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NO. 65324-5-1

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

REC'D

MAR 17 2011

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

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

The Honorable Brian D. Gain, Judge

2011 MAR 17 10:51 AM  
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COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA  
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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE COURT IMPROPERLY EXCLUDED RELEVANT EVIDENCE UNDER THE RAPE SHIELD STATUTE

The State argues the trial court properly excluded evidence that Palmer alleged she was also raped by Officer Ramirez and properly denied Tovar's request to cross examine Palmer about the rape allegation under the rape shield statute (RCW 9A.44.020(3)). Brief of Respondent (BOR) at 25 (citing State v. Gregory, 158 Wn.2d 759, 789, 147 P.3d 1201 (2006) and State v. Hudlow, 99 Wn.2d 1, 8, 659 P.2d 514 (1983) for the broad proposition the statute prohibits evidence of a victim's prior sexual conduct on the issue of credibility under any circumstances). Contrary to the State's argument, evidence that Palmer alleged Ramirez raped her a few months before she alleged Tovar also raped her was not inadmissible under the rape shield statute.

In Hudlow, the Court held the rape shield statute's prohibition on the introduction of evidence on the issue of credibility "is directed at the use of such evidence for impeaching the victim's general credibility for truth and veracity." Hudlow, 99 Wn.2d at 8 (emphasis original). See, State v. Jones, 168 Wn.2d 713, 723, 230 P.3d 576 (2010) (rape shield statute is aimed at ending the misuse of prior sexual conduct evidence, so that a woman's general reputation for truthfulness could not be impeached

because of her prior sexual behavior). The Court also held to the extent the statute limits a defendant's right to cross examination there must be a compelling State interest. *Id.* at 16. The Hudlow Court ruled the evidence of the victims' past sexual behavior in that case was irrelevant because it "concerned only the general promiscuity of the two victims and lacked further indicators showing any past consensual sexual activity comparable to the story offered by respondents Hudlow and Harper." *Id.* at 17.

Here, Palmer's allegation that Ramirez raped her was not offered to impeach her general veracity. It was offered to show her motive to lie and was relevant to the defense theory. There was no compelling State interest that justified the court's ruling denying Tovar the right to cross examine Palmer about the allegation.

Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary. State v. Demos, 94 Wn.2d 733, 736, 619 P.2d 968 (1980). The State recognizes the defense theory was Palmer would go to extremes to get what she wanted. BOR at 27-28 (citing record). There was evidence to support that theory. For example, evidence showed Palmer lied to Tovar when she told him she wanted a monogamous relationship with him in order to entice him to move in with her to help her pay her rent. The defense theory was that Palmer also fabricated the rape allegation because

she thought it would help her convince her husband to reconcile. Tovar was foreclosed from presenting the most crucial evidence in support of that theory, that Palmer told her husband Ramirez raped her and a few months later she told him Tovar raped her to garner his sympathy in the hope he would take her back. Brief of Appellant (BOA) at 29. Unlike in Hudlow, the evidence was not offered to impeach Palmer's general credibility for truth but to show her motive to lie.

The State also recognizes the rape shield statute does not apply to evidence of prior false accusations of rape. BOR at 26. The State argues Tovar failed to make the threshold showing there was a reasonable probability Palmer's allegation Ramirez raped her was false. In support of its argument the State adopts the trial court's reasoning that whether Palmer considered the incident with Ramirez a rape because she did not receive the benefit of her bargain (that Ramirez would get her marijuana possession and driving while license suspended charges dismissed in exchange for sex) was a different issue than whether she falsely alleged he raped her. BOR at 22, 27 (citing 1RP 34). That argument and the court's rationale miss the point.

The question is whether Palmer's allegation against Ramirez was false. Palmer claimed while Ramirez was citing her they exchanged sexual banter. Palmer later met Ramirez at a pub and went home with him

because he promised he would give her a letter to take to court that would cause the charges against her to be dismissed. BOA at 25; CP 406. According to Palmer, instead of giving her the promised letter, Ramirez pushed her down on the bed and had non-consensual sexual intercourse. Id. Palmer did not contact police but instead she immediately told her husband Ramirez raped her while at the same time she asked her husband to take her back. BOA at 25. Even though Palmer told her husband Ramirez raped her, she continued to communicate with Ramirez, discussed her “date” with Ramirez with friends, seemed happy about the date and never mentioned anything about a rape. Palmer even went on a second date with the alleged rapist Ramirez and engaged in sexual intercourse with him again. Id. The incident with Palmer led to official misconduct charges against Ramirez but he was never charged with rape.

