67627-0

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No. 67627-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DONALD L. CALVIN,

Appellant.

---

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

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# REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY

### 1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. CALVIN ASSAULTED THE PARK RANGER

Donald Calvin was convicted of third degree assault for placing Park Ranger Alexander Moularas in reasonable fear of imminent bodily harm while the ranger was performing his official duties. CP 49, 59, 61; RCW 9A.36.031(1)(g). Mr. Calvin's conviction must be reversed because the State did not prove beyond a reasonable doubt (1) that Ranger Moularas was placed in reasonable apprehension and immediate fear of bodily injury or (2) that Mr. Calvin intended to place the ranger in fear of injury, both elements of the crime. Brief of Appellant (hereafter AOB) at 9-19. Lumping the two elements together, the State argues the evidence of the encounter provided the necessary proof of each. Brief of Respondent (hereafter BOR) at 8-10.

The State's argument exaggerates the facts of the case with the use of emotional language. The State's claims that Mr. Calvin "rushed" and "charged" at Ranger Moularas are not supported by the ranger's testimony. BOR at 9, 10. When the ranger first saw Mr. Calvin, the ranger was in a truck about 20 feet from Mr. Calvin's car. RP 32. Mr. Calvin approached the ranger to talk to him and was

about five feet away when the ranger shined his flashlight at him. RP 23, 33. Mr. Calvin then moved towards the ranger when Ranger Moularas sprayed Mr. Calvin with pepper spray and then hit him with a baton. RP 23, 24. At no time did Ranger Moularas testify that the 54-year-old Mr. Calvin "charged" or "rushed" him as claimed by the prosecutor. BOR 9, 10; RP 111.

The State also claims Mr. Calvin was in an "aggressive posture" or "aggressive stance" when his fists were near his face. BOR at 8, 9. The ranger testified only that Mr. Calvin's hands were "up towards" his face, which was unsurprising given the two applications of pepper spray. RP 24, 25. Nor did Ranger Moularas claim that when he first encountered Mr. Calvin, Mr. Calvin gave him a "hostile glare," as argued by the State. BOR at 8 (citing RP 39 ("stare")).

The State also uses the ranger's over-reaction to Mr. Calvin to prove the reasonableness of the ranger's fear and Mr. Calvin's intent. BOR at 8-9. It is Mr. Calvin's actions, however, that are at issue. There is not sufficient evidence to prove beyond a reasonable doubt that Mr. Calvin intended to frighten the office, given the lack of evidence of aggressive actions or speech.

Because the State exaggerates the ranger's testimony its reliance upon Godsey to support its position is misplaced. BOR at 10 (citing State v. Godsey, 131 Wn. App. 278, 127 P.3d 11, rev. denied, 158 Wn.2d 1022 (2006)). The Godsey Court upheld a conviction for third degree assault by means of causing apprehension of fear of imminent bodily harm. Godsey, 131 Wn. App. at 284, 288. The defendant had active warrants for his arrest and initially ran from police officers who ordered him to stop. Id. at 283. When he stopped, he turned to face the officer with his fists up, said "Come on," and took a step towards the officer. Id. The State's recitation of this case omits the fighting language.[1] BPR at 10. Moreover, the actions described by Ranger Moularas do not support the intent to engage the officer in a fight that is described by the Godsey Court.

Viewing the evidence in the light most favorable to the State, a reasonable jury could not conclude beyond a reasonable doubt that (1) Ranger Moularas was in reasonable fear that Mr. Calvin was going immediately to inflict bodily injury on him or (2) Mr. Calvin intended to assault the ranger or place him in fear of assault. As a

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[1] The State also misrepresents Mr. Calvin's argument. Mr. Calvin cites the absence of threatening language as one of the circumstances relevant to the determination of Mr. Calvin's intent; he does not argue fighting language is required. AOB at 14-15; BOR at 9.

result, Mr. Calvin's conviction for assault in the third degree must be reversed and dismissed.

2. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. CALVIN RESISTED ARREST

Mr. Calvin was also convicted of resisting arrest, RCW 9A.76.040, for trying to prevent Ranger Moularas from handcuffing him. RP 142; CP 49; BOR at 12. His conviction must be reversed because the State did not prove beyond a reasonable doubt that he knew he was being placed under arrest or that he used force to resist the arrest. AOB at 19-22.

