

62529-2

62529.2

NO. 62529-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GEORGE SANDRU,

Appellant.

2009 AUG 28 PM 4:35
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZALEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A lesser included offense instruction should be given only if the facts presented at trial support a reasonable inference that the lesser crime was committed instead of the crime charged. In this case, the child victim described touching of a clearly sexual nature. The defendant denied that this touching had occurred. Did the trial court exercise sound discretion in finding that there were no facts to support an inference that the defendant committed assault in the fourth degree instead of child molestation?

2. When a jury considers extrinsic evidence during its deliberations, a new trial is warranted if prejudice is shown. On the other hand, the jurors' mental processes inhere in the verdict and cannot be reviewed. In this case, the jurors were instructed that their notes were a tool to assist them during deliberations. The jurors were further instructed that the only evidence they were to consider consisted of the testimony and exhibits admitted during trial. In light of this record, is the trial court's errant, isolated remark that the jurors' notes were "evidence" harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, George Sandru, was charged with three counts of child molestation in the first degree for abusing his 10-year-old son, J. Supp. CP ____ (Sub No. 1); CP 1-2. Sandru's jury trial was held in July 2008 before the Honorable Steven Gonzalez.

At the conclusion of the trial, the jury found Sandru guilty of one count of first-degree child molestation as charged. CP 49. The jury left the other two verdict forms blank, indicating that the jurors could not reach a unanimous verdict as to those counts. CP 50-51.

The trial court imposed a standard-range minimum term of 66 months, and a maximum term of life. CP 69-78; RP (10/3/08) 17-19. This timely appeal follows. Supp. CP ____ (Sub No. 59).

2. SUBSTANTIVE FACTS

Sandru married Elvira Stanus-Ghib on January 2, 1997. Both were from Romania, and both had children from their previous marriages. RP (7/8/08) 89-90, 93; RP (7/10/08) 25. Stanus-Ghib's children included two daughters: L., who was 20 years old at the time of trial, and E., who was 16 years old at the time of trial. RP (7/7/08) 34; RP (7/8/08) 61. During their marriage, Sandru and

Status-Ghib had one child together: J., a son, born on October 6, 1997. J. was 10 years old at the time of trial. RP (7/9/08) 8, 13.

Sandru and Status-Ghib were separated on January 2, 2002, and they filed for divorce in June of that year. Their acrimonious divorce became final on May 19, 2005. RP (7/8/08) 93. The terms of the parenting plan established that Sandru would be J.'s primary custodial parent. RP (7/8/08) 111-12.

On March 2, 2008, J. was staying with his mother for the weekend in accordance with the parenting plan. Status-Ghib noticed that J. seemed upset, and was not acting like his usual self. RP (7/8/08) 112-13. Status-Ghib asked him if anything was wrong; J. told his mother that Sandru was touching him inappropriately. RP (7/8/08) 114; RP (7/9/08) 27. Later that day, L. came by for a visit with her infant daughter. RP (7/8/08) 16. Status-Ghib told L. that J. did not want to live with Sandru anymore. RP (7/8/08) 18.

L. pulled J. aside to talk to him about it. J. disclosed to L. that Sandru had been touching him in a sexual way. RP (7/8/08) 18-19. After J. disclosed his experiences to L., L. told J. that Sandru had sexually abused her as well. RP (7/8/08) 25-26. L. had never before told J. about the abuse she had experienced because she did not want to "ruin [J.'s] life." RP (7/8/08) 15. But

when L. finally told J. about what had happened to her, it made J. feel better because he knew that L. would not let it happen to him anymore. RP (7/9/08) 27-28.

L. insisted that Stanus-Ghib call the police to report what had happened to J. RP (7/8/08) 27-28. Detective Gordon of the King County Sheriff's Office responded to the call, interviewed J. about the abuse, and made the decision to arrest Sandru that evening when he came to pick up J. RP (7/9/08) 66. Sandru was arrested as soon as he arrived. RP (7/9/08) 69.

