

71246-2

71246-2

NO. 71246-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LEBARON PRIM,

Appellant.

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

The Honorable Eric Lucas, Judge  
The Honorable George Appel, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor improperly commented on appellant's exercise of his constitutional right to confront the witnesses against him.

2. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

Issue Pertaining to Assignments of Error

On redirect examination, the prosecutor asked the complaining witness whether she wanted to be at trial testifying. Defense counsel's immediate objection was overruled. After redirect examination, defense counsel moved for a mistrial arguing the prosecutor's questioning was a comment on appellant's constitutional rights because it implied it was appellant's fault the complaining witness had to testify. The trial court denied the motion maintaining the prosecutor's question was proper. Is reversal required because the prosecutor question impermissibly commented on appellant's exercise of his constitutional right to confront the complaining witness?

B. STATEMENT OF THE CASE

1. Procedural History

The Snohomish County prosecutor charged appellant LeBaron Prim with one count of second degree rape of a child, for an incident with J.J. on December 27, 2011. CP 59. A jury found Prim guilty. CP 27;

3RP<sup>1</sup> 454-56. The trial court imposed an indeterminate sentence of 78 months to life in prison. CP 7-23; 4RP 13. Prim timely appeals. CP 5-6.

2. Trial Testimony

J.J. met Prim's brother, Roderick Houston, at school in 2011. 3RP 31-32, 167-68. Houston moved to Alabama before the start of the next school year. 3RP 33, 106. Despite his move, Houston kept in contact with J.J. through text messaging and Facebook. 3RP 34, 106, 168-70.

Prim and Houston returned to Washington to visit and stay with their mother, Colette Inge, in December 2011. 3RP 34, 201-03. Prim was in the Navy and stationed on the east coast at the time. 3RP 16-18. On December 27, 2011, 12-year-old J.J. walked to Inge's house to visit Houston. 3RP 34-35, 60-61. Prim was at the house when J.J. arrived. 3RP 39, 41.

Shortly after arriving, J.J. asked Houston if they could go to his bedroom. 3RP 42-43. Houston retrieved a condom from his bedroom and J.J. followed Houston to the bathroom. J.J. knew they were going to have sexual intercourse. 3RP 44-46, 108, 174-75, 180. J.J. ended the intercourse after five to ten minutes because it was painful and she was no longer in the mood. 3RP 46-47, 110, 127.

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – September 6, 2013; 2RP – October 17, 2013; 3RP – October 28, 29, 30, 31 and November 1, 2013; 4RP – December 10, 2013.

J.J. went back downstairs and sat on the couch. 3RP 48-49, 175. Prim was asleep on the couch. 3RP 111-12. J.J. left Inge's house a short time later when Houston's father came downstairs. 3RP 49-51, 120, 175-76, 193. Houston did not talk to Prim about having intercourse with J.J. 3RP 181, 186. Later that same day, J.J. began text messaging Prim. They did not discuss J.J.'s intercourse with Houston. 3RP 52-53.

J.J. left her own house through a bedroom window later that night. She walked to Inge's house. 3RP 55-56, 58-59. J.J. did not tell her father she was leaving. 3RP 55. Houston and Prim were watching a movie when J.J. arrived at the house. 3RP 61. Houston's parents were asleep. 3RP 62.

After a few minutes, Prim got up and signaled J.J. to follow him to the bathroom. 3RP 63-64. J.J. and Prim kissed in the bathroom. 3RP 64. Prim took out a condom and asked J.J. if she wanted to have sexual intercourse. J.J. nodded "yes." 3RP 65. J.J. and Prim had intercourse on the bathroom floor. 3RP 68, 95. J.J. did not feel any pain. 3RP 69. When J.J. began bleeding Prim asked if she was a virgin. J.J. ignored the question. 3RP 70. After about 15 minutes Prim asked J.J. if she was ready to be done. J.J. responded, "yes." 3RP 69-70.

J.J. went back downstairs and sat on the couch. 3RP 73. Prim stayed in the bathroom to clean up the blood. 3RP 70. J.J. left Inge's

house about 3 a.m. 3RP 75. Prim later told J.J. not to say anything to anyone because of J.J.'s age and the fact that he was in the navy. 3RP 77. J.J. called a friend on the way home to explain what happened. 3RP 75-76, 115-16.