"A person is guilty of resisting arrest if he intentionally prevents to attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040. It was dark when Mr. Calvin encountered Ranger Moularas outside Larrabee State Park. BOR at 8; RP21, 116. While the ranger was in a work vehicle and in uniform, he did not identify himself as a law enforcement officer until after he had pepper sprayed Mr. Calvin and hit him with a baton. RP 24, 25, 41. He did so by using the word "police" when he ordered Mr. Calvin to the ground. RP 24, 54. Ranger Moularas never informed Mr. Calvin he was under arrest. RP 26-27.

As used in Washington criminal statutes, a person acts intentionally if he acts with the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a); CP 60. Mr. Calvin could not intentionally resist arrest if he was unaware that Ranger Moularas was a law enforcement officer and that he was being placed under arrest.

The State asserts that it was not requires to prove "as an element of the offense that Calvin understood he was under arrest to support his conviction, only that Calvin understood he was resisting an officer who was arresting him." BOR at 12. This distinction makes no sense. Specific intent is an element of the offense, and the State was required to prove Mr. Calvin "intentionally" trying to prevent "a peace officer from lawfully arresting him." RCW 9A.76.040. It is not enough to show he knew he was resisting an officer who was attempting to detain him for some other purpose. See RCW 9A.76.020 (obstructing police officer committed when defendant willfully hinders, delays or obstructs any law enforcement officer performing official duties). It is an element of the crime that Mr. Calvin intentionally resisted an arrest, and thus the State was required to prove he knew he was under arrest.

The State argues the park ranger was not required to tell Mr. Calvin he was under arrest, as it was obvious by the actions of forcing Mr. Calvin to the ground and handcuffing him. BOR at 12-13. This is incorrect. Police officers may detain and restrain people without arresting them. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Wheeler, 108 Wn.2d 230, 235-36, 737 P.2d 1005 (1987); State v. Mitchell, 80 Wn. App. 143, 145-46, 906 P.2d 1013 (1995), rev. denied, 129 Wn.2d 1019 (1996). The ranger's actions in this case are not sufficient to prove Mr. Calvin knew he was under arrest.

In addition, the State must prove that the defendant used force to resist the arrest and was no simply "recalcitrant." State v. Hornaday, 105 Wn.2d 120, 131, 713 P.2d 71 (1986). The State argues that the ranger's use of an "arm bar take down" and difficulty when Mr. Calvin did not relax his wrists provide this force. BOR at 13-13; RP 26-27. At trial, however, the State based the resisting charge on Mr. Calvin's lack of cooperation with handcuffing. RP 142. The prosecutor explained:

> Ranger Moularas is pretty clear that the defendant was keeping his arms away from him trying to stop him from putting his hands in cuffs. That is resisting.

RP 142.

Ranger Moularas complained that Mr. Calvin "tensed" his arm, making it difficult to handcuff him, not that Mr. Calvin used force to prevent the cuffing. RP 26-27. Tensing your arm is not using force to resist arrest, as required by Hornaday. Mr. Calvin was simply being "recalcitrant." Hornaday, 105 Wn.2d at 131. His conviction for resisting arrest must be reversed. Id.

3. MR. CALVIN DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

Mr. Calvin testified that he was frightened by Ranger Moularas. RP 127. Mr. Calvin explained that the ranger's actions in shining a flashlight in his face, pepper spraying him, hitting him with a stick, and placing him in handcuffs were all painful to him; his arthritis and migraine headaches made them more so. RP 118-21. Mr. Calvin therefore tried to protect himself and avoid the ranger's blows. RP 129-30. Mr. Calvin's attorney, however, did not propose that the jury be instructed on the limited self-defense available when force is used against a law enforcement officer attempting to detain a suspect. AOB at 23-31; Washington Supreme Court Committee on Jury Instruction, 11 Washington Practice: Pattern Jury Instructions Criminal, WPIC 17.02.01 (2011) (hereafter WPIC).

The State argues defense counsel's performance was not deficient because Mr. Calvin was not entitled to a limited self-defense instruction. BOR at 15-21. The lack of self-defense is an element of assault crimes, and the defendant is therefore entitled to a self-defense instruction if, viewing the evidence in the light most favorable to the defense, there is some evidence to support the instruction. State v. Janes, 121 Wn.2d 220, 237, 850 P.3d 495 (1993); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984); State v. Ross, 71 Wn. App. 837, 840-42, 863 P.2d 102 (1993) (upholding use of "actual danger" self-defense instruction in prosecution for third degree assault). When the victim is a police officer, there must be some evidence that a reasonable person in the shoes of the defendant would believe he was in actual, imminent danger. State v. Bradley, 141 Wn.2d 731, 738, 10 P.3d 358 (2000); Janes, 121 Wn.2d at 238. To the extent the State suggests Mr. Calvin was required to produce more than "some" evidence to be entitled to the limited self-defense instruction, the State is incorrect. BOR at 18.

