No. 45488-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON CAMPBELL,

Appellant.

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

The Honorable Jay V. Roof

APPELLANT'S REPLY BRIEF

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A. REPLY ARGUMENT

1. MR. CAMPBELL OBJECTED TO THE LESSER CRIME INSTRUCTION AND THE FACTS OF THE CASE DID NOT WARRANT GIVING IT.

a. Mr. Campbell objected to the instruction being given.

Prior to trial, the Respondent determined that the facts of Mr. Campbell's case proved actual knowledge that the tires were stolen – i.e., first degree trafficking. CP 18-21; RCW 9A.82.050. Prior to instructing the jury, Mr. Campbell disagreed with the State's contention that a lesser degree instruction on reckless (second degree) trafficking was proper, and there is only one possible objection to an opposing party's request that the jury be instructed on a lesser degree offense – that the facts do not warrant the instruction. CP 39-41 (Instructions 11-13) (Appendix A).

The latter is the standard for all jury instructions, and the former has long been the case under RCW 10.61.003 – lesser degree instructions may always be given, if warranted by the facts.

Here, Mr. Campbell's defense lawyer made clear his client's objection to the lesser included offense instruction of second degree trafficking, which the defendant was entitled to lodge. That objection was that the court should not give the State's lesser-included, because this was a case of "it's all or nothing . . . that

would be the objection." 10/9/13RP at 223. Counsel communicated his client's objection in that regard. Countless Washington cases, usually in the context of ineffective assistance, recognize this as the familiar rubric for a case presented to the jury by the defense that the greater crime was committed, or the defendant is not guilty. See State v. Grier, 171 Wn.2d 17, 37-38, 246 P.3d 1260 (2011); State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991); In re Pers. Restraint of Crace, 157 Wn. App. 81, 109, 236 P.3d 914 (2010); State v. Breitung, 155 Wn. App. 606, 614, 230 P.3d 614 (2010); State v. Smith, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009); State v. Hassan, 151 Wn. App. 209, 221, 211 P.3d 441 (2009).

Counsel was asked if there was any objection to the proposed lesser-included instruction, and counsel responded: "Your Honor, there is objection." 10/9/13RP at 222. Subsequently counsel made clear the basis for his client's objection, that the case was one of all or nothing. It is true that counsel's statements reflected his client's frustration with earlier plea offers, and even indicated that he may have had a difference with Mr. Campbell at times about the crime. 10/9/13RP at 222-23.

But Mr. Campbell was entitled to make a decision about whether to object to a lesser included offense instruction, and although defense counsel might have had the ultimate authority to disagree or not disagree with his client's wish, certainly counsel was entitled to present Mr. Campbell's objection to the court as the defense objection, and he did so. State v. Grier, 171 Wn.2d 17, 30-31, 246 P.3d 1260 (2011) (comparing attorney ethics standard which state that decision about lesser included offenses is solely the defendant's to decide, with standards that provide this matter is partly the defendant's decision and partly counsel's after full consultation).

In general a party is entitled to a jury instruction only if the evidence supports it. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Thus a particular jury instruction may be given in a criminal case if it is warranted under the facts, and it may not be given if it is not.

This case involves a lesser degree offense. In contrast to questions whether an offense is a lesser included crime based on an elements analysis, lesser degree instructions automatically may be given as an included crime, RCW 10.61.003, if the evidence in

the case supports an inference that only the lesser offense was committed, State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). There was no disagreement that second degree trafficking is a lesser degree crime of first degree trafficking. The defense raised an objection, but the court gave the instruction nevertheless. Mr. Campbell did not waive the error.[1]

b. The instruction was not warranted by the facts.

Mr. Campbell's case contrasted the detective's testimony that Jason did know that the tires were stolen, with Mr. Campbell's own trial testimony that he did not have any idea at all that the tires were stolen. AOB, at pp. 5-10.

A lesser offense instruction may be given if the evidence in the case supports an inference that *only* the lesser offense was committed, State v. Berlin, 133 Wn.2d at 548. The prosecutor

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[1] Mr. Campbell also argued that this was manifest error affecting a constitutional right, and appealable pursuant to RAP 2.5(a)(3). See AOB, at pp. 6-7 and n. 2; see also State v. Bailey, 114 Wn.2d 340, 347–48, 787 P.2d 1378 (1990) (recognizing argument that improper lesser included offense instruction can deprive a defendant of constitutional notice).

