COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

NO. 38868-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM GLEN SMITH,

Appellant.

RESPONDENT'S BRIEF

SUSAN I. BAUR
Prosecuting Attorney
JAMES SMITH/WSBA# 35537
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

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I. PROCEDURAL HISTORY

The appellant was charged by amended information with ten counts of rape in the third degree against A.C., one count of assault in the forth degree against P.S., and one count of perjury in the second degree.[1] These charges stemmed from several contracts for sex that the appellant entered into with three women, two of whom were his blood relations.

After various pre-trial proceedings, not germane to this appeal, the appellant proceeded to jury trial before the Honorable Judge James Warme and was convicted of four counts of rape in the third degree and the perjury charge. The appellant was acquitted of the remaining counts. At sentencing, the trial court imposed a sentence of sixty months in prison, followed by thirty-six to forty-eight months of community custody. The instant appeal timely followed.

II. STATEMENT OF FACTS

The State generally agrees with the facts as set forth by the appellant. When appropriate, this brief cites to particular facts in the record.

[1] Due to the nature of the case, the State refers to the persons involved by their initials, and respectfully requests this Court employ its usual practice and do the same in any opinion it may issue.

III. ISSUES PRESENTED

1. Did the Trial Court Violate the Appellant's Right to a Public Trial?
2. Did Trial Counsel Provide Ineffective Assistance?
3. Was the Perjury Conviction Unsupported by Substantial Evidence?
4. Did the Trial Court Err by Imposing Certain Conditions of Community Custody?
5. Did the Trial Court Err by Entering a Sexual Assault Protection Order?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.
4. No.
5. No.

V. ARGUMENT

I. The Trial Court Did Not Violate the Appellant's Right to a Public Trial.

The appellant argues that the trial court closed the courtroom to the public by, on thirteen occasions during the trial, engaging in sidebar discussions with the attorneys outside the courtroom. The appellant alleges this practice violated Article 1, section 22 of the Washington constitution

as well as the Sixth Amendment of the United States constitution. However, the practice complained of did not amount to a closure of the courtroom, dealt only with ministerial or legal issues, and was invited and acquiesced to by the appellant. As such, this Court should reject any claim of error.

a. Engaging in a Sidebar Conference Does Not Constitute a "Closure" of the Courtroom.

The State disputes the appellant's claim that the courtroom was closed by the trial judge and the attorneys stepping into a hallway to conduct legal argument out of the hearing of the jury. Instead, this was merely a form of sidebar conference, while the actual courtroom remained open to the public. If there was no closure of the courtroom, the cases cited by the appellant have no application.

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Supreme Court noted there was a distinction between full closures of a courtroom, which require an analysis under State v. Bone-Club, 128 Wn.2d 254, 900 P.2d 235 (1995), and acts by the trial court that do not amount to a full closure. The court held that because the action at issue, the exclusion of one person from the courtroom, was not a full closure, Bone-Club did not apply and the defendant's right to a public trial was not violated. Gregory, 158 Wn.2d at 816.

This Court has recognized this distinction in State v. Wise, 148 Wn.App. 425, 200 P.3d 266 (2009). There the trial judge conducted a portion of voir dire in chambers, but never ordered the courtroom closed. Wise, 148 Wn.App. at 436. This Court found that any closure that occurred was only "temporary and partial" and was insufficient to implicate the concerns for a public trial found in the Bone-Club decision.

Given these authorities, the Court should find that the sidebar conferences at issue do not amount to an actual closure of the courtroom. The appellant has provided absolutely no authority to support a claim that a sidebar between the judge and attorneys, which cannot be heard by the jury or the public, violates the right to a public trial. Indeed, the only distinction between the conferences here and a regular sidebar in the courtroom is a positive one, namely that the conferences were on the record and preserved for public and appellate review. See State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984) (noting the danger that unrecorded sidebar conferences may preclude appellate review). This Court should find the courtroom was not closed and there was no violation of the right to a public trial.

b. The Sidebar Conferences at Issue Were Minsterial or Purely Legal, and Do Not Implicate the Right to a Public Trial.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, the constitutional right to a public trial is violated. In State v. Marsh, 126 Wn. 142, 145, 217 P. 705 (1923), the superior court tried, among other irregularities, closed the entire proceeding to the public. In Bone-Club, 128 Wn.2d at 256-57, the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant.

Most recently, in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held that private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error in conducting a portion of the voir dire outside the

courtroom, the defendant had invited the error by his conduct, so he was not entitled to a new trial.