The evidence at trial did show a person in Mr. Calvin's position would have been afraid that he was facing imminent and serious bodily harm. Mr. Calvin had been pepper sprayed twice, struck at least six times, and then forced to the ground because he

approached a park ranger to discuss use of the shower. The violence against Mr. Calvin escalated without any aggressive acts on his part, just acts the ranger interpreted as aggressive. A reasonable person might well believe that even more violence was in store for him if he did not get away from the park ranger, who was armed with a gun in addition to his baton, pepper spray, and flashlight. RP 13-14, 48-49.

The State further argues that a limited self-defense instruction was not warranted because Ranger Moularas was responding to Mr. Calvin's conduct. BOR at 20 (citing State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995)). Mierz does not support the State's proposition. Mierz ordered his dogs to attack Wildlife agents, and one dog bit an agent on the leg, drawing blood, before the agent placed him in handcuffs. Mierz, 127 Wn.2d at 466. Mierz continued to struggle and bit the agent on the hand. These actions were unprovoked; Mierz faced "no threat of injury." Id. at 476.

This Court held no self-defense instruction was warranted in a third degree assault case, City of Seattle v. Cadigan, 55 Wn. App. 30, 776 P.2d 727, rev. denied, 113 Wn.2d 1025 (1989). Cadigan swung around as he got out of his car, told the police officer to get his hands off of him, hit the officer in the mouth, and was "thrashing around" after he was restrained by three officers. Cadigan, 55 Wn. App. at 33,

36-37. This Court concluded that the officer's use of force was "in response to Cadigan's resisting behavior, not the reverse." Id. at 37.

Mr. Calvin, in contrast, simply walked toward the ranger and raised his voice. He did not touch the ranger in any way, but was nonetheless subject to painful attacks with pepper spray and a baton and then forced to the ground. Mr. Calvin was entitled to the limited self-defense instruction available in this situation.

The State does not argue that the giving of the instruction was not prejudicial to Mr. Calvin's defense. BOR at 15-21; see AOB at 30. Mr. Calvin's convictions must be reversed and remanded for a new trial.

4. THE TRIAL COURT'S SUBSTITUTION OF THE INSTRUCTION DEFINING ASSAULT WITH A NEW INSTRUCTION DURING JURY DELIBERATION VIOLATED THE LAW OF THE CASE DOCTRINE, THE APPERANCE OF FAIRNESS DOCTRINE, AND THE CONSTITUTIONAL PROHIBITION AGAINST JUDGES COMMENTING ON THE EVIDENCE

In response to a jury question during deliberations, the trial court replaced one correct definition of assault with another, explain the first instruction was incorrect. Mr. Calvin argues the giving of an unnecessary substitute instruction defining assault (1) relieved the State of its burden of proving Mr. Calvin's force was unlawful in violation of "law of the case" doctrine, (2) violated the appearance of

fairness doctrine, and (3) constituted an unconstitutional comment on the evidence. AOB at 31-41.

The first instruction defining assault was proposed by the State. CP 77; RP 134. It required the jury to find that Mr. Calvin's use of force was unlawful. Instruction 5 read:

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily harm, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury.
>
> An act is not an assault, if done with the consent of the person alleged to be assaulted.

CP 58.

Under the law of the case doctrine, the State thus undertook the burden of proving Mr. Calvin committed as assault as defined in the instruction. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995) . The court relieved the State of this responsibility when it provided the a substitute instruction when a jury question revealed the jury was struggling with the idea of what force was unlawful. CP 59. The instruction omitted the lawful force language"

> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 59.

The State responds that the law of case doctrine is not applicable because Hickman did not address a substitute instruction and because the substitute instruction in this case is not a "to convict" instruction. BOR 23-25. These distinctions do not control the result. Under the law of the case doctrine, the State assumes burden of proving an unnecessary elements of a criminal offense that are included in the instructions. Hickman, 135 Wn.2d at 102. Assault is an element of the offense of third degree assault. RCW 9A.36.031(1)(g). The State thus undertook the burden of proving assault as defined in the original Instruction 5. The substitute instruction relieved the State of the burden of proving Mr. Calvin's conduct was not lawful or that it was not done with consent. Compare CP 58, 59.