In accordance with RCW 10.58.090, L. testified at trial and described the abuse she had experienced at the hands of Sandru. L. explained that the abuse began soon after Sandru married her mother. RP (7/7/08) 41-42. L. described how Sandru would reach inside her clothes to touch her breasts, and that he would give her a dollar to let him suck on her tongue. RP (7/7/08) 42, 46-47. Sandru would also "help" L. in the bathtub and touch her private parts. RP (7/7/08) 54-56. L. described one particular incident that occurred shortly after she had had her tonsils removed. L. had fallen asleep in the bathtub. Sandru picked her up, put her on his bed, and inserted his fingers into her vagina. L. screamed, punched Sandru, and ran out of the room. RP (7/7/08) 51-53.

Although criminal charges were filed as a result of Sandru's abuse of L., Sandru was acquitted by a jury at trial. RP (7/8/08) 12-13. J. began living with Sandru after the verdict of acquittal in L.'s case. RP (7/8/05) 14.

L.'s sister E. also testified at trial in accordance with RCW 10.58.090. E. explained that Sandru liked to "help" her take a bath as well, and that he would touch her private parts while washing her. Sandru often touched E.'s thighs and buttocks, and he would make her kiss him on the lips if she wanted money or ice cream. RP (7/8/08) 67. Sandru rubbed E.'s thighs when she was riding in the car with him. RP (7/8/08) 68-69. Sandru would also make E. give him back massages. RP (7/8/08) 74. E. tried to tell her mother about what Sandru was doing, but her mother was "oblivious[.]" RP (7/8/08) 85.

J.'s descriptions of abuse were similar in many ways to what his sisters had described. Like E., J. described how Sandru made J. give him back massages. J. explained that Sandru would tell J. to go "lower and lower" until J.'s hands were "like next to his private part, his butt[.]" RP (7/9/08) 29. At that point, J. "knew it wasn't for massaging," and it made J. feel "weird." RP (7/9/08) 29-30.

Like L., J. also described how Sandru touched his private part "[w]hen he put me on his bed." J. explained that his "private part" is "the part that you use to go to the bathroom." RP (7/9/08) 16. J. explained that when Sandru touched his "private part," he would move his hand in a circular motion. This made J. feel "[n]ot good." RP (7/9/08) 17.

J. also described an incident when he was lying on the couch watching a movie. J. explained that Sandru touched him "on his butt," and called him "dad's butt" in Romanian. RP (7/9/08) 18-19. Then Sandru moved his hand to the front and rubbed J.'s genitals, again in a circular motion. RP (7/9/08) 19-20. Sandru held J. "in a hugging way" so J. couldn't get away. This made J. feel "[s]ad." RP (7/9/08) 21.

J. also explained that Sandru always wanted J. to share his bed at night. When Sandru's adult sons from his previous marriage lived with them, they stayed in one room while J. and Sandru stayed in the other. There was only one bed in Sandru's bedroom. RP (7/9/08) 13-15. But even after Sandru's adult sons moved out, Sandru would make J. sleep with him anyway. RP (7/9/08) 15. J. described an incident that occurred about two weeks before his mother called the police. Sandru had made J. come to bed with

him, and he held J. up against his body. Sandru was lying on his side, pressed up against J.'s back. RP (7/9/08) 21-22. Sandru put J.'s legs and feet between his legs, so that J. could feel Sandru's "private part a little," and he "could feel his nuts with my legs." RP (7/9/08) 22-23. About a week later, J. decided that he should tell someone about the touching because Sandru "started to do things more," although J. was afraid that Sandru "would hit me if I told." RP (7/9/08) 25. J. said he finally told his mother about it so that it wouldn't happen again. RP (7/9/08) 27.

