No. 290484 Consolidated with

No. 290751

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TANSY FAY MATHIS,

Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Ted W. Small

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it had to be unanimous to answer "no" to the special verdicts. Instruction No. 10 at CP 29; Instruction No. 51 at CP 73.

2. The trial court erred in instructing the jury in a manner that allowed application of an aggravating factor without a finding that it specifically applied to the defendant. Instruction No. 10 at CP 29.

3. The trial court erred in imposing a sentence of life without possibility of release based on the special verdicts.

4. The trial court erred in imposing sentencing enhancements based on the deadly weapon and aggravating factors special verdicts.

Issues pertaining to assignments of error.

1. A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer "no" to the aggravating factors and deadly weapon special verdicts?

2. Should one of the special verdicts be vacated because the "accomplice" language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Ms. Mathis?

B. STATEMENT OF THE CASE

The following facts are relevant to the issues on review. Additional facts as necessary are included in the argument section.

A homeowner found the body of Michelle Lee Kitterman in the driveway of her house in rural Okanogan County. RP 1047–53. She had been stabbed a number of times. RP 1433, 1460–61. Ms. Kitterman was pregnant at the time. RP 1449–51, 1473–74, 1482–83. Co-defendant Brent Phillips, having earlier pled guilty to first degree premeditated murder of Ms. Kitterman, testified for the State in this trial. RP 791–899. Phillips claimed the defendant/appellant, Tansy Fay-Arwen Mathis, participated in the murder and that an ice-pick-like tool was used. RP 797, 799, 804–827. Ms. Mathis agreed she drove Phillips from Spokane to the Tonasket area and that they picked up Ms. Kitterman, but denied involvement in the alleged criminal activity. RP 1850–63. Co-defendant David Richards owned such a tool, but did not accompany the two when they left Spokane. RP 807–08, 1940, 1943–45, 1949.

By amended information, Ms. Mathis was charged as principal or accomplice with aggravated murder or alternatively felony murder, first degree manslaughter–unborn quick child and first degree kidnapping, and tampering with physical evidence. CP 125–130.

In pertinent part, the jury was given the following general instructions:

> Instruction No. 47: As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. ...

CP 68.

> Instruction No. 69: ... Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. ...

CP 72.

In the event the jury found Ms. Mathis guilty of certain crimes, the jury was asked to find by special verdict whether Ms. Mathis was armed with a deadly weapon at the time of the commission of the particular crime. CP 75, "Special Verdict Form".

In the event the jury found Ms. Mathis guilty of premeditated murder, it was asked to find by special verdict the aggravating circumstance that the murder was committed "pursuant to an agreement that [Ms. Mathis or an accomplice] would receive money or any other thing of value for committing the murder", and/or "in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree." CP 29. The full text of the instruction is as follows:

Instruction No. 10: If you find the defendant, Tansy Mathis, guilty of premeditated murder in the first degree as defined in Instruction 5[1], you must then determine whether any of the following aggravating circumstance[s] exist[s]:

1. The defendant, Tansy Mathis or one with whom she was an accomplice, committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder; or

2. The murder was committed in the course of, in furtherance of, or in immediate flight from kidnapping in the first degree.

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt.

You should consider each of the aggravating circumstances above separately. If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.

For any of the aggravating circumstance[s] to apply, the defendant, Tansy Mathis, must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant, Tansy Mathis, was a major participant, you should answer the special verdict "no."

CP 29. The jury was given a definition of the term "participant":

Instruction No. 15: A "participant" in a crime is a person who is involved in committing that crime, either as a principal or as an accomplice. A victim of a crime is not a "participant" in that crime.

---

[1] Instruction No. 5 is the "to convict" instruction regarding the crime of "murder in the first degree as charged in count 1A." CP 24.

CP 34.

With respect to answering all special verdict forms, the jury was instructed a follows:

> Instruction No. 51: You will also be given a special verdict form for each defendant for the crimes charged in Counts 1A, 1B, 2 and 3. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and answer the question for each count that applies by filling in the blank with "yes" or "no" according to the decision(s) you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 73.

The jury found Ms. Mathis guilty as charged of premeditated first degree murder and the other four counts. CP 80–81. The jury answered "yes" to all questions on the aggravating factors and deadly weapon special verdict forms. CP 75–76. Based on these answers, the court imposed a sentence of life without possibility of parole on count 1A, and imposed high end standard range sentences on the others, including weapons enhancements on counts 1A, 2 and 3. RP 2231–33; CP 5, 8. This appeal followed. CP 1.

