71562-3

71562-3

NO. 71562-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOHNSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT (CORRECTED)

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A. ISSUES RAISED ON APPEAL

1. Was the evidence supporting counts 1 through 5 sufficient to prove appellant intentionally billed the Seattle School District's Small Business Development Program for outreach work he never performed when school district employees and outreach contractors testified that they had never seen appellant or heard of his business, when his co-defendant testified that appellant never went to outreach contractor meetings, when the invoices for the outreach work appellant submitted appeared fraudulent, and when appellant testified at trial and offered documents that were forged to prove he did outreach work?

2. Did the State improperly invite the jury to infer guilt from appellant's exercise of his constitutional right to remain silent because it elicited testimony from the investigating detective that he went to appellant's house, sent him emails, and called his telephone number several times to contact him without success when it did not argue or imply that his silence was evidence of guilt so it was not a comment on appellant's pre-arrest silence?

3. Was counsel's failure to object to the detective's testimony regarding unreturned telephone calls and emails on Fifth Amendment grounds and to ask for an exceptional sentence below the standard range

on the grounds that the multiple offense policy produced a clearly excessive sentence ineffective when the law does not support either claim?

B. STATEMENT OF FACTS

Silas W. Potter Jr. was employed as the Program Manager for the Seattle School District's Small Business Development Program (SBDP) from 2006 until July 7, 2010.[1] The program provided training classes for small and minority-owned businesses to assist them in obtaining government contracts. 6RP 45-46.[2] Potter had authority to award personal service contracts to individuals and businesses to teach classes and to engage in outreach efforts for the program. 6RP 49-50. Potter had weekly meetings with the personal service contractors at the school district's offices. 6RP 78.

Potter met appellant David Johnson in 2006 or 2007 when Johnson was installing security cameras for the school district. Potter encouraged Johnson to put his name on the SBDP small works contracts roster to obtain contracts with the school district. Potter and Johnson became friends. With Potter's help Johnson obtained several small works

[1] The name of the program was changed to the Regional Small Business Development Program (RSBDP) sometime in 2010 but will be referred to here for simplicity as the Small Business Development Program or SBDP.

[2] The State adopts the convention used by appellant for referring to the verbatim report of proceedings.

contracts with the school district to install security cameras under the business name Allstate Surveillance. 6RP 50-54.

In 2007 Potter helped Johnson become a personal service contractor to do outreach for the SBDP under the business name Grace of Mercy Outreach Center. 6RP 79-81. Potter testified that the address for Grace of Mercy, 3114 South Puget Sound Avenue in Tacoma, was Johnson's home address. 6RP 107-08. Potter testified that he did not believe Johnson had a secretary, assistant, or staff. 6RP 56. Johnson was to do his outreach work in Tacoma for the Tacoma branch of the SBDP. 6RP 83.

Potter testified that after Johnson had submitted 3 or 4 invoices to the school district Johnson met with Potter at a Denny's restaurant in Seattle to propose a scheme to steal money from the school district. The scheme involved invoicing the school district for classes Johnson purportedly taught for the Tacoma branch of SBDP. Potter and Johnson knew that Johnson would not teach the classes and agreed to split the money from the scheme. After the meeting at Denny's Johnson submitted a few invoices to the school district after which Potter began creating the invoices on his work computer and forging Johnson's signature to them because Johnson had moved to Las Vegas. The invoices charged $50 to $100 per hour for Johnson's services. 6RP 83-105, 148-50, 172, 181, 192.

The school district mailed the checks to Johnson's home address in Tacoma. 6RP 200. Potter testified that Johnson gave him cash almost every time Johnson received a check from the school district. He estimated he received around $60,000 in cash from Johnson after their meeting at Denny's in September or October of 2007. Potter was not certain about the date of the meeting. 6RP 201-02.

On October 12, 2010, the school district contacted the Seattle Police department to report that Potter had improperly deposited a check for $35,000 intended for the school district's SBDP program into a bank account Potter opened with the same name. 7RP 21-23; 9RP 129-30. The school district also reported this incident to the Washington State Auditor who conducted an audit of the SBDP and discovered the payments to Grace of Mercy. 9RP 198-99. The auditors reviewed the contracts and invoices from Grace of Mercy and noticed that the invoices were all for similar round-dollar amounts and that Johnson's signatures on the invoices appeared to be made by two different writers. They compared invoices from Grace of Mercy to SBDP class brochures, class schedules, and class rosters and could find no evidence that Johnson taught any classes on the days billed. 9RP 200-09.

