71519-4

71519-4

No. 71519-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DOREEN STARRISH,

Appellant.

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

The Honorable Mary I. Yu

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Doreen Starrish was charged with second degree felony murder and possession of heroin after she stabbed her former significant other during an argument. Among other defenses, Ms. Starrish asserted she acted in self-defense. A police detective improperly opined during his testimony regarding witnesses' truthfulness generally, and the truthfulness of one of the State's witness. The court denied Ms. Starrish's motion for a mistrial. She submits the court erred in denying the mistrial motion, thus denying her Fourteenth Amendment right to a fair trial.

Over repeated defense objections, the trial court instructed the jury in the to convict instructions that, if the jury found the elements of the offense beyond a reasonable doubt, it had a duty to convict Ms. Starrish. Ms. Starrish submits use of that instruction violated her Sixth Amendment right to a jury trial. Ms. Starrish asks this Court to reverse her convictions and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. Detective Mellis' opinion regarding Mr. Tramble's truthfulness constituted improper vouching.

2. Detective Mellis' opinion regarding Mr. Tramble's truthfulness violated Ms. Starrish's constitutionally protected right to a fair trial and right to a jury.

3. Court's Instructions 8 and 22 violated Ms. Starrish's right to a jury trial under the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A witness may not comment or opine about the credibility of another witness. Such improper vouching violates the defendant's right to a fair trial and right to a jury trial. Here, a police officer stated his unsolicited opinion regarding the truthfulness of a witness, thus bolstering the credibility of the witness and attacking the credibility of Ms. Starrish in a case where credibility was the major issue for the jury's determination. Did the officer's unsolicited opinion constitute improper vouching, thus violating Ms. Starrish's right to a fair trial and right to a jury trial?

2. The Washington Constitution provides a greater right to a jury trial than the federal constitution. Jury instructions that mislead the jury regarding its power violate that right to a jury trial. Did the instructions telling the jury it had a "duty" to convict if it found all of

the elements of the offense affirmatively mislead the jury thus violating Ms. Starrish's right to a jury trial under the Washington Constitution?

D. STATEMENT OF THE CASE

Doreen Starrish and Aaron Smith met in 2000 as teenagers and began a tempestuous and volatile romantic relationship that was frequently punctuated by oral arguments that flared into physical violence. 8/19/13amRP 42-44; 11/25/13RP 183; 11/26/13RP 21. Neither Ms. Starrish nor Mr. Smith were afraid of the other and fought on equal terms. 8/19/13amRP 54; 11/25/13RP 189. In 2003, the couple decided to have children and had a daughter not too long after; and a second daughter several years later. 8/19/13amRP 11; 11/26/13RP 24.

In 2012, Ms. Starrish and Mr. Smith were no longer romantically involved but remained friends and lived together in a house in Shoreline. At that time, Ms. Starrish was romantically involved with Jonathon Jones. 11/21/13RP 34. Mr. Smith and Mr. Jones knew each other and seemed to get along. 11/21/13RP 35.

In May 2012, also living in the home of Ms. Starrish and Mr. Smith were Dianne Berniard and her boyfriend, Reginald Tramble. 11/19/13RP 15; 11/20/13RP 13-14. Mr. Tramble had known Ms. Starrish for approximately eight years and met Mr. Smith about two

years before that. 11/20/13RP 12-13. Ms. Berniard met Ms. Starrish in 2008 and met Mr. Smith through Ms. Starrish. 11/19/13RP 7. Mr. Tramble and Ms. Berniard were sleeping on the sofa in the living room of the house. 11/19/13RP 16; 11/20/13RP 21.

On the morning of May 3, 2012, Mr. Smith was preparing breakfast and otherwise getting his daughters ready for school. 11/19/13RP 35. Earlier that morning, Ms. Starrish had brought Mr. Jones to the house and the two were in Ms. Starrish's room having sex. 11/19/13RP 33. Mr. Smith became upset at Ms. Starrish, opened the door to her room, called her several derogatory names, and closed the door. 11/19/13RP 36. Shortly thereafter, Mr. Smith again opened the door to Ms. Starrish's room and grabbed an item off of the bed. 11/19/13RP 38. There was a dispute about what this item was: Ms. Berniard claimed it was Ms. Starrish's heroin, while Ms. Starrish testified it was her money to pay for her portion of the rent. Regardless, Mr. Smith's actions made Ms. Starrish angry. 11/19/13RP 40-41.

