No. 32654-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

PHILIP PATRICK MOORE,
Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
The Honorable Harold D. Clarke III

BRIEF OF RESPONDENT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Moore guilty of conspiracy to commit first degree assault as a principle or an accomplice, where the evidence was insufficient.

2. The trial court erred in instructing the jury on an uncharged alternative means of committing attempted first degree assault.

3. The trial court erred in instructing the jury on an uncharged alternative means of committing attempted first degree assault.

4. The trial court erred in imposing restitution without the presence of Mr. Moore.

II. ISSUES PRESENTED

1. Was the evidence sufficient to establish a conspiracy to commit first degree assault?

2. May instructional error be predicated on the trial court's giving of the very instruction the defendant offered? And was any error harmless where the defendant's theory of the case involved only the issue of whether the defendant aided and abetted the assaults?

3. May instructional error be predicated on the trial court's giving of the very instruction the defendant offered? And was any error harmless where the defendant's theory of the case involved only the issue of whether the defendant aided and abetted the assaults?

4. Did the trial court err by imposing restitution where the judgment and sentence authorized the entry of an agreed order and an agreed order was entered?

III. STATEMENT OF THE CASE

Ms. Jaimie R. Nelson and her fiancé, Mr. Steven Brown, were living together. RP 39. They both knew two drug dealers, Defendant Philip Moore and Lawrence Adams,[1] and had purchased drugs from both of them in the past. RP 37. However, their contact with drug-dealing Mr. Adams had ceased by September 21, 2013, because they had heard that Mr. Adams believed he had been burglarized by Mr. Brown and Ms. Nelson. RP 49-50.

Mr. Brown and Ms. Nelson were avoiding any contact with the drug dealer (and former friend) Mr. Adams because Adams, believing that Ms. Nelson and Mr. Brown had burglarized his home, had threaten them 30-50 times by phone, including threats that Adams was going to burn Steven's house down and harm his family. RP 49-50. Because of their fear, Ms. Nelson and Mr. Brown had called a detective and stayed away from town. RP 49-50. They would never voluntarily have met with or contacted Mr. Adams. *Id*.

Prior to the date of the assaults on September 21, 2013, Defendant Moore knew that Mr. Adams believed he had been burglarized by

[1] Mr. Lawrence Adams is also referred to as having a street name of "Black." "Black" and Lawrence Adams are the same person and these two names are used interchangeably throughout the transcripts. RP 41, RP 62, RP 66-67, RP 188.

Mr. Brown and Ms. Nelson, and knew there was going to be a consequence to Mr. Brown and Ms. Nelson. RP 215. In fact, he believed there was pretty strong evidence in the drug world that Nelson and Brown had ripped off Mr. Adams. RP 151. Defendant Moore knew that in the drug world in which he lived there would be a pretty severe consequence to Ms. Nelson and Mr. Brown for ripping off dealer Adams. RP 214-15. Defendant Moore was connected with dealer Adams: Defendant Moore knew Adams and depended upon Mr. Adams for part of his living and drug sales. RP 214-15. In fact, prior to the assault, Defendant Moore had made an agreement with Mr. Adams that he would call him if Mr. Brown or Ms. Nelson ever showed up at his place. RP 212.

On September 21, 2013, Ms. Nelson was shopping at Wal-Mart when Mr. Moore called her on her cell phone to solicit a ride from his home in Hillyard to the Valley. RP 38. He had needed a ride before, so at that time she did not feel this was unusual. RP 39. He texted her many times and was very persistent. RP 48. Ms. Nelson told Defendant Moore that she would have to discuss the ride request with her fiancé, Steven Brown, when she got home. After she arrived home, she and Steven Brown decided to give Defendant Moore a ride. RP 38-39. She called him and told him they were on their way. *Id.*

Mr. Brown drove over with Ms. Nelson. RP 39-40. After entering defendant's residence, the defendant gave Brown a "fat rock" of crack cocaine to smoke. RP 66. Earlier, Moore seemed to be in a rush for a ride to the Valley, however, when Brown and Nelson arrived, he did not seem to be in a hurry at all. RP 49. As they sat there smoking crack, Defendant Moore broached for discussion the subject about the burglary of Mr. Adams residence and Brown and Nelson's involvement. RP 42.

