

68136-2

68136-2
ORIGINAL

NO. 68136-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GENE FULTON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

THE HONORABLE J. WESLEY SAINT CLAIR, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

GRACE A. WIENER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUE PRESENTED

Gene Fulton was charged with burglary in the second degree for stealing a washer and dryer from a new house that was still under construction. An eyewitness to the crime provided a detailed description of the vehicle used in the crime and a general description of the two men who perpetrated the crime. Several local police departments coordinated to secure a truck and individuals matching the provided description on State Route 167 only seven minutes after the truck involved in the crime left the crime scene. Fulton was the individual driving the stopped truck. The washer and dryer in the bed of the truck were confirmed by serial number to be those taken from the burglarized home. During direct examination, a police officer testified that, when he arrived at the location where the truck had been stopped by another officer, based on the totality of the circumstances, "this was the suspect vehicle and these were the suspects." RP 7-66. Did the trial court properly allow the police officer's testimony, when the officer referred to Fulton as a "suspect," and when the strength of the State's case suggests that the outcome of the case would have been the same either way?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On July 15, 2010, appellant Gene Fulton and his co-defendant Corey Stobie were both charged by way of information by the King County Prosecuting Attorney's Office with one count of second degree residential burglary. CP 1-7. Prior to trial, the single count in the information was amended to burglary in the second degree, to reflect the fact that the building entered into was not yet being used as a dwelling. CP 16. On October 31, 2011, trial commenced before the Honorable Wesley J. Saint Clair in King County Superior Court and a jury was convened. Subsequently, the jury returned a verdict of guilty as charged. CP 42-49. As a result of this conviction, Fulton was sentenced to 12 months plus one day in the custody of the Department of Corrections. CP 42-49.

2. SUBSTANTIVE FACTS

On July 13, 2010, Solari Mae Solari lived in a development in Auburn, located at 1446 51st Street Northeast, along with her boyfriend, her mother, and her mother's boyfriend. RP 6-14 to 6-16. On that day, at approximately 1 a.m., Solari was outside

smoking a cigarette on the porch of the home, when she saw a truck, driving very slowly, pull in to the development with its lights off. RP 6-25 to 6-27.

Solari was very familiar with vehicles and motorcycles, as her grandfather owned a motorcycle business when she was growing up and she did all her own work on all of her vehicles, including her own truck. RP 6-28. Based on her knowledge, she was able to determine that the truck was a small, white utility truck from the early 1990's with a single cab and was probably a four-cylinder. RP 6-27 to 6-29.

The primary thing that Solari remembered was that the truck made a distinctive rattle, which she believed was coming from the truck's catalytic converter. RP 6-29. Based on her experience with vehicles, Solari believed that the rattle was coming from the catalytic converter because it was a constant rattle, emanating from the middle or front of the truck as the truck was moving. The rattle from a muffler would vary in the consistency of sound, making more noise as the car accelerated or more force was coming from the engine. RP 6-29.

While standing on the porch of her home, Solari observed this truck slowly drive, with its lights off, down 51st Street Northeast,

turn on 'O' Street, then back into a driveway of a home located on 51st Place Northeast. RP 6-30. She had a clear view of this address, with no trees, cars, structures or any other obstructions blocking her view. RP 6-34 to 6-35.

Solari knew that the home at this address was unoccupied and still under construction because she had observed contractors coming in and out of the home recently. RP 6-32 to 6-33. Additionally, the home did not have a sign indicating it was occupied, as other new homes in the development had after someone moved in. RP 6-32 to 6-33. She became suspicious because she knew there would be no reason for anybody to be at an uncompleted home at 1 o'clock in the morning. RP 6-33; RP 7-23.

After the truck backed up to the unoccupied home, Solari observed two men get out of the truck, one from the passenger side and one from the driver's side, and go into the home. RP 6-36. Solari could tell that the truck was left running while the men went inside, because she would still hear the rattle from the truck. RP 6-36. Solari could not see the specific facial features of the two men who entered the home, but she did observe that they were Caucasian, were of average build, and were between 5'7" and 6'1",

with one being shorter than the other. RP 6-37 to 6-38, RP 6-55. Solari believed that one of the men was wearing a white shirt and jeans, and that the other one was wearing darker clothing. RP 6-38.