According to Berniard and Tramble, Ms. Starrish retrieved a knife and advanced on Mr. Smith. 11/19/13RP 42. Mr. Smith took the knife away from Ms. Starrish and threw it aside. *Id.* Ms. Starrish grabbed a second knife and quickly struck Mr. Smith in the chest.

11/19/13RP 43-45. Ms. Starrish and Mr. Jones immediately left. 11/20/13RP 41. Mr. Smith shouted at Ms. Starrish as she left, closed the door, then collapsed.11/20/13RP 44.

Police officers arriving in response to Ms. Berniard's 911 call found Mr. Smith lying just inside the house suffering a stab wound to the chest. 11/18/13RP 34. Mr. Smith was taken to Harborview Hospital where he died a few days later. 11/18/13RP 35, 69. A subsequent autopsy revealed Mr. Smith died from a stab wound to the chest which penetrated his heart. 11/20/13RP 152-53, 164.

Ms. Starrish was subsequently charged with second degree felony murder by assault, and possession of heroin. CP 88-89. At trial, among other defenses, Ms. Starrish asserted she acted in self-defense. During the testimony of one of the detectives assigned to this case, Mike Mellis of the King County Sheriff's Department, a discussion of the police interview of Mr. Tramble arose:

> In this case, I wanted him [Tramble] to know we did have a time crunch with the children, so I was pressuring him to give what he knew quickly because of that element. At that time, nobody knew whether the victim, or the person who was stabbed, was going to survive or not, so I certainly used that as a theme, or way of trying to bring out a truthful statement from him, letting him know there is different scenarios that could happen. If the person survived, heck, maybe that guy wouldn't even want to press charges against whoever stabbed him. If he

died, though, clearly there was going to be a full force, full-on investigation going forward and he had to cooperate. I told him, in the end, you know, "I have been around the block." He mentioned that he had kind of been on the street for a while, in a way, and that he knew – or I encouraged him to recall that, in the end, you know, in court, everybody ends up telling the truth, was my theme with him.

11/20/13RP 216.

Following up, in cross examination, Detective Mellis testified:

Q: You made a statement during your direct testimony that – that in the end, everyone who comes to in court tells the truth. That's not true, is it?

A: No, not always, no.

Q: Well, how many people come to court and perjure themselves? It happens, right?

. . .

A: Your definition of "many" might be different than mine. People have perjured themselves in court, yes.

Q: Right. So I guess that was one of your tactics to get them to talk to you, you had an emergency, right?

A: I had to get answers accurately out of Mr. Tramble, yes.

Q: All right. And there was a sense of urgency?

A: There was.

Q: Okay. And so, you know, I'm not criticizing you, it was just a tactic to use to tell him that, in the end, everybody is going to tell the truth in court?

A: Yes.

Q: But you know that that's not true?

A: Well, in my experience, sir, when a witness – I'm not talk [sic] about suspects here, but a witness, ultimately, the significant event that they witnessed, it is my experience that, you know, if you are not involved in the crime, whether you are a hardcore gangster – this is the message I was giving him, whether you are a hardcore gangster or a witness on the street, in the end, everybody tells the truth in court.

Q: That's your experience, in the end, everybody tells the truth?

A: The significant witnesses, sir, that's my experience.

. . .

Q: He [Tramble] told you that it happened outside, he said that it was a verbal argument that happened outside; right?

A: I'm sorry, he said –

Q: I'm asking you, don't you remember if he said there was a verbal argument, that happened outside; right?

A: Yes.

Q: Okay. And that wasn't true, or was it? You don't know?

A: I was left with the impression that I was not getting all of the truth out of Mr. Tramble, that's certainly true.

11/20/13RP 222-24, 226.

As Mellis was the last witness on November 20, 2013, the first thing the next day, Ms. Starrish moved for a mistrial because of the inherent prejudice of Mellis' improper opinions about truthfulness:

> Also, I do have a request as well. I'm very concerned about statements made by Detective Mellis during his testimony yesterday.
>
> The State – My impression of the statements that he made were that when he – First of all, when he said – he said two different things that bothered me.
>
> One is that witnesses eventually tell the truth when they come to court.
>
> That is a form of – it's an insidious and subtle form of vouching that is impermissible, objectionable and, frankly, astonishing he would say that.
>
> And two, he made the assertion that the witness Tramble started off lying to him, and eventually told him the truth. And, again, that's another insidious and not-so-subtle form of vouching.
>
> And I think it creates an irreparable problem of vouching, you know; these jurors have a belief that, you know, this is a police officer, no reason to lie.
>
> And they're going to – if he thinks he's telling the truth now, they're going to accept that as the truth, or there's going to be a tendency to do that.
>
> And I would ask two things: First of all, at this time, I'd move for a mistrial based on that.
>
> I don't think there is a curative instruction that can – that can help this problem. They've heard the vouching from the police officer.