However, unlike the procedures at issue in those cases, the brief sidebar conferences in the instant case are not "proceedings" that implicate the right to a public trial. In the cases cited above, all or part of an important substantive proceeding was removed from public view. See Bone-Club (pretrial testimony); Orange, (voir dire); Brightman (voir dire); Easterling (pretrial hearing); Strode (voir dire of selected jurors); Momah (voir dire of selected jurors). Here, brief conversations occurred in a hallway outside the courtroom between the trial judge and the attorneys. These brief contacts do not qualify as "proceedings" or "hearings" that can fairly be characterized as a significant part of the appellant's trial. Instead, these discussions were either ministerial, housekeeping, or non-factual discussions about legal matters. Such matters do not trigger analysis under Bone-Club and do not implicate the right to public trial.

In similar situations, the Supreme Court has recognized that sidebars are not truly proceedings to which the defendant or the public must be granted access. For example, in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the Supreme Court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial

hearing in which the court deferred ruling on an ER 609 motion, granted a motion to allow a haircut and trial clothing for the defendant, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. Lord, 123 Wn.2d at 306.

The court also considered whether defendant had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. Id. The Supreme Court rejected the claim a criminal defendant had a right to be present at these purely legal discussions between the court and counsel, holding:

> The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....' " Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id.

Furthermore, in In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the Supreme Court held a criminal defendant need not be present for discussions about the wording of jury instructions, ministerial matters, legal issues, and whether the jury should be sequestered. In Pirtle the court also held that, although the defendant should perhaps have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. Pirtle, 136 Wn.2d at 484.

Decisions from the Court of Appeals are similar. In a recent case, the court observed:

> The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during voir dire, and during the jury selection process. . . . A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted).

Also, in State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that a defendant had no right to be present at a chambers

conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court similarly held a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In State v. Walker, 13 Wn. App. 545, 536 P.2d 657 (1975), the court held that Walker had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant "need not be present during deliberations between court and counsel or during arguments on questions of law." Walker, 13 Wn. App. at 557 (cited with approval in Lord, 123 Wn.2d at 306 n.3).

Here, every one of the thirteen sidebar conferences dealt strictly with ministerial issues or purely legal questions:

1) discussion of when to take a recess, RP 204-205;

2) clarification of a prior ruling on ER 404(b), RP 218-221;

3) argument regarding a relevancy objection, RP 229;

4) argument regarding admissibility of opinion testimony on A.C.'s mental state; RP 255-260;

5) discussion regarding the proper foundation for impeachment by an inconsistent statement, RP 270-272;

6) argument regarding admissibility of opinion testimony on handwriting, RP 294-297;

7) argument regarding whether a statement made by the appellant was hearsay, RP 311-315;

8) argument regarding whether a photograph of A.C., taken by the police, was relevant, RP 326-328;

9) argument regarding admissibility of the appellant's written statement, RP 346-347;

10) argument regarding admissibility of statements A.C. made to a physician, RP 399-403;

11) argument regarding admissibility and relevance of nude photographs of A.C., RP 446-450;

12) argument regarding admission of two receipts for sexual items found in the appellant's residence, RP 451-452;

13) argument regarding permissible cross-examination of the appellant, RP 543-546.

As can be seen from this summary, each of these sidebars dealt solely with ministerial issues, such as when to take a recess or the admission of various exhibits, or were purely legal arguments involving the rules of evidence. No testimony was taken or voir dire conducted, rather the attorneys made legal arguments to the trial court. Thus, these sidebars did not involve the resolution of any disputed facts, and do not implicate the right to a public trial. Sadler, 147 Wn.App. at 114. The State asks this Court to reject the appellant's argument on this point.

c. If There Was a Closure, The Appellant Invited This Error and May Not Complain of It on Appeal.

If the Court should find there was a closure of the courtroom on matters that implicate the right to a public trial, the appellant is still not entitled to a new trial as he invited the error. Under this doctrine, a party who sets up or contributes to an error in the trial court cannot use this mistake on appeal to obtain a new trial. Momah, 167 Wn.2d at 153. In Momah, the Supreme Court found the defendant had waived the right to a public trial under the following circumstances:

> From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed voir dire might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid "contamination" of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active participation in the questioning, Momah was able to exercise numerous challenges for cause, removing biased and partial jurors from the venire.