C. ARGUMENT

1. The aggravating circumstances and deadly weapon special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdicts.[2]

Manifest Constitutional Error. As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the special verdict instructions. However, an error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " Id. (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. Id. (citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); State v. Scott, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); Martinez v. Borg, 937 F.2d 422, 423 (9th Cir.1991). This is not a case where a jury instruction merely failed to define a term, or

[2] Assignment of Error No. 1, 3, 4.

where a trial court did not instruct on a lesser included offense that was never requested. *See* Scott, 110 Wn.2d at 688 n. 5. Instead, the instruction herein effectively alters the burden of proof because it misstates the requirement of unanimity for the jury to answer "no" to the special verdict.

The State may rely on footnote 7 of State v. Bashaw, the most recent case addressing this issue regarding the special verdict instruction, to argue that the error is not of constitutional magnitude. 169 Wn.2d 133, 234 P.3d 195 (2010). Footnote 7 reads, "This rule is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in Goldberg[3]," Bashaw, 169 Wn.2d at 146 n. 7 (citations omitted).

But it is "well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal." State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)). Moreover, the Bashaw court apparently regarded this issue as a constitutional one. In Bashaw, as here, no one objected to the erroneous instruction at trial. State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008). And while the court in footnote 7 expressly noted that double

[3] State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

jeopardy considerations did not compel Bashaw's holding, it did not exclude the possibility that an erroneous jury instruction affects other constitutional rights, such as a defendant's right to the due process of law. In fact, the court applied a constitutional harmless error analysis to determine whether the instructions were prejudicial error. Bashaw, 169 Wn.2d at 147–48. It is apparent that constitutional considerations compelled the court's decision in Bashaw, notwithstanding footnote 7.

Here, the trial court's error had constitutional dimensions and practical and identifiable consequences—the jury's special verdicts added an additional 72 months to Ms. Mathis' sentence on counts 1, 2 and 3, and removed all possibility of release from the life sentence imposed on count 1. Because the instructional error was a manifest error involving a constitutional right, it may be considered for the first time on appeal. RAP 2.5(a)(3).

Invited Error Doctrine. The State may also argue that Ms. Mathis is precluded from challenging the special verdict instructions in this case under the invited error doctrine because she failed to take exception to the instructions. The invited error doctrine does not go that far. The doctrine of invited error "prohibits a party from setting up an error at trial and then

complaining of it on appeal." In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (citing In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)). The invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, courts do not apply the doctrine. Id. (citing Thompson, 141 Wn.2d at 724, 10 P.3d 380)).

In Call, the Supreme Court found the defendant did not invite the error where his attorney wrote the wrong offender score and standard range on the guilty plea statement that the defendant signed. Neither the defendant, the prosecuting attorney nor the sentencing court was aware of the error in calculating the offender score and standard range. Call, 144 Wn.2d at 324-28, 28 P.3d 709.

Similarly, in the present case, Ms. Mathis did not invite the error where her attorney failed to take exception to an instruction that the parties did not know was erroneous. Exceptions to the jury instructions were taken April 21, 2010. RP 2023.[4] Bashaw was not decided until July 1, 2010. As in Call, neither Ms. Mathis, the prosecutor nor the court was

[4] The transcript for that date ends with the court inviting counsel back later that afternoon to discuss proposed jury instructions. Apparently no objections or exceptions were put on the record. *See* RP 2023, 2028.

aware of the legal error inherent in the special verdict instruction. Furthermore, Ms. Mathis did not invite the error where she did not propose the special verdict instructions. *See* CP 131–161; Thompson, 141 Wn.2d at 724 (citing State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). This was not a situation where there were affirmative actions by the defendant in which she took knowing and voluntary actions to set up the error. Therefore, Ms. Mathis did not invite the error and may challenge it on appeal.

Improper Special Verdict Instruction. Washington requires unanimous jury verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer "no." State v. Bashaw, 169 Wn.2d at 146 ("The rule from Goldberg, then, is that a unanimous jury determination is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence."). A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant's right to a

unanimous jury verdict. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).

Jury instructions are constitutionally sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law. *See* State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). This Court applies *de novo* review to determine whether instructions met those standards. *See* State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). In this case, the instructions did not meet those standards.