> And then, in lieu of that, if the Court's not inclined to grant that, I would ask that the witness be carefully instructed, by either the Court or counsel, to avoid anything that approaches that kind of a problem or assertion.

11/21/13RP 2-3. The court denied the motion for a mistrial:

> Well, I have the benefit of the full transcript. I am denying the motion for a mistrial. You are both on notice about eliciting further testimony.
>
> Frankly, the whole credibility of that individual is in front of the jury.
>
> So do I think it's prejudicial? I do not. The question of whether any of these witnesses come in here and tell the truth is really the province of the jury.
>
> I do not believe they've been instructed on believing any particular individual.
>
> I would urge you both, and Mr. Perez as well, is if it comes back out again, somebody need to then ask the Court to strike it or leave it in the record or say something about it but, at this point, I don't believe that it rises to the level that would require a mistrial.

11/21/13RP 7-8.

Over repeated objections by Ms. Starrish, pretrial and during discussions about the jury instructions, the court in the to-convict instruction, Court's Instructions 8 and 22, instructed the jury that it has a "duty" to convict. CP 100, 119 ("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 . . .)(emphasis added). CP 70-86; 11/13/13RP 92-93; 12/5/13RP 6, 9.

At the completion of the trial, the jury found Ms. Starrish guilty as charged. CP 120-22.

E. ARGUMENT

1. **Vouching by a police officer which constituted improper opinion testimony violated Ms. Starrish's right to a jury and right to a fair trial**

a. Improper vouching by police officers violates a defendant's rights to a fair trial and a jury.

The role of the jury is to be held "inviolate." U.S. Const. amend. VI; Const. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Under the constitution, the jury has "the ultimate power to weigh the evidence and determine the facts." *State v. Montgomery*, 163 Wn.2d 577, 589-90, 183 P.3d 267 (2008), *quoting James v. Robeck,* 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

In addition, an accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 3, 21, 22. Lay witness opinion testimony about the defendant's guilt invades that

right. *State v. Johnson,* 152 Wn.App. 924, 934, 219 P.3d 958 (2009); *State v. Carlin,* 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley,* 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *citing State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Carlin,* 40 Wn.App. at 701; *see also Dubria v. Smith,* 224 F.3d 995, 1001-02 (9th Cir., 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's veracity may also violate the defendant's right to due process), *cert. denied,* 531 U.S. 1148 (2001).

In determining whether such statements are impermissible opinion testimony, courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2)

'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" *State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), *quoting Heatley,* 70 Wn.App. at 579.

There are some areas which are clearly inappropriate for opinion testimony in criminal trials, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. *Demery,* 144 Wn.2d at 759; *State v. Farr-Lenzini,* 93 Wn.App. 453, 463, 970 P.2d 313 (1999).[1] This is especially true for police officers because their testimony carries an "aura of reliability." *Demery,* 144 Wn.2d at 765. Police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt. *See Montgomery*, 163 Wn.2d at 595, *citing* Deon J. Nossel, *Note: the Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials,* 93 Colum. L.Rev. 231, 244 (1993) ("Once [the expert] had testified as to the likely drug transaction-related significance of each piece of physical evidence, the

[1] This rule is grounded in the Rules of Evidence. Testimony that tells the jury which result to reach is likely not helpful to the jury (as required by ER 702), is probably outside the witness's area of expertise (in violation of ER 703), and is likely to be unfairly prejudicial (in violation of ER 403).

jury was competent to draw its own conclusion as to [the defendant's] involvement in the distribution of cocaine." (*citing United States v. Boissoneault,* 926 F.2d 230, 233 (2d Cir.1991)).

b. Detective Mellis' opinions regarding the veracity of the truthfulness of witnesses constituted improper vouching and were improper opinion testimony.