167 Wn.2d at 155 (internal citations to record removed).

Here, the appellant never objected to conducting sidebar conferences in the hallway, and in fact affirmatively suggested or agreed with the idea on several occasions:

MR. LADOUCEUR: Your Honor, objection. May we approach.

COURT: Do you want to do this in the hall?

MR. LADOUCEUR: Yes.

RP 218.

MR. SMITH: Your Honor, I object as to relevancy and beyond the scope.

MR. LADOUCEUR: Hallway, if we need to.

COURT: Let's go out in the hall for just a minute.

RP 229.

MR. LADOUCEUR: Your Honor, I'll object and ask for a sidebar.

RP 294.

MR. LADOUCEUR: I would register an objection. We might to discuss this.

RP 346.

MR. LADOUCEUR: Maybe we should --

COURT: Let's go out in the hall.
....

MR. LADOUCEUR: ... I wanted to avoid a speaking objection out there...

RP 399.

MR. LADOUCEUR: If we could have a conference?

RP 446.

MR. LADOUCEUR: Objection. Your Honor, may we step outside. RP 543.

This record makes clear that, not only did the appellant not object to this procedure, he affirmatively requested and invited it. As in Momah, this Court should presume that trial counsel made these choices in order to achieve the best result for his client. 167 Wn.2d at 155. At trial, the appellant clearly chose to engage in the hallway sidebars in order to more effectively press his objections upon the trial court, and to avoid needlessly irritating the jury by requiring them to march in and out of the courtroom repeatedly. The appellant's trial counsel also wisely recognized that the hallway sidebars allowed him to avoid making disfavored "speaking objections" that would expose him to the wrath of the trial court and potentially indicate broadly to the jury an attempt to hide or conceal evidence. See Tegland, Courtroom Handbook on Washington Evidence, 2009-2010 Ed. at 191. As the appellant invited whatever error there may be, he cannot now use the procedure he suggested to obtain a new trial. See Momah.

The Momah court's decision that a violation of the right to a public trial may be invited error is in accord with an earlier decision by the Supreme Court in State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door to prevent spectators'

distracting the jury during closing arguments by filing in and out of the courtroom. 50 Wn.2d at 746. The defendant did not object at trial but on appeal he claimed a violation of his right to a public trial. Id.

The court refused to consider this argument for the first time on appeal. In doing so, the court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. Id. at 747-748. The court held that a discretionary ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial can be reviewed absent an objection. The Collins decision is still binding precedent in Washington, as it was not mentioned or overruled in either Momah or Strode. The holding is reproduced below in its entirety:

> If an order of a trial court clearly deprives a defendant of his right to a public trial, as in People v. Jelke, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425 [where both the public and the press were excluded from the whole trial], it is unnecessary for the defendant to raise the question by objection at the time of trial. State v. Marsh, 1923, 126 Wn. 142, 145-146, 217 P. 705.
>
> However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. *Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.* Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273,

> L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)
>
> There is here no claim of actual prejudice; there was no objection to the discretionary ruling. We are satisfied that the defendant did have a public trial within the purview of our constitutional provisions.

Id. at 747-48 (italics added).

Collins has never been abrogated. Nor has it been established that Collins should be overruled because it is incorrect and harmful. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Here, where it is not at all clear that the courtroom was actually closed, it cannot be said that that the hallway sidebars "clearly deprive[d] a defendant of his right to a public trial" such that no objection would be necessary. For these reasons, this Court should hold that the appellant, like the defendant in Collins, failed to preserve a claim of error as to the trial court's discretionary ruling. Based on these precedents and the record of this case, the Court should find that the appellant failed to preserve whatever error may have occurred at trial.

II. Trial Counsel's Cross-Examination Was Not Ineffective.

To establish ineffective assistance of counsel, the appellant bears the burden of proving that defense counsel's performance was deficient

and that this performance deprived him of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is established by proof that, when the entire trial record is considered, defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).

There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. Moreover, legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). This presumption, and the exclusion of trial strategy from claims of ineffective assistance, is because the courts have recognized that:

> A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978), quoting Finer, Ineffective Assistance of Counsel, 58 CORNELL L.Rev. 1077, 1079 (1973). Finally, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee this assistance will be successful. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

The appellant contends trial counsel was ineffective for failing to confront A.C. with a statement she purportedly made to Lois Lindfeldt. He argues that, if trial counsel had asked this question, A.C. would have either admitted it or he would have been able to call Ms. Lindfeldt to impeach her denial. This argument is highly speculative, and is based largely on conjecture. Such mere speculation is insufficient to rebut the presumption trial counsel performed adequately. See State v. Goldberg, 123 Wn.App. 848, 853, 99 P.3d 924 (2004).