About three days later, J.J.'s friend told her own grandmother about what J.J. reported. The grandmother then told J.J.'s father about the alleged incident. 3RP 137-39, 147, 241. J.J.'s father confronted J.J. about the incident. 3RP 139. J.J. initially lied to her father about what happened because she did not want him to be upset and disappointed. 3RP 102-03, 113. Eventually, J.J. told her father what happened. 3RP 79, 117. J.J. was sad and did not want to get anyone in trouble. 3RP 140. J.J.'s father also had J.J. speak with his fiancée and church pastor about the alleged incident. 3RP 80, 143, 147. Shortly after the New Year Holiday, J.J.'s father reported the alleged incident to police. 3RP 81, 117-18, 140-42, 153-54. J.J. was "closed off" when police spoke with her. 3RP 290-91.

A forensic evaluation revealed J.J. had bacterial vaginosis but no other obvious injuries. 3RP 251-53, 280-83. J.J. began menstruating about four days after the alleged incident. 3RP 241. Forensic nurse examiner, Colette Dahl, opined J.J.'s bleeding during intercourse was caused by the intercourse rather than menstruation given the amount of blood described by J.J. 3RP 231-32, 255. No semen or saliva was

detected on J.J.'s vaginal swabs. 3RP 259-60, 408-09. No semen was detected on J.J.'s underwear. 3RP 414. Blood on J.J.'s underwear was not determined to be from a specific part of the body. 3RP 415-17.

On January 16, 2012, Marysville police detective Cori Shackleton went to Inge's house. 3RP 301, 312, 397-98. Inge called Prim and Houston after being told of the allegations. 3RP 314. Inge could not contact Prim. 3RP 399-402. After contacting Houston, Inge handed Shackleton the telephone. 3RP 317. Houston told Shackleton J.J. had twice come to the house on December 27 but "that was all that happened." 3RP 318. At one point, Houston saw Prim leave the room with J.J. but he was not certain where they went or how long they were gone. 3RP 319.

Inge told Shackleton she remembered seeing a girl on December 27 and believed it could have been J.J. 3RP 319. Inge told Shackleton she went to bed between 8 and 9 p.m. on December 27. 3RP 320. Inge later found J.J. on Facebook and confirmed she had seen J.J. on December 27. 3RP 321. Inge told Shackleton she wanted to press charges against J.J. for trespassing. Shackleton reported charges were unlikely because someone had let J.J. into the house. 3RP 322, 390-91.

Shackleton called Prim by telephone three times to acquire his email and cell phone passwords. 3RP 328-30, 380. Prim could not recall the passwords. 3RP 329. Prim denied knowing J.J. 3RP 339. Phone

records showed text messages between Prim and J.J.'s cell phones beginning about 12:38 p.m. on December 27. 3RP 351-52. Police could not determine the content of the text messages between Prim and J.J. 3RP 378. Shackleton found no text messages or other relevant information regarding the alleged incident on Prim's cell phones. 3RP 344, 381.

At trial, Inge denied telling Shackleton she had seen J.J. at the house on December 27. 3RP 213, 226. Inge denied knowing who J.J. was. 3RP 219, 226, 229. Inge explained she did not go to bed until midnight on December 27. 3RP 209, 218. When she did go to bed, Prim and Houston were already asleep downstairs. 3RP 208.

Houston acknowledged having sexual intercourse with J.J. on December 27. 3RP 174-75, 180. Houston denied seeing Prim and J.J. leave the basement together or come out of the bathroom. 3RP 193.

### 3. Prosecutorial Misconduct

Prim did not testify at trial. The defense theory of the case was the state could not prove beyond a reasonable doubt that alleged incident had happened. 3RP 443-46. In support of this theory, defense counsel questioned J.J. about the events leading up to the alleged incident and the multiple statements she had made to various people about the alleged incident, including her father, friends, police, and interviewers. See 3RP 103-23.

The prosecutor concluded her redirect-examination of J.J. by asking whether J.J. wanted to remember the alleged incident and whether she wanted to be in court testifying. The following exchange occurred:

Prosecutor: Why don't you remember?

J.J. It's hard to remember because it was a long time ago, and some things are kind of vague.

Prosecutor: Do you want to remember?

J.J.: No.

Prosecutor: How Come?

Defense: Object as to relevance

Court: Overruled. That means you can –

Prosecutor: You can go ahead and answer question [J.J.]

J.J.: What was the question again?