That Palmer believed Ramirez raped her because she thought they had an agreement, sex in exchange for dismissal of the charges against her, and Ramirez reneged on the agreement strains credulity. Her actions and behavior show at least a reasonable probability Palmer’s allegation made to her husband that Ramirez raped her was false, she knew it was false and she made the allegation because she believed it would lead her husband to take her back. The rape shield statute is not a bar to the admission of the evidence. State v. Demos, 94 Wn.2d at 736.

The evidence was relevant to Tovar's theory that Palmer had a motive to lie about being raped by Tovar. As she did following her initial sexual encounter with Ramirez, Palmer immediately told her husband Tovar raped her. Palmer only went to police at her husband's insistence, who drove her to the police station. Her allegation came only hours after she spoke to her husband about reconciling and he rebuffed her telling her that he had did not think a reconciliation would work. BOA at 16-17. It was Palmer's husband who insisted she call police and who took her to the police station. Id. at 11. Palmer's plan worked because days later Palmer and her husband reconciled. Id. at 17.

Palmer's false allegation to her husband that Ramirez raped her, in the context of attempting a reconciliation with him, was relevant to the defense theory that Palmer fabricated the rape allegation against Tovar just a few months later for the same reason: to manipulate her husband into taking her back. The evidence was not offered to attack Palmer's "general credibility" for truth or veracity but to show she had a motive to lie. See, State v. Harris, 97 Wn.App. 865, 872, 989 P.2d 553 (1999) ("Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible."). Evidence of Palmer's encounter with Ramirez was not barred under the rape shield statute and the court's ruling prohibiting admission of the evidence and

prohibiting Tovar from cross examining Palmer about the encounter violated Tovar's right to present a defense, right to confrontation and right to a fair trial. See, Kentucky v. Stincer, 482 U.S. 730, 736, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.").

Moreover, on direct examination Palmer testified before Tovar raped her Tovar angrily told Palmer he wanted to give her something nobody else could and afterwards asked if he had just raped her and told her he had given her something nobody else had. 8RP 69-70, 73, 77. Tovar wanted the limited opportunity to ask Palmer if she discussed the alleged Ramirez rape to impeach her testimony that Tovar made those statements. 8RP 3-4, 120. The State argues the court correctly denied Tovar's request as being too far afield. BOR at 27.

The logical inference that can be drawn from the testimony is that Tovar believed he raped Palmer and was the only person who had ever raped her. Under the open door doctrine, when a party opens up a subject of inquiry on direct, cross examination on the same subject is permitted. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Evidence rules do not supersede the open door doctrine. State v. Brush, 32 Wn.App. 445, 451, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983). In

eliciting Palmer's testimony regarding statements Tovar allegedly made, the State opened the door to cross examination about those alleged statements regardless of the rape shield statute. Tovar had the right to introduce evidence to contradict or explain the evidence offered by the State. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, 103.14, at 52-53 (4th ed.1999). Evidence of the alleged prior rape was the only evidence at Tovar's disposal to contradict or impeach Palmer's testimony that he made the damaging and inculpatory statements.

Constitutional error is presumed to be prejudicial and the State has the burden of proving the error was harmless. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). Constitutional error is only harmless if the untainted evidence is so overwhelming that it necessarily leads to a verdict of guilt. Id. at 426.

The State argues that even if the court erroneously denied Tovar his rights to present a defense and cross examination, the error was harmless. BOR at 29. The State supports its harmless error argument claiming the prosecution case was strong and Tovar had the opportunity to impeach Palmer with some inconsistent statements and reputation testimony. BOR at 30.

The State contends its case was strong because police found two knives similar to ones Palmer described, she had bruises on the inside of

her mouth, she was upset and distraught when she spoke with her husband and Priebe-Olson overheard “damning admissions.” BOR at 30. The State’s argument is not persuasive.

The State does not cite to any “damning admissions” Tovar made because there are none. In fact, despite Palmer’s attempt to get Tovar to admit he raped her, Tovar told Palmer he did not remember hurting her. 4RP 75.

The similar looking knives and Palmer’s bruises do not necessarily lead to the conclusion that Tovar raped her. Palmer also alleged Tovar choked her with his hands around her neck. 7RP 22-23. Palmer, however, had no injuries or marks on her neck and there was no physical evidence that showed she was raped. 5RP 56; 6RP 14; 7RP 38, 47.