What Mr. Brown and Ms. Nelson did not know was that Mr. Adams had shown up at Defendant's house before they arrived and was eavesdropping on the discussion from an adjacent room. RP 66. Defendant Moore had called Mr. Adams before Brown and Nelson showed up and had a lengthy discussion after informing him that he had talked to the people that had allegedly broken into his apartment. RP 190. When Defendant Moore knew that Brown and Nelson were coming to his residence, he called Mr. Adams. RP 142-43, 152.

Defendant Moore had given Mr. Brown the cocaine rock to smoke because Moore had agreed to the plan, as discussed with Mr. Adams, that when Mr. Brown and Ms. Nelson arrived, Moore was to invite them in and give them some cocaine and get ready for what was going to go down.

RP 197, ll 13-20.[2] As Mr. Brown and Ms. Nelson were talking about Mr. Adams, Mr. Brown started taking a hit of cocaine when Mr. Adams "opened the door and he said, what mother fucker, you didn't think I would find you?" Then Adams and Defendant started assaulting Mr. Brown. RP 66.

Adams had a three-foot pipe wrapped in duct tape. He began beating and beating Mr. Brown. RP 67. Defendant Moore joined in as Mr. Adams continued to assault Mr. Brown until Brown lost consciousness. RP 68. Prior to losing consciousness, Mr. Brown was getting spit on, and both the defendant and Mr. Adams pulled out their penises and urinated on Mr. Brown. Defendant and Mr. Adams were making a game out of the assault, taking turns. RP 68, RP 74. The metal pipe that was used in the assault - and contained Mr. Brown's DNA - was found by the detectives the next day in the grassy lot located next to Mr. Moore's home. RP 94-97, 102-103, 158.

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[2] **Q.**[by defense attorney] And I think you may have already answered this; I'm not certain. When you gave them that cocaine, was it a sales transaction?

A[nswer by defendant] Well, it was -- because I -- when they came, basically at this point I was doing it because Black said, just bring them in, smoke some dope. In my mind I'm, like, at this point -- like the detective said, whatever is getting ready to go down is getting ready to go down, you know what I'm saying?

Ms. Nelson was also severely beaten. Mr. Adams swung the club-pipe at Ms. Nelson's head and face as she went for her phone. RP 42. Adams took her phone. RP 42. Mr. Adams kept hitting both victims; Steven Brown was trying to talk, and was gagging on his own blood. RP 43. Ms. Nelson, with blood in her eye, tried to get up because her fiancé had fallen off his chair and was unresponsive and shaking on the floor. RP 43. Adams hit her in the gut and she too fell to the floor. RP 43. He told her not to move. RP 43. While she was lying on the floor, Defendant Moore and Adams discussed raping her with a broom so that her fiancé, Steven, would have to watch. RP 57. Mr. Adams asked Defendant Moore to get him a knife. RP 43. Mr. Moore came back with scissors and gave them to Mr. Adams. RP 43. Adams cut off all of Ms. Nelson's hair, which had previously flowed down to her mid back. RP 43, 54.

As a result of the beating, Mr. Brown almost died. Mr. Brown's physicians informed Detective Estes that in all likelihood Mr. Brown was going to die as a result of the severe injuries to his lungs and brain. RP 136. He had been deprived of oxygen for a long period of time and he remained on a ventilator because he could not breathe on his own. RP 136-37. The medical conclusion reached by the doctors was that the beating he received was severe enough to kill him. RP 138. His teeth

were broken. RP 69. He suffered from grand mal seizures, petit mal seizures, and had been in and out of the hospital four or five times since the beating. RP 69. He had chronic headaches and pain. Because of the injuries, he had lost his job. RP 69.

After the beatings to Mr. Brown, Ms. Nelson believed he was almost dead. RP 58. Defendant Moore told her that she and Mr. Brown would have to get out of his residence. RP 55. Moore did not call 911, and Ms. Nelson no longer had her phone because it was taken during the beatings. RP 58-59. Even the defendant believed Mr. Brown was dead or would die from the beating. RP 206, RP 43.

When Ms. Nelson went to the hospital, her jaw was broken, she needed six staples to close the gash on the back of her head, and the suture to her head was so large they had to use staples. RP 135. Her eye was swollen closed. RP 48. She had a fracture of the zygomatic ridge, her cheek was pushed into her face, and she had to undergo surgery to have bone removed from the back of her eye. RP 134-35.