Sandru testified in his own defense at trial. Sandru emphatically denied that he had touched J. inappropriately. RP (7/10/08) 64-65, 70. Sandru claimed that he did not sleep in the same bed with J. after his older sons moved out. RP (7/10/08) 69. Sandru denied making J. massage his back, and said that he called J. his "little sweetheart," not his "little butt." RP (7/10/08) 65-66. Sandru also denied touching L. and E. He said he did not bathe them, kiss them, or ask them to massage him. RP (7/10/08) 73-74. When asked specifically about J.'s descriptions of sexual touching, Sandru stated, "There was never anything like that ever," and "Never did I do such a thing." RP (7/10/08) 78-79.

C. **ARGUMENT**

1. **THE TRIAL COURT EXERCISED SOUND DISCRETION IN RULING THAT THE FACTS DID NOT WARRANT INSTRUCTING THE JURY ON THE LESSER CRIME OF ASSAULT IN THE FOURTH DEGREE.**

Sandru first argues that the trial court erred in refusing to give his proposed instructions on the lesser included crime of assault in the fourth degree. More specifically, Sandru argues that there was evidence in the record from which the jury could have found that he committed this lesser crime instead of child molestation in the first degree as charged. Brief of Appellant, at 11. This claim should be rejected. As the trial court found, this case was an all-or-nothing proposition. On the one hand, J. described touching that was clearly of a sexual nature. On the other hand, Sandru testified that he had never touched J. in the manner J. described, and he flatly denied touching J.'s private parts at all. Based on this record, the trial court correctly refused Sandru's proposed instructions on fourth-degree assault, and this Court should affirm.

A lesser included offense instruction should be given if both prongs of the well-established, two-part test are met: 1) all of the elements of the lesser offense are included in the greater offense

(the legal prong); and 2) the evidence supports a reasonable inference that only the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 548 P.2d 382 (1978). The Washington Supreme Court has recently held that assault in the fourth degree meets the legal prong of this test with respect to the greater crime of child molestation. State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006). Therefore, as the trial court recognized, the only issue in this case is whether the factual prong was met. See RP (7/10/08) 97-99.

The purpose of the factual prong of the Workman test "is to ensure that there is evidence to support the giving of the requested instruction." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). This test requires "a factual showing more particularized than that required for other jury instructions." Id. Specifically, "the evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense." Id. (citing State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990)) (emphasis in original).

In making this determination, the evidence should be examined in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. However,

"the evidence must affirmatively establish the defendant's theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456. Put another way, the evidence must establish a basis that "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) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). Although the evidence supporting a lesser offense need not be offered by the defendant, there still must be some evidence in the record to support a finding that only the lesser crime was committed. State v. McClam, 69 Wn. App. 885, 850 P.2d 1377, rev. denied, 122 Wn.2d 1021 (1993).

A trial court's refusal to give an instruction on factual grounds is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

In this case, Sandru proposed instructions on the lesser offense of assault in the fourth degree. CP 31-34. In support of these instructions, Sandru argued that the jury could find that he

had touched J. in an offensive manner, but could also disbelieve the State's evidence that the touching was done for the purpose of sexual gratification. RP (7/10/08) 101-02. As the trial court found, however, there was no affirmative evidence from which the jury could have found that Sandru committed fourth-degree assault instead of first-degree child molestation.

The only direct evidence before the jury regarding Sandru's touching of J. came from just two sources: J. and Sandru. J. testified that Sandru touched him "on [his] private part" when he made J. share his bed. RP (7/9/08) 15-16. J. described his "private part" as "the part that you use to go to the bathroom." RP (7/9/08) 16. J. said Sandru moved his hand in "a roundabout motion" on his private part, and that it made him feel "[n]ot good." RP (7/9/08) 17. J. also explained that Sandru touched him on his "butt" when he was lying on the couch watching a movie, and then Sandru moved his hand to the front to touch J.'s genitals. RP (7/9/08) 18-19. Again, J. described how Sandru moved his hand in a circular motion, and it made J. feel "[n]ot good." RP (7/9/08) 20. In addition, J. described how Sandru held him against his body when they were together in Sandru's bed. J. explained that Sandru held him tightly, pressed his body against J.'s back, and held J.'s

legs between his legs. J. said he could feel Sandru's "private part a little" and he "could feel [Sandru's] nuts with [his] legs" when Sandru held him this way. RP (7/9/08) 21-23.