Prosecutor: I asked you do you want to remember and you said no, and I said how come.

J.J.: Because it's painful to think about.

Prosecutor: Why?

J.J.: Because I can't go back and change things.

Prosecutor: [J.J.], do you want to be here today?

Defense: I'd object as to relevance.

Court: Overruled.

J.J.: No.

Prosecutor: How come?

J.J. It's uncomfortable.

3RP 128-29.

After J.J.'s testimony, defense counsel moved for a mistrial, arguing the prosecutor's question about whether J.J. "wanted to be here," was a comment on Prim's constitutional right to a trial. Defense counsel argued the prosecutor's question implied that it was Prim's fault J.J. had to testify. 3RP 131.

The prosecutor maintained J.J.'s credibility had been attacked during cross-examination because of questions posed to her regarding her sometimes inconsistent statements to various people. 3RP 131-32. The prosecutor argued the question was proper to allow the juror to "assess why she [J.J.] was acting and reacting in the way she did during testimony." 3RP 132.

The trial court overruled the objection and motion for mistrial concluding the question was relevant and not prejudicial. The trial court noted, "clearly the witness was somewhat reluctant, so in a way it was asking the obvious." 3RP 132.

C. ARGUMENT

THE PROSECUTOR IMPROPERLY COMMENTED ON  
PRIM'S CONSTITUTIONAL RIGHT TO CONFRONT HIS  
ACCUSER

a. The Prosecutor's Question to J.J. Constituted An Improper  
Comment On The Exercise Of Prim's Constitutional Right  
To Confront J.J.

Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right, such as the rights to silence and to a jury trial under the Fifth and Sixth Amendments and Const. art. 1, § 22. See, e.g., United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 581, 20 L. Ed. 2d 138 (1968) (capital punishment provision of Federal Kidnapping Act unconstitutionally chilled Fifth Amendment right to silence and Sixth Amendment right to demand jury trial); Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (drawing adverse inference from defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights); State v. Frampton, 95 Wn.2d 469, 478-79, 627 P.2d 922 (1981) (previous Washington death penalty statute needlessly chilled defendant's right to plead not guilty and demand a jury trial).

Drawing negative inferences from these basic rights amounts to a "penalty imposed . . . for exercising a constitutional privilege." Griffin, 380 U.S. at 614. To protect the integrity of constitutional rights, the courts

have held that the State may not draw adverse inferences from the exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (citing Jackson, 390 U.S. at 581; Griffin, 380 U.S. at 614; State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982); Frampton, 95 Wn.2d 469).

In reviewing comments on constitutional rights, courts consider whether the prosecutor “manifestly intended the remarks to be a comment on that right.” State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008) (citing State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991)). If the comment was “so subtle and brief that it did not naturally and necessarily emphasize” the defendant’s constitutional rights, it may be considered a mere reference, rather than an impermissible comment. Burke, 163 Wn.2d at 216 (internal quotes omitted). In distinguishing mere references from impermissible comments, courts focus on the purpose of the prosecutor’s remarks. Id. The question is whether the comments serve some permissible purpose other than to invite the jury to penalize the defendant for exercising his constitutional rights.

For example, when the prosecutor invites the jury to infer a defendant is guilty because he exercised his right to silence, that is not a mere reference, but an impermissible comment on this right. Burke, 163 Wn.2d at 222. In Burke, the prosecutor noted Burke ended his interview with police and invited the jury to infer that “the guilty should keep quiet

and talk to a lawyer.” Id. The import of the prosecutor’s argument was that “those who invoke their right to silence do so because they know they have done something wrong.” Id.

Here, the prosecutor similarly implied that, simply by exercising his right to a trial and to confront the witnesses against him, Prim had done something wrong. The prosecutor improperly used Prim’s right to face his accuser as a way to ignite the jurors’ passions against him. The prosecutor’s question to J.J. about whether she wanted to be at trial testifying implied that by exercising his right to a trial and to confront witnesses, Prim was causing additional harm to J.J.

The prosecutor’s question was “manifestly intended” as a comment on the constitutional right to testify because it served no other logical purpose. Although the prosecutor maintained the question was proper to allow the jury to assess why J.J. acted as she did during her testimony, the question was not connected at that point to any defense argument regarding J.J.’s testimony. Moreover, the prosecutor’s prior questions had already elicited an explanation as to why J.J.’s statements and memory about the incident may have been inconsistent: the incident happened “a long time ago,” and the incident was “painful to think about.” 3RP 128-29. Asking J.J. whether she wanted to be at trial testifying served no

purpose other than to garner sympathy for J.J. at the expense of Prim's constitutional right to confront witnesses.