The original scope of work document for Johnson's personal service contract with the school district described "database management"

that Johnson was to perform for the program for $50 per hour. Exhibit 4. Potter was evasive when he testified about what database Johnson managed. 6RP 106. Potter testified that he modified Johnson's contract to add Eddie Rye as a subcontractor for Grace of Mercy to do outreach work in Seattle. Exhibit 4; 6RP 110-16. Johnson's first four invoices under the contract billed the school district exactly $5,000 each month, $1,400 for Rye's outreach work and $3,600 for Johnson's outreach work, using the exact same number of hours worked for each of them each month. The fifth invoice was also for $5,000 but was paid at $5,100 due to an arithmetic error on the invoice identified by the school district's accounting department. In an email to Potter Johnson blamed the error on a newly-hired employee. None of Johnson's invoices named any of the firms or individuals purportedly contacted by Johnson or Rye but referred to meetings with "King County," "Renton Mayor," "community," or "prospective firms." Subsequent invoices for teaching classes also averaged $5,000 per month with $5,000 being the most common amount. Exhibit 5. Rye, who had connections to the Urban League, the Central Area Motivation Program, and other community organizations testified that he never met Johnson. 8RP 277-82.

Potter testified that he had weekly meetings with the personal service contractors doing outreach who told him what they were doing and

who they met with. 6RP 78-79. Potter testified that Johnson didn't attend any of those meetings, 6RP 88-87, but that he met with Johnson privately. 6RP 121-23. Potter testified that Johnson never told him who he met with as part of his outreach efforts at those private meetings. 6RP 152-54. Potter testified that Johnson was not mentioned anywhere in the SBDP informational booklets. 6RP 74.

None of the SBDP classroom facilitators who were present at the training sessions had heard of Grace of Mercy and all confirmed that Johnson never taught classes for the program. 7RP 165-68; 8RP 246-52, 260-67. Ralph Ibarra testified that he had a contract with the school district to do outreach and teach classes for the SBDP in Tacoma and Seattle but never had any contact with Johnson. 9RP 138-53. SBDP employees confirmed that Johnson never taught any classes or attended any of the personal service contractor meetings at the SBDP. 7RP 182, 199.

Detective Keith Savas testified that he attempted to contact Johnson at Johnson's home in Tacoma at least six times without success and that he left Johnson telephone messages and sent him emails. Savas testified that Johnson never returned his telephone calls or emails. Detective Savas testified that during one of his trips to appellant's home he noticed an envelope addressed to appellant inside the house. He also

laid the foundation for admission of copies of the deed to Johnson's home and his driver's license. Johnson did not object to this testimony and did not cross-examine Detective Savas. 9RP 134-36.

Lorrie Sorensen testified that she and Johnson were involved romantically at the time Johnson was receiving money from the school district. 8RP 210, 217-18. She testified that Johnson told her he was being paid to teach computer classes for the school district but he didn't know how to use a computer. 8RP 224-25. She testified that Johnson spent Christmas break with her and her two children in California and Nevada in 2008 and early 2009 and that she and Johnson returned to Nevada on March 1, 2009 and that he stayed with her for about a month. She testified that after that he visited her several times in Nevada for a week to ten days at a time until the end of 2009. 8RP 229-34.

Rebecca Tyrrell, a financial analyst for the King County Prosecuting Attorney, testified that she analyzed Johnson's bank account and credit card records during the time period of the thefts including the Grace of Mercy bank accounts opened by Johnson to which the school district's checks were deposited. 10RP 13-52. She testified that Johnson's credit card records and airline records showed he was in Nevada or California at times when he was purportedly teaching classes according to invoices submitted to the school district. 10RP 71-82. She

testified that just under $89,000 of the $168,275 the school district paid Grace of Mercy was withdrawn in cash and that the rest was used for Johnson's personal expenses. 10RP 53.

Johnson did not move to dismiss any counts for insufficient evidence after the State rested. 10RP 128. Instead, Johnson called four witnesses to testify that he had engaged in outreach services for the SBDP. Seven Hobbs testified that he had known Johnson for twenty-eight years and had been good friends with him for seven or eight years. 10RP 129-31. He testified that he went to three or four SBDP classes with Johnson. 10RP 136. Hobbs testified that he was a friend of Thomas Roundtree, another defense witness, and was familiar with defense witnesses Ray Montgomery and Thomas Nicholson. 10RP 154-55. Thomas Nicholson testified that he had been friends with Johnson for 31 years and that he had attended two SBDP classes and that he knew Hobbs. 10RP 172-82. Thomas Roundtree testified that Hobbs introduced him to Johnson and that Roundtree was a business partner with Ray Montgomery. 10RP 188-89, 197. Montgomery testified that he attended one class. 11RP 22-24.