Sandru, on the other hand, categorically denied that any of the touching had occurred. Sandru denied touching J. when J. was in his bed, stating, "There was never anything like that ever." RP (7/10/08) 78. Sandru denied touching J. inappropriately while they were watching movies at home. RP (7/10/08) 64. Sandru denied rubbing J.'s penis, or even his thighs, stating, "Never did I do such a thing." RP (7/10/08) 79. In fact, Sandru denied touching J.'s buttocks and penis for any reason, since J. was old enough to take care of himself. RP (7/10/08) 70.

Based on this record, the trial court properly exercised its discretion in finding that there was no factual basis to instruct the jury on the lesser offense of fourth-degree assault. The touching J. described was undeniably sexual in nature, particularly when considered in conjunction with the testimony of L. and E. On the other hand, Sandru categorically denied that any touching had occurred. Therefore, the jury had no evidence from which to conclude that Sandru had committed only fourth-degree assault rather than child molestation as charged. As noted above, "the

evidence [supporting the lesser] must affirmatively establish the defendant's theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456. Thus, it was not enough for Sandru to argue that the jury might believe that touching occurred, yet disbelieve the evidence of sexual contact. Sandru's claim is without merit.

Moreover, Stevens is readily distinguishable. In Stevens, the defendant was charged with child molestation in the second degree for grabbing the breast of a 12-year-old girl. The evidence showed that Stevens had grabbed the victim's breast while their picture was being taken, and that Stevens was intoxicated. Stevens testified that he had reached up to make it look like he was grabbing the victim's breast in the picture as a joke, but that he did not intend to actually touch it. Stevens, 158 Wn.2d at 307. Further, the court noted that the victim herself had testified that Stevens made a joke about the incident. Id. at 312.

Given these facts as adduced at trial, the court held that it was error for the trial court to refuse Stevens's proposed instructions on the defense of voluntary intoxication *and* on the lesser offense of fourth-degree assault. Id. at 309-12. In finding that the factual prong of the Workman test had been satisfied, the

court observed that it was "not disputed that Stevens touched H.G. on her breast"; rather, the evidence conflicted as to whether the grabbing was an accident, a joke, or truly sexual contact for the purpose of sexual gratification. Id. at 311-12.

In this case, by contrast, Sandru did not claim that his touching of J. was accidental or a joke. To the contrary, Sandru vehemently denied that any touching had occurred at all. The only evidence describing the touching came from J., who unambiguously described touching of a sexual nature. Therefore, unlike in Stevens, there was no evidence in this case from which the jury could have concluded that the touching only amounted to fourth-degree assault. In other words, there was either child molestation or there was nothing at all. This Court should reject Sandru's claim, and affirm.

2. THE JURORS' NOTES WERE NOT EXTRINSIC EVIDENCE, AND THE TRIAL COURT'S PASSING REMARK WAS HARMLESS.

Sandru next argues that the jury improperly considered extrinsic evidence during its deliberations. More specifically, he argues that he was denied his right to due process when the trial court instructed the jury that the notes that some of the jurors had taken on copies of a transcript used as a listening aid were

"evidence." Brief of Appellant, at 12-15. This claim should also be rejected. First, the jurors' notes were not extrinsic evidence because the notes were not evidence at all. Second, the trial court's misstatement is harmless in light of the court's instructions to the jury, which informed the jurors of the proper use of their notes, and unambiguously informed them what evidence they could properly consider during deliberations. Thus, any error is harmless, and this Court should affirm.