The Respondent argues that the legal prong of the lesser included analysis establishes notice in all instances, but this is not the case here, where before trial the State itself determined Mr. Campbell's crime was accurately charged as first degree trafficking. The facts (if believed) showed solely that crime throughout trial, thus failing to meet the Berlin standard necessary to warrant placing the lesser trafficking charge before the jury. As a result of the incorrect notice, the defendant was impinged in his ability to "effectively argue [his] theory of the case" when faced with a new factual allegation different than that stated in the applicable information. See Berlin, 133 Wn.2d at 548.

requested an instruction on second degree trafficking – carrying the *mens rea* of recklessness. RCW 9A.08.010(1)(c); CP 40. The instruction on reckless trafficking should have been given only "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

But here, Deputy Sonya Matthews testified that Mr. Campbell told her when interrogated that his cousin Michael Smith had brought the tires by his house, and Campbell was pretty sure they were stolen because of Smith's theft record, but he had not asked so he did not know for sure. 10/8/13RP at 78-81, 92, 98. This is knowledge.

Mr. Campbell disputes that he said any of this to the detective, but the fact that he supposedly said his knowledge was not "for sure" does not transmute the evidence into proof of recklessness for purposes of a lesser included instruction, simply because the knowledge was not 100 percent.

On the other hand, Mr. Campbell, when specifically asked at trial whether he even did "feel at all" that Smith's tires might be stolen, Jason testified: "Not at all." 10/8/13RP at 163. This is a lack of knowledge. The issue was joined.

The Respondent correctly points out that a jury is "permitted" but not *required* to find that a defendant "knows" or acts with knowledge when he has information that would lead a reasonable person in the same situation to believe that such facts exist. RCW 9A.08.010(1)(b); see BOR, at pp. 15-16.

But the fact that a jury only *may* find knowledge based on these circumstances (versus being definitionally required to do so under other factual circumstances), does not result in the state of the case amounting to evidence of the next inferior *mens rea* down (recklessness). The evidence in favor of the State in the case showed only knowledge, unless the jury found reasonable doubt including by believing Mr. Campbell's case that he had no knowledge whatsoever. Either Jason Campbell knew the tires were stolen, or he didn't.

The case was indeed one of "all or nothing," as the defense objected. The evidence at trial certainly did not support an inference that **only** the lesser offense was committed, thus the lesser offense instruction was not warranted. State v. Berlin, supra. Mr. Campbell's second degree trafficking conviction must be reversed.

2. THE TRIAL COURT FORCED AN AFFIRMATIVE DEFENSE INSTRUCTION ON THE DEFENDANT THAT SIMULTANEOUSLY ADMITTED THE CRIMES CHARGED AND REQUIRED HIM TO PROVE A DEFENSE HE COULD NOT MEET, EFFECTIVELY DIRECTING A VERDICT OF GUILT.

a. The Respondent cites no authority for the proposition that a trial court may instruct a jury on an affirmative defense over the defendant's objection, simply because the defense earlier proffered evidence that putatively might go to a relevant matter or to such a defense – indeed, the law is directly to the contrary.

The gist of the Respondent's arguments appears to be that Mr. Campbell was told by the trial court during the evidence phase that the jury would be instructed on the affirmative defense of uncontrollable circumstances, if Campbell insisted on testifying about his failed arrangements for getting rides to the courthouse. BOR, at pp. 17, 21-22.

Respondent appears to argue that if a defendant introduces evidence that is putatively or arguably relevant and pertinent to a matter (here, evidence of the ride arrangements), that such defendant has thereafter forever bound himself to accept an affirmative defense associated with such evidence. The Respondent essentially argues that Mr. Campbell was estopped from later objecting when the affirmative defense was forced upon

him over his protest that this was not how he wished to defend the case. BOR, at p. 18.

This is in fact exactly what the trial court told Mr. Campbell. 10/9/13RP at 222 (overruling defense objection to the affirmative defense instruction by stating "that would be included because I allowed that testimony.").

And it is precisely what happened in State v. Lynch, and precisely what was disapproved of. There, the defendant introduced evidence that arguably cast doubt on the "forcible compulsion" element of his rape charge. The trial court then instructed the jury on the affirmative defense of consent over objection that the chosen defense strategy was doubt as to whether the State had met its burden to prove the crime, not the defense that the defendant would affirmatively prove consent by a preponderance. State v. Lynch, 178 Wn.2d 487, 492-93, 309 P.3d 482 (2013). The Lynch Court reversed because forcing the defense to be saddled with a defense that was not its defense violated the Sixth Amendment. Lynch, 178 Wn.2d at 493-94. The Court specifically rejected the State's argument that the defendant had to accept the defense since he had introduced evidence that might be considered as going to it. Lynch, 178 Wn.2d at 493-94.