Several times during his testimony, Mellis stated his unsolicited opinion regarding witnesses' truthfulness generally and Tramble's truthfulness specifically. Mellis' misguided opinion of Tramble's truthfulness is precisely the sort of vouching that is improper. The improper vouching by Mellis violated Ms. Starrish's right to a jury trial and right to a fair trial because it purported to take the issue of Tramble's credibility away from the jury.

Mellis' conduct is no different from the two police officers who rendered their opinion that a fact witness was telling the truth when he gave a statement to the police. *State v. Wilber,* 55 Wn.App. 294, 298-99, 777 P.2d 36 (1989). The officers testified that they had been given special training to enable them to determine whether or not someone was telling the truth. Over defense objection, the court allowed them to testify that, in their opinion, the witness was telling the truth when he gave his original statement to the police. *Wilber,* 55 Wn.App. at 297.

While the Court of Appeals found the opinion testimony evidence harmless, the Court nevertheless found the testimony improper. *Id.* at 298-99.

Mellis' opinion testimony was improper. This Court should reverse Ms. Starrish's convictions.

c. The error in allowing Detective Mellis' improper opinion testimony was not a harmless error.

Since improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, courts apply the constitutional harmless error standard to determine if the error was harmless. *State v. Hudson*, 150 Wn.App. 646, 656, 208 P.3d 1236 (2009); *State v. Thach,* 126 Wn.App. 297, 312-13, 106 P.3d 782 (2005). Under this standard it is presumed that constitutional errors are prejudicial, and the State must prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt,* 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach,* 126 Wn.App. at 313.

The critical issues for the jury in this case were whether Ms. Starrish was acting in self-defense and the resulting credibility of Ms. Starrish, Tramble and Berniard and Mr. Jones, the only witnesses to the event. In fact, in closing argument, the prosecutor told the jury:

"Credibility is what this case came down to." 12/5/13RP 21. Mellis' misguided opinions likely tipped the scale in favor of the State by bolstering the credibility of Tramble and, as a result, questioning the credibility of Ms. Starrish.

This was the theme of the State in closing argument: Ms. Starrish was not credible because Tramble and Berniard were:

> One of the most troubling things is that she [Ms. Starrish] has come before you trying to blame Aaron Smith for his own death by trying to create a version of events that is simply not correct. That Aaron Smith was threatening her or assaulting her that morning, which is why she stabbed him.
>
> A version of events that is not supported by her friends, Reggie Tramble and Diane Berniard. It is not even supported by her boyfriend, Jonathon Jones.
>
> Ms. Berniard and Mr. Tramble came before you and told you what happened that morning. They told you the defendant was the aggressor. She came storming out of her room that morning furious with Aaron Smith: Give me back my shit, Aaron; I'm not F-ing around, Aaron; I'm going to stab you, Aaron.

12/5/13RP 14-15; 18-21.

Given this emphasis on the credibility of Tramble and Berniard, it would be improbable the State could prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. Ms. Starrish asks this Court to reverse her convictions.

2. **The court's instruction telling the jury it had a duty to convict misstated the law and violated Ms. Starrish's rights under the Washington Constitution**

a. The Washington Constitution's right to a jury trial is more protective than its federal counterpart.

The Washington Constitution guarantees the "inviolate" right to a jury trial in criminal cases: "The right of trial by jury shall remain inviolate . . ." Const. Art. I, § 21. In addition, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury." Const. Art I, § 22.

"Once this court has determined that a particular provision of the state constitution has an independent meaning using the factors outlined in [*State v.*] *Gunwall,* [106 Wn.2d 54, 720 P.2d 808 (1986),] it need not reconsider whether to apply a state constitutional analysis in a new context." *State v. McKinney,* 148 Wn.2d 20, 26, 60 P.3d 46 (2002), *citing State v. Ladson,* 138 Wn.2d 343, 348, 979 P.2d 833 (1999). The Supreme Court has conducted an independent state analysis of the jury trial right under article I, sections 21 and 22, in *State v. Smith,* 150 Wn.2d 135, 75 P.3d 934 (2003). In *Smith,* the Court held that the language of the Washington Constitution, its structure, and its textual difference from the United States Constitution all indicate that

"Washington's right to a jury trial [is broader] . . . than the federal right." *Id.* at 156. Whether it offers greater protections varies with the context. *State v. Hobble,* 126 Wn.2d 283, 298, 892 P.2d 85 (1995); *Smith,* 150 Wn.2d at 153 ("Even if the right to jury trial is broader under our state constitution, we still must determine the nature and extent of the right."). The examination therefore is whether our state jury trial right provides greater protections in the context of jury determinations of sentencing factors.