After Ms. Nelson left, taking Mr. Brown to the hospital, the defendant began cleaning up the blood and hair evidence. Defendant Moore stated: "There was blood all over my walls, all over my floor, hair everywhere. So – just started cleaning. RP 208, lines 20-22.

The jury found Defendant Moore guilty of conspiracy to commit first degree assault, first degree assault (of Mr. Brown), and attempted first degree assault (of Ms. Nelson). Because he was a persistent offender, he was sentenced to life in prison without the possibility of early release. CP 184; RP 315-16.

IV. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH A CONSPIRACY TO COMMIT FIRST DEGREE ASSAULT

1. Standard of Review for sufficiency of evidence.

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. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court must defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

2. The evidence was sufficient to support the conviction for conspiracy to commit first degree assault.

To prove the conspiracy charge, the State had to prove that the defendant agreed with Mr. Adams to cause conduct constituting assault the first degree, that he made the agreement with the intent that such conduct be performed, and that a person involved in the agreement took a substantial step in pursuance of the agreement. RCW 9A.28.040. *See, eg. State v. Israel*, 113 Wn. App. 243, 284, 54 P.3d 1218, 1241 (2002)

To establish a conspiracy, the State does not need to show a formal agreement. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997). And, the conspiracy may be proven by the declarations, acts, and conduct of the parties, or by a concert of action. *Id.* This proof may be circumstantial. *Israel*, 113 Wn. App. at 284.

In the instant case, Defendant Moore called the victims and seemed in a rush to get a ride. When they arrived at his place, he had them come in, no longer in a rush for a ride, and had both of them sit there while discussing the burglary of Mr. Adams apartment, knowing Mr. Adams was listening from another room. Defendant admitted

knowing that Mr. Adams was attempting to find Ms. Nelson and Mr. Brown as Adams believed they were involved in a burglary of his apartment. Defendant admitted that he called Mr. Adams, had a lengthy discussion with Mr. Adams, and that this call occurred after he called the victims. Defendant knew there would be a pretty severe consequence to Ms. Nelson and Mr. Brown for ripping off dealer Adams. RP 214-15.

Defendant Moore admitted he had given victim Brown the cocaine rock to smoke because Moore had agreed to follow the plan laid down by Mr. Adams - that when Mr. Brown and Ms. Nelson arrived, Moore was to invite them in and give them some cocaine, and get ready for what was going to go down. RP 197, ll 13-20. Defendant Moore participated in both of the assaults, including taking turns beating and urinating on Mr. Brown.

A conspiracy may be proven by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *Israel*, 113 Wn. App. at 284 (internal quotation marks omitted) (quoting *State v. Casarez–Gastelum*, 48 Wn. App. 112, 116, 738 P.2d 303 (1987)). A formal agreement is not necessary, *State v. Smith*, 65 Wn. App. 468, 471, 828 P.2d 654 (1992). Adams and Defendant Moore concertedly worked - taking turns beating victim Brown with a pipe until he was unresponsive and bleeding on the

floor. The joint beating covered the walls and floor with the victims' hair and blood.

The conspiracy may be proved by circumstantial evidence. *Barnes*, 85 Wn. App. at 664; *State v. Brown*, 45 Wn. App. 571, 579, 726 P.2d 60 (1986). In this case, as outlined above, there is more than enough circumstantial and inferential evidence of "declarations, acts, and conduct of the parties" to establish that Mr. Adams and Defendant Moore agreed to coordinate the first degree assault that did in fact occur at Mr. Moore's residence. The evidence establishes that Defendant Moore provided the place, opportunity, and willingly participated in both assaults after discussing the situation with Mr. Adams.

B. INSTRUCTIONAL ERROR MAY NOT BE PREDICATED ON THE TRIAL COURT GIVING THE VERY INSTRUCTION OFFERED BY THE DEFENDANT. ADDITIONALLY, ANY ERROR WAS HARMLESS WHERE THE DEFENDANT'S THEORY OF THE CASE INVOLVED ONLY THE ISSUE OF WHETHER THE DEFENDANT AIDED AND ABETTED THE ASSAULTS.

The appellant claims that the State charged Mr. Moore with first degree assault under the "third alternative means, '[a]ssaults another and inflicts great bodily harm'" but that "the to-convict jury instruction included only the first alternative means of committing first degree assault, 'the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm or death[.]" Brief of Appellant,

page 20. The appellant then claims that this error in the to-convict instruction on an uncharged alternative means prejudiced the defendant. *Id*. Page 21-23. However, any error in the jury instruction is not reviewable because it was invited, and in any event, any error was harmless.