Furthermore, the courts take a skeptical view of ineffective assistance claims based upon supposedly faulty cross-examination. The Supreme Court has held that "even a lame cross-examination will seldom, if ever, amount to a Sixth Amendment violation." Matter of Pirtle, 136 Wn.2d 467, 489, 965 P.2d 593 (1998); citing Henderson v. Norris, 118 F.3d 1283 (8th Cir. 1997). The Henderson court observed that "[t]he cross-examination of a witness is a delicate task; what works for one lawyer

may not be successful for another. Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." 118 F.3d at 1287. Indeed, the same federal court has held "there are a few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would past muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996).

Given this exacting standard, the failure to confront A.C. on a single issue cannot be said to constitute ineffective assistance when the totality of the record is considered. Trial counsel's cross-examination focused, wisely, on extracting concessions from A.C. that could be used to undermine her testimony the sex was non-consensual. Trial counsel obtained her agreement that the appellant never used force, never assaulted her, and never tied her up or held her captive. RP 196-197. Trial counsel also confronted A.C. with a previous, arguably false, rape complaint she had made against an ex-husband. RP 203-204. Despite whatever deficiencies may now be claimed by the appellant, it is apparent that trial counsel attempted to impeach and contradict A.C., and did not abandon his duties under the Sixth Amendment.

Also, an examination of the record reveals that trial counsel made a strategic decision not to recall A.C. to confront her with the supposed

IV. The Appellant's Objections to the Condition of His Community Custody Are Not Ripe for Review.

The appellant complains that various condition of community custody imposed by the trial court violate his constitutional right to remain silent. However, the appellant is currently incarcerated, is not subject to community custody, and has not been effected or harmed by these conditions in any way. Thus, this issue is not ripe for review by this court.

In State v. Massey, 81 Wn.App. 198, 200, 913 P.2d 424 (1996), a defendant challenged a condition that he submit to searches by the Department of Corrections. This Court held that the judicial review was premature unless and until the defendant had actually been subjected to a search he claimed was unreasonable. Massey, 81 Wn.App. at 200. Again, in State v. Motter, 139 Wn.App. 797, 162 P.2d 1190 (2007), a defendant argued a condition he not possess certain items, drug paraphernalia, was vague and constitutional. This Court again declined to decide the issue, holding that it was only proper to review these issues in the context of an allegedly harmful application of a condition of community custody. Motter, 139 Wn.App. at 804. Based on these authorities, the State asks this Court to find that this issue is not appropriately before the Court at this time.

V. The Trial Court Did Not Err by Entering the Sexual Assault Protection Order, and the Record is Insufficient for this Court to Review the Issue.

The appellant argues the trial court erred by entering a Sexual Assault Protection Order (SAPO) for two persons the appellant had not been convicted of offending against. Frustrating this Court's review of this issue is the fact the record apparently omits the trial court's decision on this issue, as well as the arguments of the parties, leaving the Court without any information as to whether the appellant objected to or agreed to the SAPO. RP 641. It is long established that "[t]he party seeking review has the burden of perfecting the record so that the reviewing court has before it all of the relevant evidence." State v. Vazquez, 66 Wn.App. 573, 583, 832 P.2d 883 (1992); Allemeier v. Univ. of Wash., 42 Wn.App. 465, 472-473, 712 P.2d 306 (1985). As it the appellant's responsibility to provide this Court a record sufficient for review, the State asks the Court to deny this claim.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal and uphold the appellant's convictions for rape and perjury. The appellant's claims of error are either not

supported the law and the record, are not preserved for appeal. As such, the Court should uphold the judgment and sentence of the trial court.

Respectfully submitted this 5th day of January, 2010.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: _____
James Smith, WSBA #35537
Deputy Prosecuting Attorney

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 38868-5-II**
	)	**Cowlitz County No.**
Appellant,	)	**08-1-00302-4**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
WILLIAM GLEN SMITH,	)	
	)	
Respondent.	)	
	)	

COURT OF APPEALS
DIVISION II
10 JAN -7 PM 12:19
STATE OF WASHINGTON
BY
DEPUTY

I, Michelle Sasser, certify and declare:

That on the 5th day of January, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of January, 2010.

Michelle Sasser

Michelle Sasser