In addition, it was Palmer’s husband who testified Palmer seemed distraught and exhausted when she came to him the next day, which was consistent with the defense theory that Palmer was trying to manipulate her husband into taking her back. 5RP 116. The doctor who examined Palmer later that day testified she did not appear distressed or uncomfortable and Priebe-Olson testified that while she was with Palmer in Palmer’s home looking for potential evidence Palmer would occasionally laugh. 5RP 55; 7RP 32-33.

The State correctly points out that Palmer was impeached with some inconsistent statements and there was testimony that she had reputation for being untruthful. Although that evidence was relevant to Palmer's general credibility, it had no connection with Tovar's defense theory that Palmer lied to evoke her husband's sympathy as part of her attempt to get him to take her back and was no substitute for cross examination about her similar false allegations against Ramirez. See, Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (cross examination is the "principal means by which the believability of a witness and the truth of his testimony are tested."). Moreover, none of the other impeaching evidence had any direct nexus to Palmer's testimony that Tovar made inculpatory statements.<sup>1</sup>

This case boiled down to credibility. The jury necessarily had to believe Palmer's testimony to convict Tovar. The evidence was not so overwhelming that it can be said the jury would have reached the same verdict had Tovar been allowed to present evidence and cross examine her

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<sup>1</sup> The State cites United States v. Beardslee, 197 F.3d 378, 383 (9<sup>th</sup> Cir. 1999) for the proposition that whether exclusion of evidence left the jury with sufficient information to assess the credibility of the witness is one consideration in determining whether a defendant's confrontation rights have been violated. BOR at 28. The failure to allow Tovar to cross examine Palmer about the Ramirez rape in light of her testimony left the jury with insufficient information to assess her credibility.

about her previous allegation against Ramirez. The State fails to meet its burden to prove the error was harmless.

2. COUNSEL'S FAILURE TO OBJECT TO TESTIMONY TOVAR WAS PREVIOUSLY IN PRISON DENIED TOVAR HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In response to Tovar's argument that trial counsel was ineffective for failing to object to evidence Tovar was previously in prison, the State claims counsel "could have" decided not to object because he did not want to highlight the evidence. BOR at 33. That claim is based on nothing more than speculation. The same can be said in every instance where counsel fails to object to improper damaging evidence. The State, however, does not cite to any authority that holds the failure to object to improper testimony about a defendant's prior criminal history to avoid highlighting the evidence is a legitimate trial tactic. Instead of highlighting the testimony, the court would have admonished the jury to disregard the testimony if a proper objection had been made. See, State v. Robinson, 146 Wn.App. 471, 483, 191 P.3d 906 (2008) (juries are presumed to follow admonishments and curative instructions). Moreover, the State does not point to any other legitimate reason why counsel would have wanted the jury to hear the evidence.

The State also contends Tovar was not prejudiced by the improper evidence because the jury did not learn why Tovar was previously in prison and the testimony was only a “passing remark.” BOR at 34. Its contention is not persuasive.

Where the jury learns a defendant was previously been convicted of a crime the probability of conviction increases dramatically. State v. Hardy, 133 Wn.2d at 701, 710-711, 946 P.2d 1175 (1997) (citation omitted). Even though the jury was not told why Tovar had been in prison, it did not mitigate the improper evidence. The testimony was part of Palmer’s response to the prosecuting attorney’s question about what Tovar said to Palmer about contacting police. Because Palmer’s statement was made in the context of her going to police with the rape allegation, the jury likely inferred Tovar’s previous imprisonment was for a similar crime. See, Hardy, 133 Wn.2d at 711 (greater prejudice where crime is similar to the one charged). In addition, referring to Tovar being in prison would have led jurors to believe the prior crime was a serious felony and jurors likely inferred that despite the problems with Palmer’s credibility, given Tovar’s criminal history his character was suspect and he likely committed the crime or deserved to be sent to prison. State v. Newton, 109 Wn.2d 69, 74, 743 P.2d 254 (1987).

Finally, Palmer's statement was more than a mere "passing remark" the jury would have likely paid little attention to. It was the reason she said Tovar did not want her to go to police, which led jurors to infer that Tovar did not want Palmer to go to police because he was innocent but because he was convicted felon and did not want to serve more time in prison.

The State fails to show counsel had a legitimate reason for failing to object to the improper testimony. There is a reasonable probability the improper prison evidence effected the jury's verdict. BOA at 37-38.