The crux of the decision was that the defendant has a right to autonomy in deciding what the defense will be at trial. Lynch, 178 Wn.2d at 492 ("Instructing the jury on an affirmative defense over the defendant's objection violates the Sixth Amendment by interfering with the defendant's autonomy to present a defense"). And the Court relied on State v. Coristine, 177 Wn.2d 370, 376, 300 P.3d 400 (2013), where the court improperly instructed the jury on the affirmative defense of reasonable belief and the State argued that the defendant had to accept this defense since he had introduced evidence.

> The State argues that the consent instruction was justified because Lynch introduced evidence that T.S. consented. But in Coristine, we rejected a similar argument made by the State that evidence presented by Coristine bolstering his case somehow justified instructing the jury on an affirmative defense. In accordance with Coristine, we hold that the trial court violated Lynch's Sixth Amendment right to control his defense by instructing the jury on the affirmative defense of consent over Lynch's objection.

Lynch, at 493-94 (citing Coristine, at 374).

Here, Mr. Campbell's evidence that on both occasions he made failed arrangements to make it to the courthouse, only to be told that the hearings were ended and he was too late, arguably went to the element of whether he failed to appear with knowledge

within the meaning of the statute. See, e.g., State v. Fredrick, 123 Wn. App. 347, 97 P.3d 47 (2004) (State proved knowledge element where "[t]he evidence showed Fredrick knew she had a court date on January 3 [and] also knew she failed to appear because she called her attorney two days after missing her court date."). A jury might conceivably be well within its rights to determine that this evidence bears on the question of guilt, and creates reasonable doubt.

But notably it makes no difference, however, whether the evidence admitted did or did not go to an element or adequately proved the affirmative defense in question. The prosecutor was entitled at any time to seek reconsideration of the trial court's earlier ruling allowing Mr. Campbell to present testimony regarding his efforts at arranging rides to the courthouse, and to ask that the testimony be stricken.

The question presented is the defendant's autonomy to choose his defense at trial, including his choice to proceed under the standard defense of showing that the State simply failed to prove the case beyond a reasonable doubt. Forcing an affirmative defense on a defendant is not an allowable form of punishment for

the fact that the prosecutor, or the court, believes that evidence admitted earlier in trial was inadmissible.

Indeed, if the Respondent is arguing that Mr. Campbell had to accept the affirmative defense instruction because he introduced evidence that did not go to it, and was **in**adequate to meet it (BOR, at pp. 18, 21), then the giving of that instruction must be all the more harmful, and all the more violative of his Sixth Amendment rights. It must be beyond cavil that a defendant's right to control his defense is violated if the trial court tells the defendant he must accept an affirmative defense that *admits his guilt to the elements of the crime*, and which instruction instead forces him to defend by making out an affirmative excuse that the court at the same time tells him he *will not be able to satisfy*.

That, of course, is this case. 10/9/13RP at 149 (trial court stating to the defense that the court would instruct his jury on the affirmative defense, even though "it can't be met" by the defendant's testimony).

The Respondent also offers the following twin arguments that the jury instruction was proper: that it

1. "clarified any potential confusion the jury may have had regarding the legal sufficiency of the defense Campbell chose to present" and/or

2. "instructed the jury on the proper legal effect of the evidence presented at trial".

BOR, at p. 22, p. 23. These statements miss the point and fail to obviate the constitutional error. It is not an excuse for forcing an affirmative defense on a defendant to claim that the act of doing so was merely for purposes of telling the jury that the defendant's evidence at trial was inadequate to meet that defense, nor is it an excuse that the instruction was proper because it was necessary to tell the jury that the legal effect of the defense's evidence was 'nil.'

If the foregoing ideas are the State's attempts to justify the giving of the instruction, then the arguments backfire.

If the prosecutor believed that Mr. Campbell's testimony was irrelevant or inadequate to cast reasonable doubt, then the recourse was to make that argument in closing, in reliance on the bail jumping crimes' "to-convict" instructions and an argument that Jason's evidence did not prevent guilt. Or, the prosecutor could have lobbied the court that the evidence had been inadmissible and asked the court to reconsider its admission, and tell the jury to ignore it, before deliberations.

The court genuinely felt that the proper action might well be to give the affirmative defense instruction. This was error under the

new case law, however, and the prosecutor's recourse was not to vigorously advocate and effectively agitate the court into giving the affirmative defense instruction under the reasoning (then) that the defendant was estopped from complaining, or the reasoning (now) that it would make clear to the jury that the legal effect of the testimony was that the defense must in turn fail. In the second place, this latter motivation would verge on a comment on the evidence. In the first place, the defendant did not wish to raise this defense, and was not attempting to meet its requirements.