The Washington Constitution forbids judges from commenting on the evidence. Const. art. I, § 16. Thus, judges may not do anything to influence the jury's evaluation of the evidence. Bardwell v. Ziegler, 3 Wash. 34, 42, 28 P. 360 (1891); State v. Lang, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Here, the judge told the jury it had been "misinstructed" when it substituted one correct definition of assault for another correct definition that removed

language that had troubled the jury. CP 58, 59; RP 178. The State argues the judge's comments were not a comment on the evidence because they addressed instructions, not facts. BOR at 27-28. In context, however, the comments did reveal the court's attitude, as the court withdrew an instruction that the jury questioned even though it was a correct statement of law. By removing the section that appeared to be troubling the jury, an average juror could view the substitute as a signal from the court that their deliberations were off point. The comment, while well-meaning, could thus impact the jury deliberations and constituted an unconstitutional comment on the evidence.

Finally, Mr. Calvin argues the trial court's action in substituting a new instruction defining assault violated the appearance of fairness doctrine. The State counters that no disinterested observer could conclude from the court's action that the proceedings were not fair. BOR at 26. Because the new instruction relieved the State of the obligation to prove Mr. Calvin's use of force was not lawful, however, an observer could conclude Mr. Calvin did not receive a fair trial.

Mr. Calvin's assault conviction must therefore be reversed and remanded for a new trial.

5. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. CALVIN A FAIR TRIAL

During his closing argument, the prosecuting attorney committed misconduct by belittling the argument of Mr. Calvin's defense counsel, William Johnston, and accusing Mr. Calvin lying. RP 138-40, 162-64, 166.

The prosecutor argues that the argument was a proper response to Mr. Johnston's argument. BOR at 30. Mr. Johnston did point out reasons to doubt Ranger Moularas's credibility in his argument. For example, he stressed the conflict between the ranger's testimony and the original report prepared by investigating officer D. J. Osborn of the Whatcom County Sheriff's Office, which tended to corroborate Mr. Calvin's testimony by was later changed by the deputy. RP 153-56. He also pointed out that Ranger Moularas was relatively inexperienced and may have ignored his own training in placing himself in a position where he felt he had to act. RP 148, 149-50. Defense counsel's argument, however, was based on the testimony presented and reasonable inferences from the evidence. Mr. Johnston never accused Ranger Moularas of lying, and he made it clear that the jury was the judge of the credibility of the witnesses. RP 143-44.

Defense counsel's argument thus does not provide justification for the prosecutor's disparaging remarks. In rebuttal, the prosecutor immediately referred to defense counsel's closing argument as "quite a story" and claimed Mr. Johnston was calling Ranger Moularas a liar. RP 162. After the defense objected, the prosecutor switched to accusing Mr. Johnston of calling the ranger "untruthful." RP 162.

This attack on defense counsel was unnecessary misconduct. See State v. Thorgerson, 172 Wn.2d 438, 466, 258 P.3d 43 (2011) (misconduct for prosecutor to refer to defense case as "slight of hand"). In McCreven, the prosecutor agued the jury had to determine the "truth." State v. McCreven, __ Wn. App. ____, 284 P.3d 793, 807 (2012). When defense counsel's objection was overruled, the prosecutor said "truth doesn't involve game play, loop holes or trickery." Id. This Court found the reference to "trickery" impermissibly impugned defense counsel and constituted prejudicial misconduct. Id. at 809. The prosecutor's attack on defense counsel here was far more direct, was not invited by defense counsel's argument, and was misconduct.

Concerning the prosecutor's statement that Mr. Calvin was telling a "story" and "just trying to pull the wool over your eyes," the

State claims it is not clear from the deputy prosecutor's argument that he was expressing his personal opinion that Mr. Calvin was a liar. RP 138, 140; BOR at 33. Any reasonable juror would interpret these remarks as an expression of the prosecutor's personal belief that Mr. Calvin was lying.

The prosecutor thus committed misconduct by disparaging Mr. Calvin's attorney and directly accusing Mr. Calvin of lying to the jury. In a case where the jury's decision hinged largely on whether it believed Mr. Calvin or Ranger Moularas, the misconduct was prejudicial and Mr. Calvin's convictions must be reversed and remanded for a new trial.

6. THE SENTENCING COURT'S FINDING THAT MR. CALVIN HAD THE FINANCIAL ABILTY TO PAY A FINE AND COURT COSTS IS NOT SUPPORTED BY THE RECORD

At sentencing, the court ordered Mr. Calvin to pay a $250 fine and court costs of $450 in addition to mandatory penalties, for a total of $1,300. CP 17; 8/8/11RP 9. The court also entered a written finding that Mr. Calvin had the financial ability to pay all of the financial obligations. CP 15. There is no evidence in the record to support this finding, and it must be stricken. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511 (2011).