3. COUNSEL'S FAILURE TO REQUEST AN INFERIOR DEGREE INSTRUCTION ON PROPER LEGAL GROUNDS DENIED TOVAR HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

a. *The issue is not waived*

Tovar argues his counsel was ineffective for failing to request an inferior degree instruction on third degree rape under the lack of consent prong. BOA at 39-44. The State argues because defense counsel told the court he was not requesting the instruction under that prong the issue is waived. BOR at 37-39 (citing State v. Carter, 4 Wn.App. 103, 113, 480 P.2d 794 (1971)). The Carter court held because counsel failed to take exception to the court's instruction, that failure waived Carter's right to appeal the court's failure to instruct the jury on the definition of intent.

State v. Carter, 4 Wn. App. at 113. Carter did not allege his counsel was ineffective.

Carter lends no support to the State's waiver argument. Tovar claims counsel was ineffective for failing to request the instruction under the correct legal prong. There is no authority for the State's proposition that a defendant waives an ineffective assistance of counsel claim on appeal because of counsel's failure to recognize the proper legal basis for a requested inferior degree instruction. The Washington Supreme Court recently held that counsel's failure to request a lesser included instruction does not waive a claim counsel's failure was ineffective. State v. Grier, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2011 WL 459466 at 8. Indeed, counsel may not effectively waive a client's rights where the record reveals that the client was the victim of inadequate representation. State v. Finch, 137 Wn.2d 792, 807, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). The State's claim the issue of whether counsel was ineffective for failing to request the inferior degree instruction on the proper grounds is waived is without merit.

- b. *The instruction was warranted when the evidence is viewed in the light most favorable to the defense*

The State contends there was no affirmative evidence to support an instruction on the inferior degree offense of third degree rape under a theory the sexual intercourse was nonconsensual but unforced. BOR at 41. It claims the evidence cited by Tovar supporting the inferior degree instruction is taken out of context. BOR at 42. The State's argument, however, is not based on any contextual view of the facts but on a view of the facts in the light most favorable to the State, which is not the test. See, State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150, 1153 (2000) (a defendant is entitled to an instruction on a inferior degree offense if the evidence viewed in the light most favorable to the defense raises an inference that only the inferior degree offense was committed to the exclusion of the charged offense).

The State contends Palmer's testimony that Tovar had a knife in his hand "pretty much the whole time when he was on top of me" and her testimony Tovar tried to pull her legs apart, belie a finding that the facts supported an inferior degree instruction on third degree (nonconsensual) rape. BOR at 42. If the evidence is viewed in the light most favorable to the State, the State's contention might have merit, but viewed in the light most favorable to the defense an inferior degree instruction was warranted.

According to Palmer, Tovar and Palmer talked for hours before the alleged rape. During that time Tovar held a hunting knife but there was no evidence he threatened Palmer with the knife. Instead, according to Palmer, Tovar used the knife to cut himself. 8RP 144-145.<sup>2</sup> Tovar then put the knife on the side table, got into the bed, and started crying about her relationships with other men and how he was not able to please her sexually while at the same time he pulled her legs apart. 8RP 72.

Tovar then stopped what he was doing, got out of the bed, stood up and took his clothes off. While he was taking his clothes off Palmer ignored him. 8RP 73-74, 147-148. Tovar then got back on the bed, ran his hand up her leg and touched her while talking about “fucking” her “like no other guy has ever fucked me.” 8RP 73. Palmer told Tovar to leave her alone and turned her body away from him. 8RP 74. Tovar got on top of her, however, and forced himself inside her. 8RP 75. Palmer did not tell Tovar “no” and did not try to push him off her. 8RP 146. Tovar did not use any more force than was necessary to achieve penetration.

Under these facts an inferior degree instruction on third degree rape was warranted. The jury could have believed Tovar never threatened Palmer with the knife and although he earlier tried to pull her legs apart.

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<sup>2</sup> The State asserts “Tovar claims that ‘at some point’ after he cut himself, ‘he laid the knife on the night stand.’” BOR at 42 (citing BOA at 41). The State’s assertion is misleading. Tovar did not make that claim; it was Palmer who testified to that. BOA at 41.

he abandoned any attempt at forced intercourse (assuming that was his intent when he pulled legs apart) when he stopped and left the bed. On the other hand, the jury could have believed when Tovar later got back into the bed and started to touch Palmer, her telling him to leave her alone and turning away from him before he penetrated her showed her lack of consent but that Tovar used no more force than normally required to achieve penetration.

When viewed in the light most favorable to the defense, the evidence supports an inferior degree instruction on third degree rape under the nonconsensual intercourse alternative of committing the offense. Counsel's failure to request the instruction under that theory was ineffective as there is no legitimate trial tactic that explains his failure given that he requested the same instruction under the substantial harm to property alternative. Because the jury was not instructed on the inferior degree offense, even though Tovar was entitled to such an instruction, Tovar was prejudiced by counsel's deficient performance and his conviction should be reverse. BOA at 44-45.