1. The error was invited and this precludes the defendant from raising the issue on appeal.

Under the invited error rule, a party may not request an instruction and later complain on appeal that the requested instruction was given. *State v. Studd,* 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The appellate courts are to apply the invited error doctrine as a "strict rule" to situations where the defendant's actions at least in part caused the error. *Studd,* 137 Wn.2d at 547 (applying the doctrine even in cases where the error resulted from neither negligence nor bad faith. *Id.*).

Indeed, the invited error doctrine applies even to cases where the to-convict instruction omitted an essential element of the crime. *See State v. Henderson*, 114 Wn.2d 867, 869, 792 P.2d 514 (1990) ("even if error was committed, *of whatever kind,* it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." *Id.* at 870) (emphasis added); *State v. Summers,* 107 Wn. App. 373, 380–82, 28 P.3d 780 (2001), *modified on other grounds,* 43 P.3d 526

(2002). In the instant case, the trial court gave the following instruction now excepted to:

INSTRUCTION No. 10

> To convict the defendant of the crime of assault 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 21st day of September, 2013, the defendant assaulted STEVEN BROWN;
>
> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
>
> (3) That the defendant acted with intent to inflict great bodily harm; 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.

CP 136 (Trial Court's Instruction No. 10).

The defendant's proposed instruction does not differ:

INSTRUCTION NO. ____

To convict the defendant of the crime of assault 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 21st day of September, 2013, the defendant assaulted Steven Brown.

(2) That the assault was committed with with a deadly weapon or by a force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; 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.

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CP 79 (Defendant's proposed instructions to the jury).

Similarly, the defendant's proposed instruction on the crime of attempted first degree assault charges does not vary in any significant

degree than the one given by the Court. Compare CP 144 (court's to-convict instruction #18 on attempted first degree assault) with CP 81 (defendant's proposed to convict instruction on attempted first degree assault).

Here, Defendant Moore's proposed to-convict instructions contain the language adopted by the court. A defendant may not request instructions be given to the jury and then complain upon appeal that the instructions are constitutionally deficient, even if the error is of constitutional magnitude. *State v. Aho,* 137 Wn.2d 736, 744–45, 975 P.2d 512 (1999). As our State Supreme Court noted in *State v. Henderson*:

The law in this regard was clearly declared in *State v. Boyer,* 91 Wn.2d 342, 588 P.2d 1151 (1979), a *unanimous* decision of *this court:*

> This court, in *State v. Kroll,* 87 Wn.2d 829, 558 P.2d 173 (1976), and succeeding cases, has recognized the constitutional requirement that the prosecution bear the burden of proving beyond a reasonable doubt each element of the crime charged. It is against this constitutional test that a challenged instruction may be measured. In this case, however, we do not reach the constitutional issue.
>
> *The instruction given is one which the defendant himself proposed. A party may not request an instruction and later complain on appeal that the requested instruction was given. Ball v. Smith,* 87 Wn.2d 717, 556 P.2d 936 (1976); *Vangemert v. McCalmon,* 68 Wn.2d 618, 414 P.2d 617 (1966).

> The defendant's challenge to the instruction must therefore fail.
>
> The judgment is affirmed.

(Italics ours.) *Boyer,* 91 Wn.2d at 344–45, 588 P.2d 1151, *Henderson,* 114 Wn.2d at 870.

Thus, regardless of the merit of Moore's argument on the issue, the invited error doctrine precludes relief. He cannot request instructions, receive the instructions he requested, and thereby set up error on appeal.[3]

2. Any error was harmless because the defendant stipulated that the degree of injury was not an issue – the only issue was whether the defendant acted as an accomplice.

The defendant's whole theory of the case was that the assaults took place - almost killing Mr. Brown and severely injuring Ms. Nelson – but that he had nothing to do with the first degree assaults because he was neither an accomplice nor a principal to the assaults.