Johnson testified that he did outreach work throughout the time he was a contractor for the SBDP and that Potter had forged his name to invoices showing that he taught classes. Johnson admitted that he never taught any classes and claimed he had produced his own invoices for his

outreach services and submitted them to Potter. 11RP 99-123. He denied meeting Potter at the Denny's to discuss the billing scheme or splitting money with him. 11RP 118-20. In support of his defense he offered exhibit 104, a scope of work proposal for Grace of Mercy to do outreach, that he testified he submitted to the school district. 11RP 102. Potter testified that he had never seen the proposal and that the signature on it was not his. 6RP 207-10. Johnson offered exhibits 110 and 111, fliers and booklets for Grace of Mercy advertising SBDP training classes, in support of his claim. 11RP 110-12. Potter testified that the fliers and booklets were not authorized by the SBDP but contained information copied from SBDP booklets and class schedules. 6RP 210-16.

Johnson offered exhibits 113 and 114, letters he claimed he received from Potter acknowledging the work of William Wilson, Johnson's nephew, as a subcontractor for Grace of Mercy who purportedly did outreach work while Johnson was out of state. 11RP 124-25, 173-75. He offered exhibit 123, a letter he claimed he received from Potter acknowledging Johnson's investment in the "Portland program" and offering Johnson a teaching position. 11RP 176-78. Johnson also offered exhibit 116, a letter from Fred Stevens, the Executive Director of Facilities at the school district, acknowledging Johnson's outreach efforts for the SBDP program. 11RP 165-67.

During cross-examination the defendant conceded that exhibits 114 and 123 were photocopies, that the signatures on the two letters were identical, and that both signatures were identical to the signature on exhibit 149, an original letter from Potter asking Johnson for an updated copy of his business license. 11RP 226-29. Johnson could not explain why the signatures on the three letters were identical or why he had an original copy of exhibit 149 but only photocopies of exhibits 114 and 123, or why the signature blocks on exhibits 113, 114 and 123 were slightly off center from the body of the letters. 11RP 229-39. Johnson also admitted that Fred Stevens' signature on exhibit 116, a photocopy of the letter from Stevens acknowledging his outreach services, was identical to Stevens' signature on exhibit 126, an original letter from Stevens terminating Johnson's contract with the school district. 11RP 239-41. Finally, Johnson could not explain why the handwritten addresses on the photocopied envelopes for the three photocopied letters were also identical. 11RP 241-42; Exhibits 114, 116, 123. Johnson admitted he had two working photocopiers at his home. 11RP 193.

Johnson was charged with thirty counts of theft in the first degree and six counts of theft in the second degree by color or aid of deception, one count for each check from the school district payable to Grace of

Mercy. CP 25-39.[3] The jury found Johnson guilty as charged. CP 196-201. Johnson was sentenced to 43 months in prison, the low-end of his standard sentence range. CP 304-15. The State recommended this sentence to be commensurate with the sentence received by Potter, Johnson's co-defendant, who also received 43 months. RP 2/7/14 45-48.[4] Johnson appealed his convictions and sentence. CP 317-18.

C. SUMMARY OF ARGUMENT

1. The evidence supporting counts 1 through 5 was sufficient to prove appellant intentionally billed the Seattle School District's Small Business Development Program for outreach work he never performed because it proved that school district employees and outreach contractors had never seen the appellant or heard of his business, that appellant never went to outreach contractor meetings, that the invoices appellant submitted for the outreach work were fraudulent, and that appellant lied and offered forged documents to support his claim during his testimony at trial.

2. The State did not improperly invite the jury to infer guilt from appellant's exercise of his constitutional right to remain silent when it elicited testimony from the investigating detective that he went to appellant's house, sent him emails, and called his telephone number several times to contact him without success, because it did not argue or

[3] Clerk's papers at page indicated.
[4] Verbatim report of proceedings dated February 7, 2014, at pages indicated.

imply his silence was evidence of guilt so it was not a comment on appellant's pre-arrest silence.

3. Counsel's failure to object to the detective's testimony regarding unreturned telephone calls and emails on Fifth Amendment grounds and to ask for an exceptional sentence below the standard range on the grounds that the multiple offense policy produced a clearly excessive sentence was not ineffective because the law does not support either claim.