The Supreme Court has interpreted article I, section 21 as guaranteeing "that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate." *State ex rel. Mullen v. Doherty,* 16 Wash. 382, 384-85, 47 P. 958 (1897), *citing Whallon v. Bancroft,* 4 Minn. 109 (1860); *State ex rel. Clapp v. Minn. Thresher Mfg. Co.,* 40 Minn. 213, 41 N.W. 1020 (1889); and *Taliaferro v. Lee,* 97 Ala. 92, 13 So. 125 (1893). The key to determining whether the state constitution offers greater jury trial rights within a particular context is the state of the law at the time of adoption of the constitution. *Hobble,* 126 Wn.2d at 300; *Smith,* 150 Wn.2d at 151; *City of Pasco v. Mace,* 98 Wn.2d 87, 96, 653 P.2d 618 (1983) (rights under common law preserved); *In re Ellern,* 23

Wn.2d 219, 224, 160 P.2d 639 (1945) (rights under territorial statutes preserved).

b. The Washington Constitution requires reversal when the jury instructions misstate the law regarding the jury's power to acquit.

Courts review challenged jury instructions *de novo*. *State v. Levy,* 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions are inadequate if they misstate the applicable law.

Under Washington law, juries always have the ability to deliver a verdict of acquittal even if it is against the clear weight of the evidence. *Hartigan v. Territory*, 1 Wash.Terr. 447, 449 (1874) ("This conflict arises from the different construction of constitutional and statutory provisions, and from different views entertained as to the legal effect of the conceded fact, that the jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from mistake or a willful disregard of the law, there is no remedy.").

Although juries have the power to acquit despite the evidence, courts are not required to inform the jurors of this power. *State v. Meggyesy*, 90 Wn.App. 693, 699-700, 958 P.2d 319, *review denied*, 136 Wn.2d 1028 (1998), *overruled on other grounds in State v.*

Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). However, an instruction telling jurors they must convict and therefore cannot acquit, even if the elements have been established, affirmatively misstates the law. Because it misstates the law, such an instruction is legally inadequate and violates the defendant's right to a jury trial under article I, sections 21 and 22.

In this case, the court instructed the jury that it was their "duty" to convict the defendant if the elements were proved beyond a reasonable doubt. CP 100. 119. The court's use of the word "duty" conveyed to the jury it could not acquit if the elements had been established, which was a misstatement of the law. *Hartigan,* 1 Wash.Terr. at 450. Instead, Ms. Starrish's proposed instruction telling the jurors they *may* convict was the correct statement of the law. The court was not required to instruct the jury on its right to acquit despite the weight of the evidence; however, it could not affirmatively misrepresent the law in its instruction.

The court's instructions 8 and 22 misstated the law on the power of jury's to acquit and therefore violated Ms. Starrish's right to a jury trial under the Washington Constitution. Ms. Starrish's convictions must be reversed and remanded for a new trial.

c. The decision in *Meggyesy* does not govern the outcome in this case.

This Court rejected a similar challenge in *Meggyesy, supra*, which was subsequently adopted by Division Two in *State v. Bonisisio*, 92 Wn.App. 783, 794, 964 P.2d 1222 (1998). In *Meggyesy*, the Court characterized the argument as a request that the trial court "require an instruction notifying the jury of its power to acquit against the evidence." *Meggyesy*, 90 Wn.App. at 699.

The error is *not* that the jury should have been told of its power of jury nullification, as the *Meggyesy* Court characterized it. Rather, the error is that the jury should not have been affirmatively misled into believing that it lacked the power to acquit despite the weight of the evidence. This problem was not addressed in either *Meggyessy* or *Bonisisio*, thus neither holding governs here.

Because the jury instructions misstated the law, this Court should reverse Ms. Starrish's convictions.

F. CONCLUSION

For the reasons stated, Ms. Starrish asks this Court to reverse her convictions and remand for a new trial.

DATED this 19th day of November 2014.

Respectfully submitted,

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. DOREEN STARRISH, Appellant.	)))))))))	NO. 71519-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING 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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[X] DOREEN STARRISH ID#193969 YAKIMA COUNTY JAIL 111 N FRONT ST YAKIMA, WA 98901	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF NOVEMBER, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710