The emotional cost of a trial for the complaining witness in a sex crime is undisputed. But Washington courts have laid down careful guidelines to prevent that cost from being used to penalize a defendant for exercising the constitutional rights to trial and to confront witnesses. Comments on the emotional cost of testifying are permissible if used to support a witness's credibility. State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006).

Comparison with Gregory illustrates the point. Gregory was charged with the three counts of rape for an incident with R.S. Gregory, 158 Wn.2d at 778. At trial, Gregory testified the sexual act was consensual in exchange for money. Gregory explained R.S. became upset and demanded more money when she discovered the condom had broken. When he refused, she became irate, and he told her to get out of the car. The defense theory was that R.S. accused Gregory of rape in retaliation. Gregory, 158 Wn.2d at 779-80.

The prosecutor asked R.S. how she felt about having to testify and be cross-examined. Defense counsel's objection was overruled and R.S. described the experience as "horrific." Gregory, 158 Wn.2d at 805-06. In closing, the prosecutor read back the answer to the jury and argued R.S.

would not have put herself through the ordeal of trial merely to avenge a broken condom. Gregory, 158 Wn.2d at 780, 806.

On appeal, Gregory contended the prosecutor chilled his constitutional confrontation rights by asking how the complainant felt about cross-examination. Gregory, 158 Wn.2d at 806. The Court rejected this argument, concluding the questioning and argument “were not improper because they did not focus on Gregory’s exercise of his constitutional rights to trial and to confront witnesses. Instead they focused on the credibility of the victim as compared to the credibility of the accused.” Gregory, 158 Wn.2d at 808. Significantly, the State’s actions in that case did not rise to the level of improper comment on the exercise of a constitutional right because the State did not specifically criticize the defense’s cross-examination of the witness or suggest Gregory should have spared her the unpleasantness of going through trial. Gregory, 158 Wn.2d at 807.

Unlike Gregory, Prim did not testify. The case therefore, did not come down to a credibility contest between J.J. and Prim. Rather, Prim sought to hold the State to its burden of proving beyond a reasonable doubt the alleged incident occurred. Assuming the prosecutor was merely attempting to make the type of credibility argument permitted in Gregory, that J.J. should be believed based on how difficult it was for her to testify,

it was entirely unnecessary to connect that cost to Prim's constitutional rights. By turning the focus away from the emotional cost of testifying and toward Prim's right to confront witnesses, the prosecutor went too far.

For example, the right to confrontation was compromised in State v. Jones when the prosecutor focused the jury on the traumatic impact of the trial on the child witness and connected it to the defendant's exercise of his rights to jury trial and to confront witnesses. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994). During the child's testimony, the prosecutor stood so as to block her from Jones' view. Jones, 71 Wn. App. at 805. During a break, Jones brought this to the court's attention and was permitted to adjust his position so he could see. Id. The prosecutor cross-examined Jones about this, saying, "[W]eren't you frustrated because I was blocking your view from her such that you could not stare at her as she was testifying?" Id. During closing argument, the prosecutor referred to this again, arguing that while society professes to care about children,

we still have a system that requires that child to have to walk in through those two big doors as a very, very small person and walk up here in front of twelve people, twelve grownups whom they don't know, and sit in this chair in a courtroom such as this, with the defendant sitting right there, staring at them.

Jones, 71 Wn. App. at 805-06. The prosecutor later returned to the point, saying that although Jones professed to care for the child,

he wants to have direct eye contact with her. Why? And what was the result of that direct eye contact that first day? She broke down and she cried and she told you she was afraid. She was afraid of who? Of [Jones]. And the CPS worker told you that outside how upset and how disturbed and how frightened she was so that she refused to walk through those two big doors again.

Jones, 71 Wn. App. at 806. The court held this questioning and argument was improper because it invited the jury to draw a negative inference from Jones' exercise of a constitutional right. Jones, 71 Wn. App. at 811-12.

As in Jones, the prosecutor here committed misconduct in violation of Prim's constitutional rights because the prosecutor's question to J.J. invited the jury to blame Prim not just for the crime he was charged with, but also for traumatizing J.J. by exercising his constitutional right to confront her at trial.

