs. Barney as to what the defendant was wearing.
- That Mrs. Barney responded that he was wearing a black flat bill.
 - That the State asked, "a black flat billed what?"
 - That Mrs. Barnet responded, "a black flat billed hat".
- XIII. That the hat was a fact that had been put in evidence by the State during its direct examination.
- XIV. That during closing the State made comments regarding features of the defendant and that those same features were present in the identifications that had been submitted to the jury; which was appropriate.
- XV. That the State made its comments, regarding the black hat that was present with the defendant during trial, within the same instance of pointing out the defendant's features; and that these comments were in response to defense comments regarding how features were not the same.
- XVI. That the State was not arguing facts not in evidence as the hat had been a fact that had been submitted into evidence.
- XVII. Law is clear that argument of the attorney are not evidence and that jury should disregard any argument that isn't supported by the evidence.
- XVIII. That the jury was properly instructed in this case and they are presumed to have followed the law.
- XIX. That the hat was evidence and it was not error to discuss the hat in closing arguments.
- XX. That the hat was only one piece of evidence that the jury saw, and that the defendant chose to bring it into the courtroom; that it is not often that defendants bring evidence into the court room.
- XXI. That prosecutors all the time will point out descriptions of the perpetrators of the crime; that the witnesses gave a description of the defendant at the time the crime was committed with included the black flat billed hat.

XXII. That defense counsel's objection has preserved the argument for potential appeal.

XXIII. Even if it was error to touch on the hat during the State's closing arguments there was other evidence at trial from which the jury could establish identity.

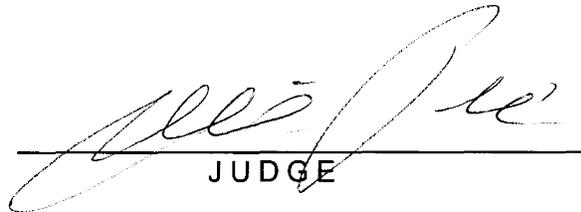
XXIV. That the argument was not driven to enflame passions or the prejudice of the jury and again, extensive other evidence had been presented regarding the identity of the defendant.

XXV. It was not error to discuss the hat in closing arguments and even if it was, it was most likely harmless error.

ORDER

Based on the foregoing findings and conclusions, the Defendant's motion for a new trial is denied.

Dated this 7 day of August, 2019.



JUDGE

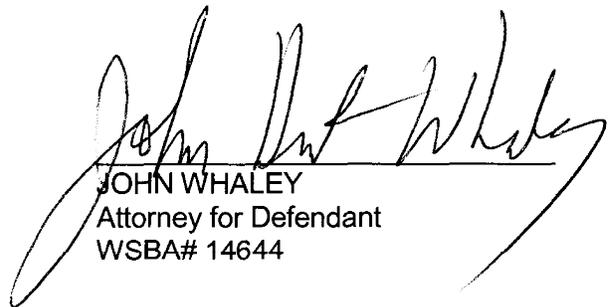
MICHAEL P. PRICE

Presented by:

Approved as to form:



MICHAEL A JOLSTEAD JR.
Deputy Prosecuting Attorney
WSBA # 51177



JOHN WHALEY
Attorney for Defendant
WSBA# 14644

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36995-1-III
)	
JULIAN ALMAGUER,)	
)	
APPELLANT.)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MAY, 2020, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SPOKANE COUNTY PROSECUTOR'S OFFICE
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(X) | U.S. MAIL
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E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> JULIAN ALMAGUER
714892
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326-0769 | (X)
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WASHINGTON APPELLATE PROJECT

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