Upon seeing these two men go into the home, Solari called 911 and described what she had observed. RP 6-39 to 6-40. She observed as the men came out of the house carrying a huge white box, which she recognized as either a washer or a dryer, loaded it into the back of the pick-up truck, and positioned it. RP 6-37 to 6-41. Solari continued to observe as the men re-entered the home, again coming out of the home with either a washer or dryer and loading it into the truck. RP 6-40 to 6-40.

After the men loaded up the washer and dryer, the men got into the vehicle and pulled away from the home, taking a right out of the driveway and exiting the development on to 277th Street. RP 6-44. The only access to the development by road was on 277th Street and, from there, one could only go west or east on 277th. RP 6-83. Solari could tell that the truck was not going east because she would have seen them and heard them going up the hill from the porch. RP 6-46. She could hear that the truck went

west on 277th Street, because she heard the rattle getting quieter in that direction. RP 6-46.

After Solari placed the 911 call at 1:07 a.m., she stayed on the phone with the 911 operator and described what she had seen, the description of the truck, as well as information about which direction the truck went. RP 6-46. Auburn Police Officer Jamie Douglas also recalled that, in addition to the general description of the truck, that the suspected truck the officers were looking for was a Ford model. RP 6-153. Several Auburn Police Department officers were dispatched to the scene at 1:06 a.m. and arrived at the burglarized home in a couple of police patrol cars approximately three minutes later. RP 6-47, RP 6-152; RP 7-56. They became aware that the suspect truck left the development at 1:07 a.m. RP 6-152.

When Auburn Police Department officers checked the burglarized home, they found that the door to the unfinished home was unlocked and that all of the appliances were in place except the washer and dryer. RP 6-88. Law enforcement did, however, see that the piping where the large vent pipe attaches as well as the hookups for the washer/dryer were there. RP 6-87.

Algona Police Officer Tilman Atkins heard the dispatch and was on nearby State Route 167 when he saw a vehicle matching the suspect vehicle's description headed southbound on that route at 1:14 a.m.. RP 5-40 to 41. The truck was a very loud, older white Ford pickup with an open bed truck with a new washer and dryer set in the truck bed. RP 5-39. The Algona officer stopped the truck and found Fulton and Stobie within the truck. RP 5-41. Upon closer inspection, Officer Atkins saw that the washer and dryer looked clean and shiny as if they had been just taken off the showroom floor. RP 5-40.

Upon learning that an Algona police officer had a suspect vehicle on State Route 167 southbound, Auburn Police Sergeant Mark Callier instructed Auburn Officer Jamie Douglas to respond to that location. RP 6-89. Officer Jamie Douglas arrived at SR 167 and Ellingson Road at 1:17 a.m. RP 7-59. Upon his arrival, Officer Douglas observed that this truck matched the description of the suspected vehicle and that the washer and dryer in the back of the truck were wrapped with clear plastic and a dryer hose was still attached to the dryer. RP 7-63 to 66.

Ed Glen, the property developer from Centex Homes, later compared the serial numbers on the washer and dryer in the back

of the truck driven by Fulton with those purchased by the company to be in the home that was burglarized. RP 7-29. In doing so, he confirmed that the appliances in the back of the truck were stolen from the burglarized Centex home. RP 7-29.

Fulton testified at trial. Fulton testified that he could not remember anything that he had done that morning, afternoon, or evening prior to going to Muckleshoot Casino in Auburn. RP 8-93 to 94. Fulton said that he was at the casino for several hours, that he did not remember when he left the casino, nor what time he went to pick up Stobie from the Sportspage Tavern that evening. RP 8-102. Fulton testified that, when he went to pick up Stobie, he recognized a couple of guys in another white or tan pickup truck in the middle of the parking lot whom he had seen at casinos on a different day. RP 8-83.