A jury's consideration of extrinsic evidence may warrant a new trial. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence "is defined as information that is outside all the evidence admitted at trial, either orally or by document." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). "Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal." Balisok, 123 Wn.2d at 118 (citing Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973)). When extrinsic evidence has been introduced into the jury's deliberations, the question is not whether error has occurred, but whether there are reasonable grounds to believe that the defendant has been prejudiced by the error. State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982); Allyn v.

Boe, 87 Wn. App. 722, 729, 943 P.2d 364 (1997), rev. denied, 134 Wn.2d 1020 (1998).

On the other hand, the mental processes by which jurors reach their decisions are not evidence, but are matters that inhere in the verdict. State v. Havens, 70 Wn. App. 251, 256, 825 P.2d 1120, rev. denied, 122 Wn.2d 1023 (1993). Appellate courts cannot review aspects of the jury deliberation process that inhere in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962).

In this case, the notes that some of the jurors apparently took when listening to the recorded interview of defense witness Beth Graham do not constitute "extrinsic evidence" as that term has been defined in the case law. See, e.g., State v. Briggs, 55 Wn. App. 44, 48-59, 776 P.2d 1347 (1989) (a juror's personal experience with stuttering, which was a central issue at trial); State v. Pete, 152 Wn.2d 546, 550-51, 98 P.3d 803 (2004) (written statement of defendant, which was not introduced at trial); State v. Rinkes, 70 Wn.2d 854, 860-62, 425 P.2d 631 (1994) (inflammatory newspaper cartoon and editorial, which would not have been admissible at trial). Rather, the jurors' notes are more akin to those individual jurors' thought processes, which inhere in the verdict.

See Havens, 70 Wn. App. at 256. Put simply, the jurors' notes are not evidence at all.

In any event, the trial court clearly misspoke when stating that the notes were evidence. But the court's misstatement is harmless in light of the record.

Before the evidentiary portion of the trial began, the trial court instructed the jury on taking notes as follows:

As I mentioned, you now each have notepads. Those are for you to take notes, of course, during the trial.

You can decide when to take notes and when not to. Those notes remain your own private notes. You may not share them with each other until you begin deliberating, and then only if you wish to share them.

You should not assume that the notes are more or less accurate than your memories. They're simply a tool to assist you during deliberations.

Testimony will rarely, if ever, be repeated for you during deliberations, so please pay close attention during trial, and take notes about those aspects of the testimony that you wish to recall and refer to during deliberations.

Some jurors find those notes invaluable for that purpose. Others find that they've spent too much time looking down at the notepad and they've missed important things happening in the courtroom. So again, this is a matter for your discretion.

The notepads will be locked up each evening by [the bailiff]. No one else will ever read your notes.

At the end of the case, if you wish to keep them, you may. Otherwise, he will shred them, again, without anyone else ever looking at your notes.

RP (7/7/08) 4-5.

During the defense case, the State agreed that Sandru could present a recording of an interview with Beth Graham, one of J.'s teachers, in lieu of live testimony. In addition, the jurors were provided with copies of a transcript to assist them in listening to the recording. The trial court properly instructed the jury that the transcript was not evidence, but only a tool to assist them in listening to the recording. RP (7/10/08) 87-88. Accordingly, the transcripts were collected immediately after the recording was played. RP (7/10/08) 88.

Later in the trial, the bailiff informed the court and the parties that some of the jurors had taken notes on their copies of the transcript, and had asked to have the transcripts back. RP (7/14/08) 5. Both parties agreed that the jurors in question could have the transcripts back briefly, in order to transcribe their notes into their notepads, but that the transcripts should not be in the jury room for deliberations. The trial court agreed with that proposed

procedure. RP (7/14/08) 6. When the jurors were brought into the courtroom, the trial court addressed them as follows:

There was an inquiry from the jury regarding notes on a transcript. The transcripts are not evidence, but your notes are. We will pass those transcripts back to you. You can take any of those notes and transfer them to your notepads so you can refer to them during deliberations, but the transcripts themselves will not be with you in the jury room as you deliberate.