4. TOVAR HAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT COUNSEL DISREGARDED HIS WISH TO TESTIFY

In response to Tovar's argument that his counsel disregarded his desire to testify, the State emphasizes the trial court's finding that counsel's advice to Tovar that he not testify was a legitimate trial strategy. BOR at 49. Whether the advice was legitimate is debatable, given Tovar and Palmer were the only two who knew what happened that night and Palmer's credibility was suspect. But, regardless of whether the advice was legitimate, the decision to testify was for Tovar to make and not counsel. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

The State recognizes the trial court's ruling hinged on two factors. The first, its finding counsel's testimony that Tovar decided not testify was more accurate than Tovar's testimony because of Tovar's emotional instability. The second, that counsel's advice was a legitimate trial strategy. BOR at 47, 49.

Whether counsel's advice was a legitimate trial strategy begs the question. The question is whether Tovar wanted to testify and counsel prevented him from doing so. The undisputed facts show that from the beginning Tovar was adamant that he wanted to testify and that despite counsel's testimony that after their first meeting Tovar was "agitated" but decided not to testify, Tovar was so upset after the meeting he

immediately sent a message to counsel through Latham informing counsel he insisted on testifying. 13 RP 58, 74-75, 82. It was also undisputed that Tovar gave Todd a list of questions he wanted Todd to ask him during his direct testimony when Todd met with Tovar the second time that evening or even the following morning. 13 RP 63-64.

In addition to the undisputed facts, both defense counsel were uncertain about how Todd communicated to Tovar whether he agreed with counsel's decision to rest the defense case without calling him to testify. If Tovar told Todd at their second meeting he agreed he would not testify there would have been no reason for Todd to try to ask Tovar if he wanted to testify before resting the defense case. And, even if Tovar nodded in response to Todd's "good to go" comment, that would only indicate Tovar agreed not to testify if the only reasonable interpretation of the comment is "do you agree you do not want to testify" which is not the only reasonable interpretation. BOA at 47.<sup>3</sup>

As Tovar argues in his opening brief, the court's decision finding Tovar's account less accurate because he is emotionally unstable is unsupported because there is nothing that shows Tovar was emotionally unstable at the time of trial or during his testimony at the new trial motion

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<sup>3</sup> The State asserts Tovar told Todd "we were good." BOR at 46. Todd and Dacanay never testified Tovar told Todd "we were good." Todd testified he asked Tovar if he was "good to go" and Dacanay testified Todd "kind of Looked at Tovar and asked something like whether they were good and Tovar nodded. BOA at 47 (citing 13RP 65, 76).

hearing. And, even if the record did show Tovar was emotionally unstable, there is no nexus between that and his ability to give an accurate account of his discussions with counsel. BOA at 48. The State does provide any reasoned response to Tovar's argument. It merely concludes the court's emotionally unstable finding supports its decision. BOR at 47.

On this record, Tovar showed by a preponderance of the evidence that he wanted to testify but counsel failed put him on the stand before resting the defense case. Counsel's failure denied Tovar his right to effective assistance of counsel and his right to testify.

The State argues Tovar was not prejudiced because the prior acts evidence would have been admitted if he testified. BOR at 49-50. In its oral ruling the court stated it was extremely likely that evidence would have been admitted. 14RP 10. It was not a certainty, however, and it depended on whether Tovar's testimony opened the door. Moreover, even if that evidence was admitted, it is not possible to determine what effect it would have had on the jury. Depending on factors like Tovar's demeanor and the consistency of his testimony, the jury could have found Tovar's prior acts did not make it less likely he was telling truth about the incident with Palmer. The State fails to show Tovar was not prejudiced by counsel's failure to acquiesce to Tovar's wish to testify.

B. CONCLUSION

For the above reasons and the reasons in the Brief of Appellant,  
this Court should reverse Tovar's conviction.

DATED this 17 day of March, 2011.

Respectfully submitted,

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ERIC J. NIELSEN,

WSBA 12773

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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65324-5-1
	)	
MICHAEL TOVAR,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17<sup>TH</sup> DAY OF MARCH 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL TOVAR  
DOC NO. 874007  
MONROE CORRECTIONAL COMPLEX  
P.O. BOX 888  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF MARCH 2011.

x *Patrick Mayovsky*

2011 MAR 17 PM 4:17  
SUPERIOR COURT  
CLERK OF COURT