When the two other guys offered for him to purchase the washer and dryer from them, he initially said he could not afford the washer and dryer. RP 8-84. However, he said that the men said that there was a good price on it. RP 8-84. Fulton further testified that he had been over at some friends a few days beforehand and that their washer and dryer were on the blink, so he purchased this washer and dryer for them for \$240. Fulton testified that he made

this purchase despite the fact that he had been unemployed for over a year. RP 8-84, 8-92, 8-105.

During cross-examination, Fulton testified that his truck did not have any car problems causing it to be loud. RP 8-91. Fulton said that he did not know the names of the individuals who he bought the washer and dryer from and that he did not ask them their names. RP 8-103. He also did not ask them where they obtained the washer and dryer. RP 8-104.

Furthermore, when he was asked what the names were of his friends that he bought the washer and dryer for, he gave the names, "David and Teresa," but said he did not know their last names. RP 8-105. Upon being questioned further about these friends, Fulton testified that he knew "David and Teresa" through mutual friends. When asked who that mutual friend was, the appellant responded "my sister." Fulton was asked how long ago he had known these friends "David and Teresa" and he responded "probably a year ago." RP 8-108. When Fulton was confronted about the fact that a year ago would have been a couple months after the alleged incident occurred, he changed his mind and said it was much longer ago than that. RP 8-108.

C. ARGUMENT

1. THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BECAUSE THE POLICE OFFICER DID NOT TESTIFY THE APPELLANT WAS GUILTY.

Fulton contends that he was denied due process when “the jury was permitted (over defense objection) to hear an officer’s opinion on guilt.” Brief of Appellant, pg. 1, A. He argues that a testifying police officer stating “his opinion that police had found the perpetrator” constituted an improper comment on guilt, thus denying the appellant his constitutional right to a fair jury trial. Id. When considering all of the evidence presented at trial, as is required, this claim fails.

Under the facts of this case, the trial court properly overruled the appellant’s objection to the officer’s statement. Contrary to what is suggested in the appellant’s brief, the police officer in question at no time stated that the defendant was guilty of the charged crime. Rather, the police officer stated that he believed they had “the suspect vehicle” and “the suspects.” The actual word choice and context of the officer’s statement demonstrates that the appellant’s claim falls short.

During the trial, while Officer Jamie Douglas was testifying in direct examination, the following exchange occurred:

Q: What were you thinking when you came upon the scene and saw what you described to us?

A: Based on the totality of everything I'd been given and what I saw, this was the suspect vehicle and [inaudible 3:31:01].

Defense Counsel: Objection, your Honor. I think that calls for something the Jury needs to decide and not this officer. Apparently, the question is along the line of did we get the right people. I think that's a question that other people have to answer, not this officer.

[Prosecutor:] Obviously, the ultimate, the Jury will ultimately decide...whether or not the law enforcement obtained the correct individuals, but nevertheless, his thinking during the course of the investigation is extremely relevant to the facts of the case.

[Court:] I'm going to allow it. Overruled.

Q: Pardon me, officer, so you indicated based on the totality of what you knew about this situation?

A: That the, this was the suspect vehicle and these were the suspects.

Q: Did you have any reason to doubt that?

A: No.

RP 7-66 and 7-67.

In the Appellant's Brief, the above exchange is referenced in many ways, none of which accurately reflects the testimony that

was actually stated at trial. On the first page of his brief, the appellant writes that, "a police officer testified that, based on the information dispatched and what he saw when he responded to the detention location, it was his opinion that police had found the perpetrator." The appellant's argument heading on pg. 5 asserts that, "Appellant was denied a fair trial when the jury heard a police officer testify appellant was guilty."

Furthermore, the appellant indicates that, "the State presented Officer Douglas' opinion that he believed Fulton and Stobie were the persons who broke into the house and stole the washer and dryer," as well as references, "Douglas' opinion that Fulton was the person who stole the washer and dryer." Pg. 5, 7. At yet another portion of the appellant's brief, he states that, "the opining witness was an officer who offered his opinion that when officers stopped Fulton they had caught the perpetrator." Pg. 7.