The proper instructions of law – the "to-convict" instruction and the instructions requiring that its elements be proved beyond a reasonable doubt – was all that was needed for the prosecutor to present his contention that the elements' proof was not impaired by the defendant's testimony regarding failed efforts to have others drive him to court. That is the proper response to defense evidence that the State believes casts no doubt on proof of guilt.

Interestingly, if the State's argument is that Mr. Campbell's failed-ride evidence was utterly undeserving of an "uncontrollable circumstances" claim, then is the State contending that that is the reason that it was proper to give the instruction? Yet this is what the Respondent is contending. See BOR, at p. 23 (arguing that the

instruction was necessary to apprise the jury of the "proper legal effect" of the defendant's "irrelevant" trial evidence) (Emphasis added.). Surely this novel argument turns the entire law of instructional entitlement on its head.

If the prosecutor believed that the evidence admitted earlier at trial was utterly irrelevant, his option was to seek reconsideration of the ruling admitting it, and asking the court to tell the jury to ignore it. Even if admitting that evidence was erroneous earlier, that does not bind the defendant to a defense he never wished to assert. The State's proper recourse was not forcing an affirmative defense on Mr. Campbell that (a) admitted the elements of the crime charged, and (b) burdened him with affirmative defense of excuse.

The Respondent's argument that the defendant did become so bound by submitting evidence earlier in trial, is contrary to the recent Washington case law in this area. Lynch, supra; Coristine, supra.

b. The Respondent's argument of harmlessness fails under the case law and the two bail jumping convictions must be reversed.

The central aspect of the harmfulness identified in the Lynch case and identified by the appellant in this case is that, to force an

affirmative defense on the accused which admits the elements of the crime and then burdens him to escape that admission and prove by a preponderance that a reason existed for the criminal conduct, is to completely change the normal burden of proof in a criminal case of proof beyond a reasonable doubt. 11 and 11A Washington Practice, Jury Instructions- Criminal, WPIC 19.17 (Comment), WPIC 120.41 (Comment) (3rd ed. 2008) (both noting that this defense admits guilt and posits justifiable excuse). This was a complete burden-shift. As defense counsel protested in vain:

> So I would just renew my objection that I made yesterday that the defendant is not requesting this affirmative instruction, and it's not appropriate for him to have to meet the burden imposed by that instruction.

10/9/13RP at 221-22.[2]

In this case, forcing a defendant to accept a jury instruction that essentially tells the jury he is conceding guilt was not harmless

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[2] Notably, the question regarding harmless error debated in Coristine was whether this sort of Sixth Amendment violation can *ever* be excused as harmless, or whether it requires automatic reversal. Coristine, at 377-78 and n. 1. Mr. Campbell adheres to his additional argument in Assignment of Error 3 that the court's ruling forcing the affirmative defense on the defense requires automatic reversal. AOB, at pp. 1-2, 24-29. As argued, the trial court's ruling did far more than merely hobble defense counsel's closing argument, rather it was structural error because it eviscerated counsel's entire effort to defend his client, violating his client's Sixth Amendment right to counsel and his Due Process rights. It was a complete denial of counsel. Frost v. Van Boening, ___ P.3d ___, ___ (9th Cir. No. 11-35114) (April 29, 2014, at pp. 13-17).

beyond a reasonable doubt, unless the State is advocating for a rule allowing directed verdicts of guilt in jury trials.

This involuntary placing of an excuse defense on Mr. Campbell was not harmless in this case because it precluded the jury from finding reasonable doubt, which was the desired defense strategy. 10/8/13RP at 148-50 (counsel emphasizing that Mr. Campbell's intended defense was to argue reasonable doubt).

The harmfulness of the error can be predicated upon the trial court's own statements. In telling Mr. Campbell he would be under the affirmative defense of uncontrollable circumstances – a defense that admits the elements – the trial court at the same time also opined that Mr. Campbell's evidence *would not be enough to succeed with that defense*. 10/8/13RP at 149.