D. ARGUMENT

1. SUFFICIENCY OF THE EVIDENCE FOR COUNTS 1 THROUGH 5.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be

drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

> This inquiry does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. "Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628, 632 (1980) (citations omitted). Where evidence is conflicting or of such a character that reasonable minds may differ it is the province of the jury to weigh the evidence, determine the credibility of witnesses, and decide the disputed questions of fact. State v. Gerber, 28 Wn. App. 214, 216-17, 622 P.2d 888 (1981).

A rational juror could have found appellant guilty of first-degree theft as charged in counts 1 through 5 beyond a reasonable doubt. Given what the jurors had heard about Potter and appellant's scheme to steal money from the school district by submitting false invoices they could have rationally inferred that appellant had not done the outreach work he billed for in his first five invoices. The exact same amounts billed on the first four invoices, the exact same hours billed on the invoices for Rye and appellant, appellant's email blaming the "new employee" for the $100 error on the fifth invoice, the vague yet similar descriptions of the work

performed, Potter's evasiveness about Johnson's services and admission that appellant attended none of the personal service contractor meetings and appeared nowhere in the SBDP literature, his testimony that the scope of work document appellant admitted as exhibit 104 for his outreach work and the Grace of Mercy flyers he admitted as exhibits 110 and 111 were forgeries, and testimony by Rye, Ibarra, and the SBDP employees that they had never met appellant or heard of Grace of Mercy, support this inference. The jury observed appellant's testimony contradicting Potter's version of events and could have rationally concluded that appellant lied when he testified that he performed outreach work throughout the time period of the thefts, particularly after he offered several forged documents into evidence to support his claim.

In his brief, appellant views the evidence at trial in a light most favorable to himself and omits any contrary evidence to argue that the evidence at trial on counts 1 through 5 was insufficient. He omits the circumstantial evidence contained in the first five invoices themselves and testimony about them that show they were fraudulent. He omits the evidence of the unexplained absence of his name or the name of his business in any of the SBDP literature and his absence at the personal service contractor meetings. Finally, he omits his own unbelievable testimony at trial and the several documents he forged and offered at trial

to support that testimony. Taking that evidence in a light most favorable to the State, the evidence was sufficient to prove that appellant's first five invoices for outreach work were also fraudulent and constituted theft by deception.

2. VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHT.

The State may not comment on the accused's exercise of his Fifth Amendment pre-arrest right to remain silent. State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999); State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996); State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991). A defendant's pre-arrest silence may not be used as evidence of a defendant's guilt. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). However, not all remarks about a defendant's pre-arrest silence amount to a "comment" on the exercise of a constitutional right. See, e.g., Sweet, 138 Wn.2d at 481; Lewis, 130 Wn.2d at 706. The test is "whether the prosecutor manifestly intended the remarks to be a comment on that right." Crane, 116 Wn.2d at 331; State v. Gregory, 158 Wn.2d 759, 840, 147 P.3d 1201, 1243 (2006).

Without objection at trial reversal based on Fifth Amendment grounds is warranted only if there has been a manifest error affecting a constitutional right. RAP 2.5(a). "[T]he appellant has the burden to

demonstrate that the alleged error actually affected his or her rights. '[I]t is this showing of actual prejudice that makes the error "manifest," allowing appellate review.'" State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

In Easter the investigating officer was allowed to testify over defendant's objection that the defendant ignored his questions about an automobile accident and looked downward "once again ignoring me, ignoring my questions" when the officer continued to question him. The officer was allowed to testify again over the defendant's objection that after the officer told him he would be taken for a blood draw to detect alcohol the defendant was no longer evasive and answered questions. The prosecutor referred to the defendant repeatedly during closing as a "smart drunk." In reversing, the court found that the officer's testimony combined with the prosecutor's statements in closing effectively used the defendant's pre-arrest silence as evidence of his guilt. Easter, supra, at 232-35.

Contrast Sweet in which the investigating officer testified that he spoke to the defendant who agreed to take a polygraph test and to give a written statement after he spoke with his attorney. Defendant did not object to this testimony. Neither the results of a polygraph test nor

statement were admitted in evidence. In ruling that the testimony did not violate the defendant's Fifth Amendment rights the court distinguished the case from the facts in Easter and characterized the officer's testimony as "at best a mere reference to silence which is not a "comment" on the silence [and] is not reversible error absent a showing of prejudice." Sweet, supra, at 480-81, citing State v. Lewis, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996).