None of these descriptions accurately relay what actually happened at the trial court level. The appellant's mischaracterization of the actual testimony at trial is consistent throughout their briefing on this appeal. At no time during his testimony does the officer say that he had caught "the perpetrator" or that the appellant was guilty. Rather, he states that, "this was

the suspect vehicle and these were the suspects.” This distinction is one that should be noted and should not be undervalued.

As a general rule, no witness is permitted to express an opinion that is a conclusion of law, or merely tells the jury what result to reach. In a criminal case, it is improper for a witness to express a personal opinion on whether the defendant is guilty. State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973).

To determine whether a statement constitutes improper opinion testimony, a court considers the nature of the charges, the type of defense, the type of witness, the specific nature of the testimony, and the other evidence before the trier of fact. State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008).

There are no bright-line rules on this issue. Trial judges have broad discretion to do what seems fair under the circumstances. State v. Nelson, 152 Wn. App. 755, 219 P.3d 100 (2009), review denied, 168 Wn.2d 1028, 230 P.3d 1060 (2010) (“We defer to trial judges on these questions for a number of reasons. Among those reasons is the inability of appellate courts to craft a rule that would apply to every case... The non-amenable of

the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop, appears to be a sound reason for conferring discretion on the [trial judge]”).

Here, at no time during this trial did any officer express an opinion regarding the appellant’s guilt or give an opinion on the ultimate issue. ER 704. Specifically, in the portion of testimony that was objected to by the appellant, the prosecutor neither asked for, nor did the officer provide, an opinion as to the appellant’s guilt or tell the jury what result to reach.

Defense counsel objected when the officer said, “this was the suspect vehicle,” indicating that the question that was asked was along the line of did we get the right people. In actuality, as a reading of the relevant portion of the testimony will show, the question was regarding what the police officer was thinking. His response pertained to the fact that the vehicle that he saw at the scene was the one that was suspected. As the prosecutor then clarified in response to the objection, while the jury ultimately decides whether or not law enforcement obtained the correct individuals, the officer’s thinking during the course of the

investigation is extremely relevant to the facts of the case. The court agreed and overruled the objection.

It is worth underscoring that, from the moment that the jurors entered the courtroom and saw Fulton in the chair reserved for defendants in a criminal case sitting next to a defense attorney, it was known to the jurors that Fulton was "suspected" of doing something criminal. Were the appellant not suspected of this, he would have not been involved in a criminal proceeding. As the jurors are instructed in the court's instructions, however, the fact that the appellant had been charged with a crime, had been suspected of committing a wrongdoing, does not mean that he is guilty and can not be held against him.

Moreover, the choice of words during testimony is important and the actual words used must be examined. The officer did not state that the appellant was the perpetrator or the one who stole the washer and dryer from the home, as set forth in the appellant's brief. Rather, he indicated that the vehicle was the "suspected" one and that these were the "suspects." The plain meaning of the word suspect implies that it is not yet confirmed or known whether the thing or person in question was that which committed a wrongdoing

or crime. In other words, there is a chance that he was the perpetrator, but also a chance that he is not.

Fulton's argument presupposes that the words and meanings of "suspect" and "perpetrator" are interchangeable. However, the distinction in meaning between "suspect" and "perpetrator" should not be discounted. The word "suspect," at its very essence, suggests that it is not yet confirmed whether or not the one in question is the actual perpetrator. If something (here, a car) is suspected or one is a suspect, they are suspected of being involved with something, but not yet determined to be involved. As the prosecutor stated at the time, it was and is up to the jury to determine whether the suspected individuals are the actual ones who perpetrated the crime.

The officer's choice of words here is important because he indicated that they were "suspects," not that they were the perpetrators. The use of the word "suspect" or "suspected" provides context to understand the officer's investigative process. The officer's thoughts during certain periods of the investigation show why the officer took the next investigative steps and are particularly relevant considering the attacks on the police department's investigation that were being levied by the defense.

In making his remarks, however, the officer made no direct comment on the appellant's guilt.