In Goldberg, the jury was given the following special verdict instruction:

> In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Goldberg, 149 Wn.2d at 893.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083. The Goldberg jurors originally rendered a "no" to the special verdict and, when polled, indicated that the "no" verdict was not

unanimous. 149 Wn.2d at 891–93. The Supreme Court held that the trial court erred in refusing to accept that original "no" verdict and in ordering the jurors to continue deliberation until they were "unanimous", because there is no requirement for such unanimity in order to answer "no". Id.

In Bashaw, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to the one given in this case. Bashaw, 169 Wn.2d at 147–48. In this case as well as in Bashaw, the jury was incorrectly instructed that all twelve jurors must agree on the answer to the special verdict.

> Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

CP 73; Bashaw, 169 Wn.2d at 139. The Court held the instruction was in error:

> Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, [] it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (internal citation omitted) (emphasis original).

In the present case, the jurors were instructed even more specifically than in Bashaw by being told they *must be unanimous* to return a "no" verdict:

> ... Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. *If you unanimously have a reasonable doubt as to this question, you must answer "no".*

Instruction No. 51 at CP 73 (emphasis added).

The instruction in the present case incorrectly requires jury unanimity for the jury to answer "no" to the special verdicts, contrary to Bashaw and Goldberg. Since this instruction misstates the law, the aggravating circumstances and deadly weapon enhancements based on the special verdicts must be vacated. Bashaw, 169 Wn.2d at 147, Goldberg, 149 Wn.2d at 894.

Harmless Error. In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The Bashaw court found the erroneous special verdict

instruction was an incorrect statement of the law. Bashaw, 169 Wn.2d at 147. A clear misstatement of the law is presumed to be prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 249–50, 44 P.3d 845 (2002) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless, the Bashaw Court stated the following:

> The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a non-unanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that direction to reach unanimity was given preemptively.
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147–48.

The situation in the present case is indistinguishable from Bashaw. The trial court's directive to reach unanimity was given preemptively, resulting in a flawed deliberative process. It is impossible—and improper— to speculate about what the jury would have decided if it had been given the correct instruction.[5] The instructions in this case incorrectly required unanimity for the jury to answer "no" to the special verdicts. Under Bashaw, the error was not harmless. The matter must be remanded for resentencing without the aggravating factors and deadly weapon enhancements. *See* Bashaw, 169 Wn.2d at 148.

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[5] *Cf., e.g.,* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process,* 31 Gonz. L. Rev. 277, 280 (1995-96) ("Whether and to what extent an error influenced a given jury verdict is therefore necessarily an exercise in judicial speculation–perhaps principled or reasoned speculation, but nonetheless speculation, about what a jury would or would not have done with or without the offending evidence, instruction, or comment. While much has been written about what does or does not influence juries, what influences a particular case can simply never be discovered."); Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967) ("The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself."); State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006) ("Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict).

2. The aggravating factor special verdict regarding commission of murder pursuant to an agreement to be compensated must be vacated because the "accomplice" language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Ms. Mathis.[6]

An aggravating factor for premeditated murder includes whether "[t]he person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder." RCW 10.95.020 (4).

"[A] defendant's culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature's intent to create strict liability. Instead, any such sentence enhancement must depend on the defendant's own misconduct." In re Howerton,109 Wn. App 494, 501, 36 P.3d 565, 569 (2001) (citing State v. McKim, 98 Wn.2d 111, 117, 653 P.2d 1040 (1982) (holding that the accomplice liability statute's strict liability for the substantive crime was not intended by the legislature to apply to sentence enhancements that must instead be based on "the accused's own misconduct")).

[6] Assignment of Error No. 2.

In Howerton, the jury found the defendant guilty of first degree premeditated murder. As in this case, the state did not seek the death penalty. By special verdict the jury found that two aggravating factors existed and Howerton was sentenced to life imprisonment without the possibility of release or parole. On appeal, the court concluded that use of "accomplice" language in one of the factors improperly allowed application of the aggravating factor without a finding that it specifically applied to the defendant.

> In this case, the jury was instructed that the first aggravating factor applied if '[t]he *defendant or an accomplice* committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.') (Emphasis added.). As Howerton argues, this interrogatory allowed the jury to attribute the aggravating factor to him without a finding that he possessed the requisite mens rea. In other words, the jury could have concluded that the aggravating factor applied to Howerton based only on the fact that an accomplice (i.e., Barnes) committed the murder to conceal the commission of a crime and without any evidence that Howerton shared the same motivation. Because the language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Howerton, it was erroneous.