Now, today we're moving to closing argument. You should each have a set of the court's written instructions to the jury. I'm required to read them aloud to you, which I will do now. You will have them during deliberations and during closing arguments as well.

RP (7/14/08) 7.

Immediately thereafter, the court instructed the jury on the law. RP (7/14/08) 7. In the court's first instruction to the jury, the jurors were told explicitly that it was their "duty to decide the facts in this case based upon the evidence presented . . . during the trial," and that "[t]he evidence you are to consider during deliberations consists of the testimony you have heard from witnesses, stipulations and the exhibits I have admitted during the trial." CP 53.

Based on this record, there are no reasonable grounds to believe that Sandru was prejudiced by the trial court's misstatement

that the jurors' notes on the transcript were "evidence." First, the non-evidentiary nature of the notes is self-evident, and would have been apparent to the average juror despite the court's remark. Furthermore, the trial court had already instructed the jurors regarding the purpose of note-taking before the trial began. These instructions explicitly stated that the notes were "simply a tool to assist you during deliberations." RP (7/7/08) 5. In addition, the jurors were further instructed at the conclusion of trial, both orally and in writing, that the evidence they were to consider consisted solely of the testimony, stipulations, and exhibits that were admitted during the trial. In sum, the trial court's passing remark that the notes were "evidence" had no impact on the trial, and thus, any error was harmless.

Nonetheless, Sandru argues that a new trial is warranted, citing State v. Pete. Pete is readily distinguishable. In Pete, the trial court's bailiff inadvertently provided the deliberating jury with a copy of the defendant's written statement to the police, which neither party had introduced into evidence during the trial. Pete, 152 Wn.2d at 550. Pete's written statement contradicted his defense at trial and "seriously undermined" it. Accordingly, Pete

had demonstrated prejudice warranting a new trial due to the jury's consideration of extrinsic evidence. Id. at 554.

In this case, by contrast, no such showing of prejudice has been made. To the contrary, the trial court's detailed instructions both before and after the evidentiary portion of the trial were sufficient to overcome any possible prejudice that could have stemmed from the trial court's one errant remark. Sandru's claim is without merit, and this Court should affirm.

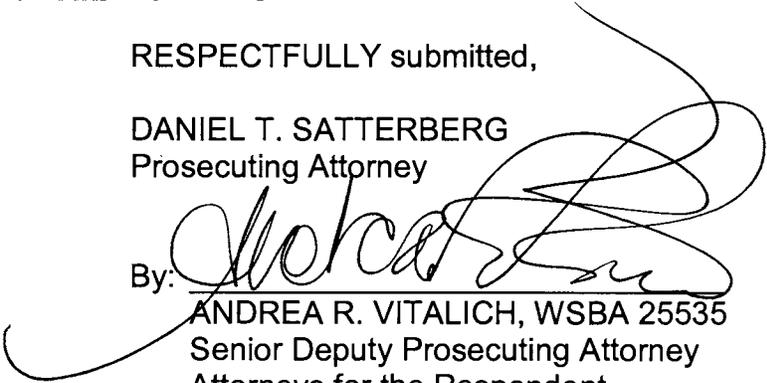
D. CONCLUSION

The trial court exercised sound discretion in finding that there was not a sufficient factual basis to instruct the jury on the lesser included crime of assault in the fourth degree. Moreover, the trial court's passing remark that the jurors' notes on a transcript were "evidence" did not result in prejudice. For the reasons stated above, this Court should affirm Sandru's conviction for child molestation in the first degree.

DATED this 28th day of August, 2009.

RESPECTFULLY submitted,

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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 Anthony Savage, the attorney for the appellant, at 615 Second Ave., Suite 340, Seattle, WA 98104-2200, containing a copy of the Brief of Respondent, in STATE V. GEORGE SANDRU, Cause No. 62529-2-I, in the Court 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.

W Brame

Name

Done in Seattle, Washington

8/28/09

Date