Appellant argues that State v. Easter, supra, supports his claim that Detective Savas' testimony that appellant failed to return telephone calls and email messages violated his Fifth Amendment right to remain silent. Here, unlike in either Easter or Sweet Detective Savas never spoke to appellant so there was no testimony that appellant did not respond to questions or promised to give a statement or the like. Here, unlike in Easter, there was no claim or inference by the State during Detective Savas' testimony, during appellant's cross-examination, or during closing argument that appellant's failure to answer telephone calls or emails was evidence of his guilt although impeachment of appellant with his pre-arrest silence would not have been improper in this case because appellant testified. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2007). Finally, unlike in Easter, appellant failed to object to the detective's testimony.

Appellant has failed to demonstrate that Detective Savas' testimony about unreturned telephone calls and emails was used as evidence of his guilt or that it resulted in actual prejudice that affected his constitutional right to remain silent. At most, Detective Savas' testimony was, as in Sweet, a mere reference to silence and not a comment on that silence. Easter does not support appellant's argument.

3. INEFFECTIVE ASSISTANCE OF COUNSEL.

a. Failure To Object To Detective Savas' Testimony.

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. Id. at 335; State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916, 922 (2009).

Appellant has met none of the burdens imposed by McFarland and Sutherby. As discussed in section 2 above, there was no reason for counsel to object to Detective Savas' testimony about the emails and

phone messages because it did not logically implicate his pre-arrest Fifth Amendment right to silence but was admitted to clarify the scope of Detective Savas' investigation including his efforts to get appellant's side of the story.

Appellant makes the circular argument that counsel's failure to object to Detective Savas' testimony about his lack of response to phone calls and emails was ineffective because it was a comment on his pre-arrest silence in violation of the Fifth Amendment. However, as argued in section 2 above, the testimony did not violate appellant's Fifth Amendment rights. Appellant has failed to show how counsel's failure to object to the testimony prejudiced him or how there could have been no strategic or tactical advantage to his failure to object. Appellant's claim that counsel's failure to object was ineffective is without merit.

b. Failure To Cite Case Law Supporting A Sentence Below The Standard Sentence Range.

Appellant argues his counsel was ineffective for failing to argue at sentencing that the operation of the multiple offense policy of RCW 9.94A.589 resulted in a sentence that was clearly excessive under RCW 9.94A.535(1)(g). A presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the difference between the effects of the first criminal act and the cumulative effects of the

subsequent criminal acts is nonexistent, trivial or trifling. State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208, review denied, 122 Wn.2d 1007, 859 P.2d 604 (1993); State v. Kinneman, 120 Wn. App. 327, 342, 84 P.3d 882, 890 (2003).

In Kinneman, the court reversed the trial court's finding that under the multiple offense policy the defendant's standard sentence range was clearly excessive holding that the cumulative effects of his sixty-seven separate takings from his IOLTA trust account were not nonexistent, trivial, or trifling. Id. at 346. As in Kinneman, the cumulative effects of appellant's thirty-six takings from the school district were also not nonexistent, trivial, or trifling.

Again, appellant does not explain how counsel's performance was deficient by not raising this meritless argument at sentencing or how he was prejudiced by this failure. He also makes no attempt to show there was no legitimate strategic or tactical reason for his counsel's decision. Instead, appellant substitutes his own judgment for trial counsel's in hindsight arguing that he should have argued the multiple offense policy at sentencing instead of double jeopardy. Given the evidence at trial and the egregiousness of appellant's conduct this argument would likely have failed to sway the trial court as well. Appellant has not met his burden of

showing that trial counsel's performance was deficient for not making this argument.

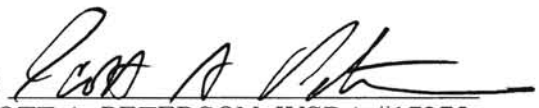
E. CONCLUSION

For these reasons, this court should affirm the judgment and sentence of the trial court.

DATED this 3rd day of February, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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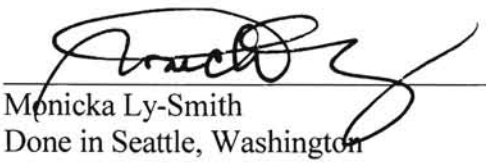
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mary T. Swift, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the **Brief of Respondent (Corrected)**, in State v. David Anthony Johnson, COA No. 71562-3 - I, in the Courts of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Monicka Ly-Smith
Done in Seattle, Washington

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Date