Prior to any trial testimony, the following stipulation occurred:

> COURT: What else do we have for this morning?
> MR. CIPOLLA (Prosecutor): Your Honor, the only thing I would bring to the Court's attention is, we have a stipulation of the parties that the detective can talk about the injuries. **Injury is not the issue, it is accomplice liability.**
> THE COURT: Mr. Dressler.
> **MR. DRESSLER: It is correct, because our defense is Mr. Moore had absolutely nothing to do with any of the injuries, and did not act as an accomplice or as a principal.** As long as the detective is subject to cross-

[3] The defendant had no objections to the instructions. RP 236, line 18-20

> examination on those injuries, and that I can use any of the documents I have been provided in discovery to use. As he's the lead detective, he would have access to them all.
> THE COURT: As it pertains to the injuries, you are talking about?
> MR. DRESSLER: Yes, Your Honor.
> THE COURT: Okay.
> MR. DRESSLER: So Mr. Cipolla is correct. I suspect at some point we'll need to write up a stipulation of some sort unless the Court believes that the transcript will be sufficient.
> THE COURT: It is up to you, folks. It is clearly on the record, and you two have talked about it. If you want something else in writing, that is fine.

RP 31

Indeed, all of the evidence, *including the defendant's testimony,* clearly established that a first degree assault had taken place that would meet either of the first degree assault alternatives (other than poisoning). The evidence was overwhelming and uncontested in this regard. The defendant believed that Mr. Brown was almost killed by the beating with a club. RP 207. The doctors agreed. RP 136-38. The only issue was whether the defendant was involved as an accomplice to Mr. Adams. RP 31. That is what the defendant argued in closing. That was the theory of his case. As Mr. Dressler stated in closing argument for Mr. Moore:

> Was Mr. Steven Brown assaulted? Yes. I am not about to try to convince you otherwise. You heard Mr. Brown. You saw the pictures. There is no doubt that he not only was assaulted, it was done viciously, and that he's fortunate that he's here today. Mr. Moore and I do not dispute that. But

> who did the beating? The evidence does a good job of showing it's Black.

RP 270.

Any instructional error was both invited and harmless.

C. THE DEFENDANT AND HIS ATTORNEY SIGNED THE JUDGMENT AND SENTENCE WHICH AUTHORIZED "AN AGREED RESTITUTION ORDER MAY BE ENTERED." DEFENDANT THEREBY WAIVED ANY COMPLAINT REGARDING THE ENTRY OF THE AGREED ORDER THAT WAS SUBMITTED TO AND SIGNED BY PARTIES AND THE COURT.

The Judgement and Sentence specifically authorized that an agreed restitution order could be entered. J&S, p. 6, ¶ 4,3; CP 185. The Judgment was signed by the Defendant. Defendant's attorney agreed to the restitution order and approved it for entry. CP 212. Presumptively he discussed the matter with his client. In determining the amount of restitution, a trial court may rely on a defendant's admission or acknowledgment of the amount of restitution. *State v. Gray*, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012); *State v. Hunsicker*, 129 Wn.2d 554, 558–59, 919 P.2d 79 (1996). The sentencing judge may rely on what is acknowledged, admitted, or shown at trial to impose restitution. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998).

Additionally, the restitution was for Crime Victims Compensation which is specifically provided for in RCW 9.94A.753 (7):

> Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

Because the defendant's attorney stipulated to the agreed order, the State did not have a restitution hearing. Defendant may have done so from a tactical standpoint, because at a full restitution hearing the medical expenses incurred by the State (unpaid by the victim) could amount to thousands and thousands of dollars. If the defendant prevails on the restitution issue, then the matter should be remanded for a full restitution hearing where the State can seek to determine the full amount of restitution.

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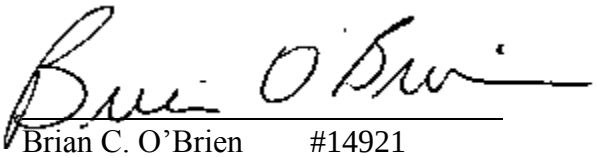
V. CONCLUSION

The evidence was more than sufficient to support the conviction for conspiracy; any instructional error was invited and harmless. For the reasons stated above, the defendant's convictions and sentence should be affirmed.

Dated this 27 day of April, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. PHILIP PATRICK MOORE, Appellant,	NO. 32654-3-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 27, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina Nichols
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and mailed a copy to:

Philop Patrick Moore, DOC #259028
Washington Corrections Center
PO Box 900
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4/27/2015	Spokane, WA	Crystal McNees
(Date)	**(Place)**	**(Signature)**