The fact that the officer did not express improper opinion testimony regarding the appellant's guilt is highlighted when one compares several cases in which an opinion on an ultimate issue has been permitted. In City of Seattle v. Heatley, an officer was allowed to testify that the defendant in a DUI case "was obviously intoxicated and... could not drive a motor vehicle in a safe manner." 70 Wn. App. 573, 854 P.2d 658 (Div. 1, 1993). In a prosecution for possession of cocaine with intent to deliver, an opinion that the defendant "was involved in the transaction or he was the one running the show," was permitted by the Court. State v. Fisher, 74 Wn. App. 804, 874 P.2d 1381 (Div. 1, 1994), as amended on denial of reconsideration (July 21, 1994), and aff'd in part, vacated in part on other grounds, 127 Wn.2d 322, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995). Additionally, in a prosecution for assault, the Court permitted a physician's opinion that cuts on victim's face appeared to have been inflicted deliberately. State v. Baird, 83 Wn. App. 477, 922 P.2d 157 (Div. 1, 1996).

These cases illustrate a wide variety of circumstances where opinions were held to be admissible evidence, but not opinions on

guilt. While these permissible opinions were conclusive and directed at the ultimate issue, the testimony by the officer in the case at hand was only that the vehicle and people stopped were suspected. Therefore, Fulton's due process rights were not violated because there was no opinion testimony admitted as to his guilt.

2. THE APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BECAUSE, EVEN IF THE ERRORS ALLEGED HAD NOT OCCURRED, THE OUTCOME OF THE TRIAL WOULD NOT HAVE BEEN DIFFERENT.

Under the facts of this case, the officer did not state an improper opinion about whether Fulton was guilty, nor did the trial court err by overruling Fulton's objection to the officer's statement. However, assuming, arguendo, that the statement by the police officer was impermissible, the verdict should not be overturned in light of the fact that the jury would have reached the same result without that impermissible statement due to the overwhelming evidence proving Fulton guilty.

An error is not harmless beyond a reasonable doubt if there is a reasonable probability that the outcome of the trial would have been different if the error had not occurred. State v. Powell, 126

Wn.2d 244, 267, 893 P.2d 615 (1995). Here, the outcome would not have been any different, even if the alleged errors did not exist, because of strength of the State's evidence in this case.

To prove burglary in the second degree in this case, the State had to prove beyond a reasonable doubt that, on or about July 13, 2010, in Washington State, the appellant unlawfully entered or remained unlawfully in a building with the intent to commit a crime against a person or property therein. RCW 9A.52.030. The evidence in this case was not particularly complicated. Rather, it was very straightforward and ruled out the plausibility that anyone other than Fulton and his co-defendant were the individuals who burglarized the home.

Here, Solari was an eyewitness to the actual burglary and gave a detailed description of the vehicle used to haul off the washer and dryer (including the distinctive rattle of the truck), as well as a general description of the men involved in the burglary. A truck with a new washer and dryer in the back was found driving in a direction away from the home. The truck matched the description and sound of the truck seen at the burglarized home. The two men in the truck matched the general description of the two men seen at the home. Indeed, the washer and dryer that

were found in the bed of the truck were later confirmed to be that taken from the burglarized home through the property developer's comparison of serial numbers.

The timeline of the crime and investigation in this case is also important. This is not a situation where a washer and dryer were stolen from a location and then, several days, several hours, or even 20 minutes later, the appliances ended up in the possession of the appellant. Rather, from the time that the two men in the truck left the housing development with the washer and dryer, to the time that the truck with the same washer and dryer was stopped by the Algona police officer, was a time span of seven minutes (1:07 a.m. to 1:14 a.m.).

It took a short amount of time for law enforcement to find the truck with the washer and dryer because of the manner in which law enforcement created a perimeter and conducted area checks on the primary roadways where the truck could have gone when leaving the housing development. Furthermore, the distinct description of the truck and the fact that there are not as many cars on the road during this time of night meant this particular vehicle could be identified quickly.