Further, the effect of the forced affirmative defense was to create just the sort of jury confusion that the Supreme Court spoke of in Coristine. The error in Mr. Campbell's trial requires reversal unless the State proves it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Coristine Court noted how the instruction forced upon that defendant caused an inconsistency in what legal

arguments were being made, including by the defense, and engendered jury confusion, which all required reversal:

> Under the Chapman standard, the State has not demonstrated that forcing an affirmative defense upon Coristine after the close of the evidence was harmless beyond a reasonable doubt. Preliminarily, the error in this case was not merely the giving of a gratuitous or unnecessary correct instruction. This is because the injury was not to Coristine's right to be tried by a jury applying accurate instructions of law. Instead, the trial court erred by denying Coristine his Sixth Amendment right to mount the defense of his choosing. McKaskle [v. Wiggins, 465 U.S. 168, 177-78, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)]. A deprivation of this right respecting individual autonomy is error even if the trial court's instructions in the law are a model of accuracy. Indeed, if seizing control over a defendant's trial strategy were harmless so long as the court correctly instructed the jury in the defense it chose, little would remain of the Sixth Amendment right to control one's defense. On the facts of this case, the presence of the unwanted instruction was not inconsequential to the jury's deliberations. First, the instruction risked confusion between the jury's consideration of the victim's capacity and Coristine's "reasonable belief" in her capacity, an issue that had not been directly addressed in the evidence. We need not determine whether the affirmative defense instruction shifted the burden of proof to the defense on the issue of capacity, as Coristine asserts. It certainly impacted jury deliberations by interfering with Coristine's straightforward presentation of his sole defense—that L.F. was in fact not incapacitated. The likelihood of confusion was compounded here by the fact that the jury heard no testimony about reasonable belief, as the instruction was not forced upon Coristine until after the close of the evidence.. . . We cannot agree with [dissenting] Chief Justice Madsen that a

> defendant who does not have the opportunity to support an unwanted defense by offering evidence somehow suffers less prejudice than one who does.

State v. Coristine, 177 Wn.2d at 371-72. Here, the same conflict among the parties' assessment of the core of the litigation was caused, and the same jury confusion engendered. In closing the State argued that "the defense has raised the defense" of uncontrollable circumstances and specifically told the jury: [T]he burden shifts to them. 10/9/13RP at 242-43. (The prosecutor in the next breath argued about how Mr. Campbell's claim was not a flood, earthquake or fire, and therefore failed to satisfy the aforementioned burden).

Defense counsel tried to tell the jury what the desired defense was – that the prosecutor had failed to meet the "reasonable doubt standard." 10/9/13RP at 247-48. But then in rebuttal, the State again announced to the jury Mr. Campbell and the jury had no choice but to accept the affirmative defense instructions because "they're the court's instructions. They're the law that applies to the facts and charges of this case." 10/9/13RP at 255-56. A jury might wonder what exactly the defense was, anyway. Apparently defense counsel was disreputably trying to make an argument that was contrary to the Judge's legal rulings in

the courtroom. Contrary to the State's argument, BOR, at p. 37, the forced affirmative defense instruction did not "clear up" any confusion, it injected it, on a constitutionally harmful scale. The error was not harmless beyond a reasonable doubt.

4. THE STATE RECEIVED THE MISSING WITNESS INSTRUCTION UNDER ITS ERRONEOUS ARGUMENT THAT A PERSON WOULD NATURALLY BRING CERTAIN WITNESSES FORWARD TO SUPPORT A DEFENSE THAT HE WAS NOT RAISING.

After forcing a defense on Mr. Campbell that was not his defense, the court (at the prosecutor's urging) then saddled him with a missing witness instruction that chastised him for not bringing forth witnesses in support of that affirmative defense -- which he was not raising.

The State obtained the missing witness instruction under the specific reasoning that the particular witnesses would naturally be brought forth by a party raising this affirmative defense. 10/9/13RP at 225-26 (arguing that the missing witness instruction "goes to witnesses for the bail jump and affirmative defense). But Mr. Campbell was not raising this affirmative defense – thus it cannot tenably be contended that it would be natural that he would bring

these witnesses for a defense that was not his defense. It was therefore wrong to tell the jury it could fault him for not doing so.

In response, the Respondent understandably attempts to divorce itself from the trial prosecutor's argument below that these witnesses should have been brought forth to support the defense, by now arguing that any party offering testimony that two people promised but failed to give the accused a helpful ride should bring those people to court. BOR, at 29-32. Yet the failed ride arrangements is the very factual matter that the State argued was utterly irrelevant to the case including the defense of uncontrollable circumstances. If that is true, then of no party would naturally and normally bring such witnesses forth. The State cannot have it both ways. The supposed missing witnesses were ones that a party would normally and naturally bring forward under the *prosecution's* notion of what Mr. Campbell's defense was to be. See 10/9/13RP at 227 ((defense counsel, objecting to missing witness instruction, stating, "I want to note that we have objected to the State's proposing the affirmative defense.). Faulting Mr. Campbell for not calling certain witnesses to support the defense he was not raising was additional error that greatly contributes to the reversible harmfulness of the first error.

5. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN OF PROOF AND WERE NOT RENDERED ADEQUATE BY THE 'TO-CONVICT' INSTRUCTION AS STATED IN STATE V. JOHNSON.

Respondent contends that pursuant to the Supreme Court's reasoning in the recent case of State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014), jury instructions that include a definition of recklessness that generically refers to a "wrongful act" are not violative of Due Process as a whole if the 'to-convict' instruction makes clear that the *mens rea* applies specifically to the particular fact necessary for conviction on the charged crime. State v. Johnson, 180 Wn.2d at 306, see 304-08. This is correct.

Thus in Johnson, the reckless definition used the same generic language as the instruction in the present case. Johnson, 180 Wn.2d at 304 (a person is reckless . . . when he or she knows of and disregards a substantial risk that *a wrongful act* may occur"); see CP 40 (Instruction 12) (same) (Emphasis added.). However, in Johnson the to-convict instruction made specifically clear that the defendant had to be proved to have been reckless as to whether his assaultive conduct recklessly "*inflicted substantial bodily harm.*" Johnson, 180 Wn.2d at 304-05 (Emphasis in Johnson.); see RCW 9A.36.021(1)(a).

In the present case, the 'to-convict' did not cure the jury instructions' failure to hold the State to its burden of proof. The to-convict instruction for second degree trafficking did not make clear that the defendant, to be found guilty, must have acted recklessly as to whether he was trafficking in property that was stolen: Jury instruction 13 read as follows, in pertinent part:

> To convict the defendant of the crime of trafficking in stolen property in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the period of August 1st, 2012 to August 4th, 2012, the defendant trafficked in stolen property;
> (2) That the defendant acted recklessly; and
> (3) That the acts occurred in the State of Washington.

CP 41 (Instruction 13). For comparison, the first degree trafficking to-convict instruction in this case did make clear that the knowledge required for that offense was knowledge of the fact that the property was stolen. Instruction 9 provided in pertinent part:

> To convict the defendant of the crime of trafficking in stolen property in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the period of August 1st, 2012 to August 4th, 2012, the defendant **knowingly trafficked** in stolen property;
> (2) That the defendant acted with **knowledge that the property had been stolen**; and

(3) That the acts occurred in the State of Washington.

CP 37 (Instruction 9). The jury instructions relieved the State of its burden to prove all of the essential elements of trafficking in the second degree, and the reasoning of Johnson does not repair this error. AOB, at p. 35.

Second, as noted in the Opening Brief, the State's burden was further lessened because the jury was told that the recklessness element was proved if Jason Campbell acted intentionally. CP 40; AOB, at pp. 35-36. Similarly imprecise phrasing in a recklessness definition was disapproved of in State v. Hayward, 152 Wn. App. 632, 640, 217 P.3d 354 (2009). This language creates an erroneous presumption that merges the concepts of recklessness and intent, here, by making the jury think that if Mr. Campbell *intentionally* held the tires for sale, it was therefore automatically proved that he was "reckless" for purposes of trafficking. See also State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). This further lessened the burden of proof. The State has not responded to this argument.

Third, the non-grammatical, complete omission of some missing word after the word "particular [sic]" in the definition of

recklessness must have further heightened a reasonable jury's confusion on how to judge whether the State had met its burden of proof on recklessness. AOB, at pp. 33, 36. CP 40; compare WPIC 10.03 at 209 (3d ed. 2008). The State has not responded to this argument.

The jury instructions in Mr. Campbell's case did not hold the State to its burden of proof on second degree trafficking. U.S. Const. amend. 14; Wash. Const. art. 1, § 3. It is reversible error to instruct the jury in a manner that relieves the State of that burden. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).[3]

The trafficking conviction must be reversed. Because the State cannot show the error is harmless beyond a reasonable doubt. Peters, 163 Wn. App. at 850. Mr. Campbell strenuously argues there was no evidence of recklessness, and that this lesser offense was not properly put before the jury because the jury could either find knowledge, or deem knowledge absent. See Part A.1, supra. But the evidence was certainly highly controverted and not

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[3] Contrary to the Respondent's implicit argument, the Due Process error in Mr. Campbell's case is not argued to be simply the mis-wording of a definitional instruction, in one single aspect. BOR, at pp. 35-37. The adequacy of the jury instructions must be assessed as a whole. Johnson, 180 Wn.2d at 306. A defendant may raise a claim of error that the jury instructions relieved the State of its burden of proof, for the first time on appeal. AOB, at pp. 33-35 and n. 12; State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011); RAP 2.5(a)(3).

overwhelming. When Deputy Matthews asked him about some tires having been stolen property, Jason Campbell told her he "didn't understand, and he testified, "I had no idea what she was talking about." 10/8/13RP at 157, and 159 (testifying that he told the Deputy that he does not steal, and "I didn't know what she was talking about."). Jason's defense case fully controverted the State's claim that he held property for sale with any idea or awareness that it was some stolen property from somewhere. Reversal of his trafficking conviction is required because the State was relieved of its burden to prove all the elements, and the error was not harmless beyond a reasonable doubt.