The State first argues Mr. Calvin may not challenge the trial court's finding that he had the ability to pay his legal financial obligations on appeal because he did not object at the time of sentencing. BOR at 34-36. This Court should reject the State's argument, as Washington permits appeals from improper sentencing orders.

Appellate courts normally address issues that were raised in the trial courts, but have the discretion to address other issues as well. RAP 2.5(a); State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). In Washington, erroneous or illegal sentences may always be addressed for the first time on appeal. Ford, 137 Wn.2d at 477-78, 484-85 (criminal history); State v. Mendoza, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) (criminal history); State v. Hunter, 102 Wn. App. 630, 633-64, 9 P.3d 872 (2000) (drug fund contribution), rev. denied, 142 Wn.2d 1026 (2001); State v. Paine, 69 Wn.App. 873, 884, 850 P.2d 1369 (State's appeal of sentence below standard range), rev. denied, 122 Wn.2d 1024 (1993) (and cases cited therein).

Sentencing is a critical stage in a criminal proceeding. Permitting defendants to challenge an illegal sentence on appeal helps ensure that sentences are in compliance with the sentencing

statues. Mendoza, 165 Wn.2d at 920. Moreover, the rule inspires confidence in the criminal justice system and is consistent with the Sentencing Reform Act's goal of uniform and proportional sentencing. Id; Ford, 137 Wn.2d at 478-79, 484; RCW 9.94A.010(1)-(3). Mr. Calvin is not required to show that the sentencing error meets the RAP 2.5(a) requirement of manifest constitutional error.

The State also claims Mr. Calvin may not appeal from his standard range sentence. BOR at 35 (citing RCW 9.94A.585). Not only is this doctrine limited by the cases cited above, Mr. Calvin's sentence is not based only on the SRA. One of his convictions, resisting arrest, is a misdemeanor to which the SRA does not apply. RCW 9A.76.040(2); State v. Snedden, 149 Wn.2d 914, 922, 73 P.3d 995 (2003); RCW 9.94A.505(1); see RCW 9.94A.760(1) (addressing legal financial obligations for offenders convicted of felonies).

The State also asserts that Mr. Calvin's argument fails because the SRA does not require the sentencing court to enter a specific finding that the defendant is able to pay the legal financial obligations before imposing them. BOR at 36-37. The State is correct that the sentencing court need not make "formal, specific findings regarding the defendant's ability to pay court costs." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). But the court

must make a determination of ability to pay before ordering payment of costs. Curry, 118 Wn.2d at 915 ("Repayment may only be ordered if the defendant is or will be able to pay") (citing State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976)). RCW 10.01.160(3) (court should not order a defendant to pay costs unless the defendant is or will be able to pay them).

The State's argument is off point. The sentencing court did make a formal written finding that Mr. Calvin was able to pay the financial obligations.[2] CP 15. The only issue before this Court is whether there is any evidence to support that finding.

The prosecutor also argues "there is nothing in the record to show that Calvin will not have the ability to pay his legal financial obligations in the future." BOR at 39 (emphasis omitted). On appeal, however, the reviewing court looks to evidence to support the court's finding, not the lack of evidence. Clayton v. Wilson, 168 Wn.2d 57, 62-63, 227 P.3d 278 (2010) (substantial evidence is the quantum required to persuade a rational fair-minded person the premise is true).

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[2] The finding appears to be a part of the Whatcom County Prosecuting Attorney's Judgment and Sentence form for felony cases.

The evidence in the record shows that Mr. Calvin's financial situation is tenuous, with inadequate housing and several health problems. The court's finding must therefore be stricken. Bertrand, 165 Wn. App. at 405.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Calvin's convictions must be dismissed due to insufficient evidence. In the alternative, reversal is required because (1) defense counsel was ineffective; (2) the court replaced a correct jury instruction during deliberation; and (3) the prosecutor committed misconduct in closing argument. Additionally, there is no support in the record for the trial court's finding that Mr. Calvin had the present or future ability to pay his legal financial obligations and the finding must be stricken.

Respectfully submitted this 15th day of October 2012.

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

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| STATE OF WASHINGTON, | ) | |
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| RESPONDENT, | ) | |
| | ) | |
| v. | ) | NO. 67627-0-I |
| | ) | |
| DONALD CALVIN, | ) | |
| | ) | |
| APPELLANT. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 15TH DAY OF OCTOBER, 2012.

X_____

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