Knowing that the washer and dryer left the housing development on a truck at 1:07 a.m. and was then found at 1:14 a.m. to be in a truck at SR 167 and Ellingson Road is an important factor to consider. Having a timeline of only seven minutes for the appliances to get from point A to point B was a crucial fact for the jurors to consider because it limited what would have been feasible for the burglars to accomplish during that short timeframe.

As part of his follow-up investigation on this case, a police officer drove the distance from the home where the washer and dryer was taken from to the location where the appellant was stopped at State Route 167 and Ellingson Road. The officer testified that this route, driving the speed limit at the same time of night, took eleven minutes to drive. RP 7-70 to 72.

Meanwhile, even by the defense investigator's own timelines, Fulton's version of events would not be possible. A defense investigator drove the distance from the home where the washer and dryer were taken to the Sportspage Tavern parking lot, then from that parking lot to the location where Fulton was stopped by law enforcement. RP 8-135 to 138. The defense investigator testified that, when he drove these distances, it took him seven

minutes to drive from the burglarized home to the Sportspage Tavern and an additional ten minutes to drive from the tavern parking lot to the location where the appellant was stopped.

RP 8-138.

Therefore, it would have taken, at a minimum approximately 17 minutes for Fulton to make this drive (not including any time it took him to get the co-defendant from inside the tavern or to negotiate the purchase of the washer and dryer). This timeline is not consistent with the facts.

In addition to the evidence and testimony presented during the State's case in chief, the testimony of Fulton himself strengthened the State's case. The jury heard Fulton's testimony, several aspects of which could have been viewed as simply incredible. The jury was allowed to consider the defendant's testimony as well as evaluate his credibility.

In addition to the feasibility constraints set out by the timeline in this case, another feasibility question that the jury had to consider is the likelihood that two men in a truck remarkably similar to theirs would be selling a washer and dryer at 1 a.m. in a tavern parking lot, only minutes after they had stolen it. It is also highly questionable that Fulton, who was unemployed for a year at the

time of this incident, would have spent \$240 to purchase a washer/dryer set from two people he did not know, not knowing if the washer and dryer even worked, for friends whose last name he could not recall.

Fulton also first indicated that he knew these friends for a year. However, when he was then confronted about the fact that that would have been several months after the incident, he changed his mind and said that, in fact, he had known them much longer than that. Fulton also said he knew these people through mutual friends, but then said that person was his sister.

During his testimony, Fulton also stated that he did not remember anything that he had done on the day of the incident prior to going to Muckleshoot Casino, that he did not remember when he left the casino, and that he did not remember what time he got to the Sportspage Tavern. Additionally, Fulton said that his truck did not have any car problems causing it to be loud. However, both officers who were at the scene where Fulton was stopped referenced the loudness of the truck. In light of the State's evidence and Fulton's testimony, there was overwhelming evidence of guilt.

In conclusion, Fulton's constitutional right to a fair trial was upheld because the officer did not give impermissible testimony and, therefore, the trial court did not err by allowing the testimony. However, had there been an error, there is no reasonable probability that the outcome of the trial would have been different if the alleged error had not occurred due to the strength of the State's case.

D. CONCLUSION

For all of the foregoing reasons, the State requests that this Court reject Fulton's arguments and affirm his conviction.

DATED this 15 day of October, 2012.

Respectfully submitted,

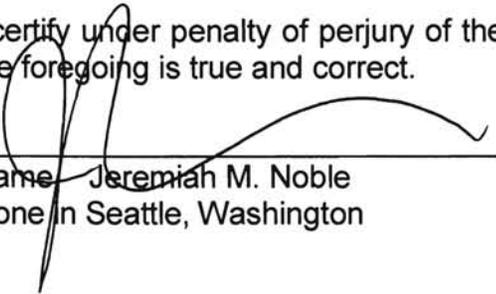
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: BSM #33167 for
GRACE A. WIENER, WSBA #40743
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. GENE FULTON, Cause No. 68136-2-I, in the Court of Appeals, Division I, for the State of Washington.

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


Name Jeremiah M. Noble
Done in Seattle, Washington

10.15.2012
Date 10/15/2012