6. THE TRIAL COURT INTERJECTED NEW EVIDENCE AND IMPROPERLY COMMENTED ON THE EVIDENCE IN ANSWERING THE JURY INQUIRY BY STATING THAT A NEW INFORMATION HAD BEEN FILED.

a. Defense counsel objected to the court giving an affirmative answer to the jury inquiry.

The proper instructions of law are those proposed by the parties and given by the court following discussion of instructions, following objections and exceptions. These are the instructions the court instructs upon, and that jury takes with them to the jury room. CrR 6.15(a) – (e). In this case, when the trial court determined that

it would answer the jury's inquiry with an affirmative response, the defense objected and specifically asked that the jury be told to read its instructions. If the defense objection and the defense request had been granted, the present error would not have occurred. The issue is properly before this Court of Appeals.[4]

b. The State properly submitted documentary *evidence* of the originally filed charge by information, and the State's argument on appeal that the existence of a different charge could simply be told to the jury in the jury note answer is fallacious and contrary to the State's burden to introduce proof of matters during the evidence phase of trial.

Under Washington law, to be convicted of bail jumping, the defendant must be charged with a particular underlying crime. State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). Using this standard, the courts have invalidated a number of generic charging attempts. See State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007) (citing State v. Ibsen, 98 Wn. App. 214, 989 P.2d 1184 (1999) and State v. Green, 101 Wn. App. 885, 888, 6 P.3d 53 (2000)).

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[4] Had there been no objection, Mr. Campbell could nonetheless make out manifest constitutional error under RAP 2.5(a), because the trial court added new evidence not introduced in the evidence phase, and commented on the evidence. See State v. Sublett, 176 Wn.2d 58, 82-83, 292 P.3d 715 (2012) (recognizing RAP 2.5(a) standard where actual prejudice is caused by a constitutional error in the trial court's decision to give further instruction to a deliberating jury).

As with the charging document, the State must of course also prove the crime at issue, with admissible evidence. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). For example, in the present case, at Mr. Campbell's trial on the two violations of the bail jumping statute RCW 9A.76.170, the prosecutor offered and the trial court admitted the original second degree trafficking charging documents in the case. CP 71, CP, 75-78, 84-87. And in cases where a conviction is required to be proved as part of the crime at issue, such as unlawful firearm possession, the prosecutor similarly submits documentary evidence of the conviction, or the parties stipulate. See, e.g., State v. Garcia, 177 Wn. App. 769, 772, 313 P.3d 422 (2013); Old Chief v. United States, 519 U.S. 172, 174, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

But unless a jury instruction indicates a stipulation of the parties, such as in a VUFA case, jury instructions are not evidence. The trial court, in its answer to the jury inquiry telling the jurors that in addition to the documentary evidence of a charge of second degree trafficking, Mr. Campbell was charged on a certain with first degree trafficking. CP 50. The answer on its face plainly transmitted a matter of new fact, not an instruction of law. CP 50 ("An Amended Information has been filed."). As argued, the jury

cannot consider matters not properly admitted as evidence, the court cannot introduce a new theory of legal culpability in a jury answer, and the court cannot comment on the evidentiary state of the case or the merits of the case.

If the State's argument were correct, then it would be unnecessary for the State to ever submit adequate proof of an underlying charge or a predicate conviction to the jury in any case where the same is an aspect of the conviction sought. Rather, the State could simply unilaterally request that the trial court tell the jury that the defendant was charged at the time with a certain crime or class of crime, or that he had been previously convicted. But this is plainly not the case.

c. Reversal of both bail jumping counts is required.