The prosecutor's question to J.J. becomes even more problematic when viewed in the context of the entire argument at trial. See State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (court views prosecutorial argument in the context of the entire argument and evidence at trial), cert. denied, 556 U.S. 1192 (2009). During closing argument, the prosecutor further emphasized that it was difficult for J.J. to testify: "Did [J.J.] seem like she wanted to share all of this information with all of you?"

Was she all that forthcoming? You were here, you had an opportunity to observe. Was she just spilling all this information out?” 3RP 447. Given the entire context of the case, the prosecutor’s question coupled with these comments served only to point out that Prim’s exercise of his constitutional right to a jury trial was traumatic for J.J. The only possible effect was to burden Prim’s exercise of the right to confront witnesses at trial.

b. The Prosecutor’s Misconduct Requires Reversal.

An impermissible comment on a constitutional right is constitutional error. Burke, 163 Wn.2d at 222. Reversal is required unless “the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error,” and that “the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” Id. (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)). With no physical evidence, the jury was entitled to believe either J.J. or find the State had not met its burden of proving the incident beyond a reasonable doubt. It is far from certain beyond a reasonable doubt that the outcome would have been the same without the unconstitutional penalty on Prim’s exercise of the right to trial.

The State may argue that the constitutional harmless error standard does not apply because Washington’s Supreme Court recently declined to

adopt the constitutional harmless error standard in a case where the prosecutor misstated the burden of proof and improperly argued the defendant carried the burden to produce evidence. See State v. Emery, 174 Wn.2d 741, 757-59, 278 P.3d 653 (2012). But, the Court has also long held that the constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments. See, Emery, 174 Wn.2d at 757 (citing Easter, 130 Wn.2d 228 (pre arrest silence); State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979) (post arrest silence)).

However, even under the general standard requiring reversal when prosecutorial misconduct is "both improper and prejudicial in the context of the entire record and circumstances at trial," Prim's convictions should be reversed. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004). Under that standard, the defendant bears the burden of establishing both. Hughes, 118 Wn. App. at 727. Prejudice is established if there is a substantial likelihood the misconduct affected the jury's verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

First, the question to J.J. regarding whether she wanted to testify was entirely unnecessary, even assuming the prosecutor was trying to

make the type of credibility argument permitted in Gregory. The prosecutor's question to J.J. therefore impermissibly invited the jury to blame Prim not just for the crime he was charged with, but also for traumatizing J.J. by exercising his constitutional right to confront her at trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (As a quasi-judicial officer, a prosecutor is duty bound to seek a decision based on reason rather than sympathy or prejudice), cert. denied, 393 U.S. 1096 (1969).

Moreover, the trial court's overruling of defense counsel's objection signaled to the jury that the trial court believed the prosecutor's question concerning J.J.'s desire to testify was proper. See State v. Perez-Mejia, 134 Wn. App. 907, 920, 143 P.3d 838 (2006) (trial court's overruling of defense objection and failure to give curative instruction "augmented the argument's prejudicial impact by lending its imprimatur to the remarks."). See also State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (trial court's overruling of petitioner's timely objection "lent an aura of legitimacy to what was otherwise improper argument.").

The prejudice is incurable because the jury is unlikely to be able to erase from its mind the implication that J.J. was yet again traumatized by Prim's constitutional right to confront her at trial. This was also not an isolated comment. The theme of the prosecutor's rebuttal was that J.J.

was traumatized by the event and reluctant to testify. The prosecutor's misconduct deprived Prim of his right to a fair trial.

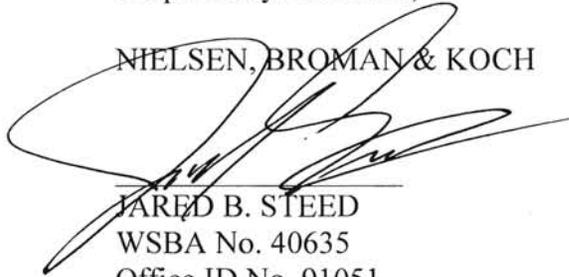
D. CONCLUSION

For the reasons discussed above, this Court should reverse Prim's conviction and remand for a new trial.

DATED this 29<sup>th</sup> day of September, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71246-2-I
	)	
LEBARON PRIM,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29<sup>TH</sup> DAY OF SEPTEMBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2014.

x *Patrick Mayovsky*