Howerton, 109 Wn. App. at 501–502 (foot note omitted) (emphasis in original).

The jury in this case was similarly instructed as to one of the aggravating factors:

> Instruction No. 10: If you find the defendant, Tansy Mathis, guilty or premeditated murder in the firs degree [], you must then determine whether any of the following aggravating circumstance[s] exist[s]:
>
> 1. The *defendant, Tansy Mathis or one with whom she was an accomplice* committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder; ...
>
> ...
>
> For any of the aggravating circumstance[s] to apply, the defendant, Tansy Mathis, must have been a major participant in acts causing the death of Michelle Kitterman and the aggravating factors must specifically apply to the defendant's actions. ...

CP 29 (emphasis added).

As in Howerton, the accomplice language—"or one with whom she was an accomplice"—allowed application of the aggravating factor without a finding that it specifically applied to Ms. Mathis and it was therefore erroneous. The jury could have concluded that the aggravating factor applied to Ms. Mathis based only on the fact that an accomplice (Brent Phillips and/or David Richards) committed the murder pursuant to an agreement that he would be compensated for committing it and without any evidence that Mathis shared the same motivation.

Phillips was highly motivated by payment in the form of drugs. The record shows that in the past, Phillips accepted drugs as payment for his work for others. RP 794. On this trip he accepted and used drugs given to him by others. RP 811, 814, 818–19, 860–61. When the trip ended,

Phillips was given even more drugs. RP 839–40. Similarly, Richards was highly motivated by money and had told friends he had a job to do for which he would be paid. RP 840, 843, 1240, 1585, 1814. Phillips apparently believed that payment might also be in the form of money—$500, $1,000, $5,000, $10,000—but there is no evidence that Ms. Mathis would be getting paid. RP 805, 816, 840. In fact, the record supports the opposite conclusion. According to Phillips, Ms. Mathis made phone calls to the "person paying the other half to get the [job] done" and later gave Phillips an envelope with $500 cash in it. RP 806, 840. There is nothing in the record to show that Ms. Mathis did anything "pursuant to an agreement that she would receive money or any other thing of value". Without evidence that Ms. Mathis was motivated by an expectation of compensation, the jury could have improperly relied on Phillips' or Richards' motivation in finding that the aggravating factor applied.

Furthermore, the requirement that Mathis be a "major participant" does not save the instructional error because the language is directed to her "participa[tion] in acts causing the death" of the victim rather than to her motivation for the participation. The language that "the aggravating factors must specifically apply to the defendant's actions" is essentially meaningless and inconsistent, where the instruction regarding the specific

factor states that the jury must find that the "defendant or an accomplice" committed murder based on an agreement that "he or she" would receive compensation. Because the "accomplice" language of the instruction allowed application of the aggravating factor without a finding that it specifically applied to Mathis, the finding was in error and should be vacated. *See* Howerton, 109 Wn. App. at 501–02.

D. CONCLUSION

For the reasons stated, the aggravating factors and deadly weapon special verdicts should be vacated and the case remanded for resentencing within the standard range.

Respectfully submitted February 16, 2011.

Susan Marie Gasch
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, vs. TANSY FAY ARWEN MATHIS, DAVID EUGENE RICHARDS, Defendants/Appellants.)	Court of Appeals No. 29048-4-III (consolidated with No. 29075-1-III) PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 16, 2011, I mailed to the following as appropriate, by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of appellant Ms. Mathis' opening brief:

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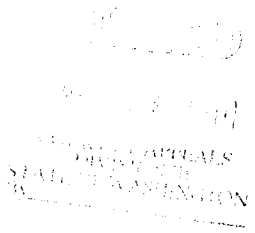

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RE: State v. Tansy Fay Mathis, COA #29048-4-III (consolidated with 29075-1-III)
First Statement of Additional Authority

Dear Ms. Townsley:

As permitted by RAP 10.8. Appellant submits the following as additional authority pertaining to Brief of Appellant, Issue 1:

State v. Ryan, No. 64726-1 (April 4, 2011)

I am enclosing five (5) copies of this letter for the Court's use. If you have any questions, please let me know.

Sincerely,

Susan Marie Gasch

Susan Marie Gasch

Enclosures as stated

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