Because it is at least equally as likely that the jury relied on the improper answer rather than the proper trial evidence as the predicate for its verdicts on the bail jumping charges, the State, *a fortiori*, cannot prove beyond a reasonable doubt that the bail jumping verdicts were not predicated on the error.[5]

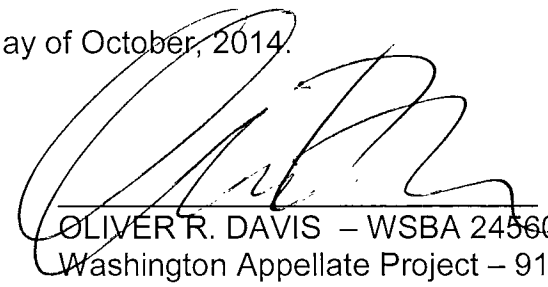
[5] This argument does seem to apply identically to both counts of Bail Jumping. CP 44 (Instruction 16), CP 45 (Instruction 17). Although the second count of Bail jumping told the jury it need only find that Mr. Campbell was charged with a Class C felony, the jury likely relied on the court's answer that the

Impermissible judicial comments on the evidence are presumed to be prejudicial. Here, the State cannot show beyond a reasonable doubt that the jury did not rely on the new evidentiary fact injected with the jury answer, as the predicate for its bail jumping verdicts. Reversal is required.

E. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, this Court should reverse Jason Campbell's convictions.

Dated this 15 day of October, 2014.



OLIVER R. DAVIS – WSBA 24560
Washington Appellate Project – 91052
Attorneys for Appellant

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defendant's charge had been amended to first degree trafficking to find that this element was certainly proved. CP 45.

APPENDIX A – JURY INSTRUCTIONS

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. JASON SCOTT CAMPBELL, Defendant.	No. 13-1-00077-4

COURT'S INSTRUCTIONS TO THE JURY

DATED October 7, 2013 _____, JUDGE

47A

SUB(47A)

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed

in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 6

A person commits the crime of trafficking in stolen property in the first degree when he or she knowingly traffics in stolen property.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

INSTRUCTION NO. 7

Stolen means obtained by theft.

Theft means–

to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or service.

INSTRUCTION NO. 8

A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

INSTRUCTION NO. 9

To convict the defendant of the crime of trafficking in stolen property in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period of August 1st to August 4th, 2012, the defendant knowingly trafficked in stolen property;

(2) That the defendant acted with knowledge that the property had been stolen; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

The defendant is charged in count one with trafficking in stolen property in the first degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of trafficking in stolen property in the second degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

Instruction No. 11

A person commits the crime of trafficking in stolen property in the second degree when he or she recklessly traffics in stolen property.

"Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

INSTRUCTION NO. 12

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact.

Instruction No. 13

To convict the defendant of the crime of trafficking in stolen property in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period of August 1st, 2012 to August 4th, 2012, the defendant trafficked in stolen property;

(2) That the defendant acted recklessly; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

A person commits the crime of Bail Jumping when he or she fails to appear as required after having been released by court order with knowledge of the requirement of a subsequent personal appearance before a court in which the person was charged with a class B or class C felony.

INSTRUCTION NO. 15

Trafficking in Stolen Property in the Second Degree is a class C felony.

INSTRUCTION NO. 16

To convict the defendant of the crime of Bail Jumping as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt–

(1) That on or about January 28th, 2013, the defendant failed to appear before a court;

(2) That the defendant was charged with a class B or class C felony;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

To convict the defendant of the crime of Bail Jumping as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt–

(1) That on or about February 4th, 2013, the defendant failed to appear before a court;

(2) That the defendant was charged with a class C felony;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

It is a defense to the charge of Bail Jumping that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

An "uncontrollable circumstance" means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the Defendant has established this defense, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

(1) The witness is within the control of, or peculiarly available to, that party;
(2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
(3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
(4) There is no satisfactory explanation of why the party did not call the person as a witness; and
(5) The inference is reasonable in light of all the circumstances.

The parties in this case are the State of Washington and Jason Scott Campbell.

INSTRUCTION NO. 20

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and B. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of trafficking in stolen property in the first degree as charged. If you unanimously agree on a verdict on that charge, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A for count I.

If you find the defendant guilty on verdict form A for count I, do not use verdict form B. If you find the defendant not guilty of the crime of trafficking in stolen property in the first degree or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of trafficking in stolen property in the second degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

For counts II and III you will use the appropriate blocks to fill in your verdict on Verdict Form A.

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. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 45488-2-II
v.	)	
	)	
JASON CAMPBELL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[kcpa@co.kitsap.wa.us]	( )	HAND DELIVERY
KITSAP COUNTY PROSECUTING ATTORNEY	(X)	E-MAIL
614 DIVISION ST.		
PORT ORCHARD, WA 98366-4681		

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF OCTOBER, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
(206) 587-2711

WASHINGTON APPELLATE PROJECT

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Court of Appeals Case Number: 45488-2

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