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NO. 34397-5-II  
Skamania County No. 05-1-00107-9

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**MARK ANTHONY TAYLOR**

**Appellant.**

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**BRIEF OF APPELLANT**

---

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PM 10-30 06

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**A. ASSIGNMENTS OF ERROR**

**I. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO AMEND THE INFORMATION.**

**II. MR. TAYLOR WAS DENIED A FAIR TRIAL BY THE CUMULATIVE MISCONDUCT OF THE STATE.**

**III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR ASSAULT IN THE FIRST DEGREE.**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I. MR. TAYLOR WAS DENIED A FAIR TRIAL WHEN THE COURT GRANTED THE STATE'S MOTION TO AMEND THE INFORMATION TO ADD THE CHARGE OF ASSAULT IN THE FIRST DEGREE.**

**II. MR. TAYLOR WAS DENIED A FAIR TRIAL BY NUMEROUS INSTANCES OF MISCONDUCT BY THE STATE, INCLUDING THE ELICITATION OF TESTIMONY FROM DEPUTY ROBISON ON MR. TAYLOR'S CREDIBILITY AND ARGUMENT OF THE PROSECUTOR THAT IN ORDER TO BELIEVE MR. TAYLOR, THE JURY WOULD HAVE TO DISBELIEVE EVERY STATE WITNESS.**

**III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR ASSAULT IN THE FIRST DEGREE.**

**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

On October 20<sup>th</sup>, 2005 the Skamania County Prosecuting Attorney charged Appellant, Mark Anthony Taylor, was charged by Amended Information with Count I: Attempted Premeditated Murder in the First

Degree against Lester McDonald. CP 3-4. On the original trial date of December 12<sup>th</sup>, 2005, the State moved to continue the trial outside of speedy trial (Mr. Taylor never waived his right to a speedy trial) due to the unavailability of a necessary witness for the State. RP Vol. I, 40. The court granted the continuance over Mr. Taylor's objection and re-set the trial for January 9<sup>th</sup>, 2006. Id. at 45. The parties and the court agreed that the original expiration of Mr. Taylor's time-for-trial period was December 26<sup>th</sup>, 2005. The jury trial commenced on January 9<sup>th</sup>, 2006. RP Vol. II. On the morning of trial, the State moved to amend the information to add an alternative charge of Assault in the First Degree. RP Vol. II, 58. The court granted the motion to amend the information over Mr. Taylor's objection. Id. at 69. The Second Amended Information charged Count I: Attempted Premeditated Murder in the First Degree and Count II: Assault in the First Degree. CP 23. Count II alleged that Mr. Taylor, with intent to inflict great bodily harm, assaulted Lester McDonald with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm and/or did inflict great bodily harm, contrary to RCW 9A.36.011 (a) and/or (c). CP 23. The jury returned a verdict of not guilty on the charge of Attempted Murder in the First Degree, and a verdict of guilty on the charge of Assault in the First Degree. CP 130, 133. The jury also returned a special verdict that Mr. Taylor was armed with a deadly

weapon during the commission of the crime. CP 134. Mr. Taylor was given a standard range sentence. CP 141. This timely appeal followed. CP 150.

## **2. FACTUAL HISTORY**

On October 18<sup>th</sup>, 2005 Appellant Mark Taylor and Lester McDonald had a physical altercation in a park in Stevenson, Washington. Lester McDonald had been released from prison the day prior to the altercation. RP Vol. II, 80. Prior to going to prison, Lester had been involved in a relationship with Cynthia Moore, who was now dating Mark Taylor. RP Vol. II, 80-81. On the evening of October 18<sup>th</sup>, Lester became aware that Cynthia wanted to meet with him at his house in Stevenson. *Id.* at 81. After work he went home and found Cynthia there but asleep. *Id.* at 82. This made Lester angry and he left the house and headed for a park near his house. *Id.* at 82-83.

According to Lester, when he arrived at the park he sat down on a bench to collect his thoughts and heard a noise off to his right. *Id.* at 83. When he turned to look, he saw someone walking toward him who he couldn't identify. *Id.* at 83-84. He asked who was there, but didn't receive a response. *Id.* at 84. The person came closer and Lester stood up, standing nearly face to face with the person. *Id.* at 84. However, he still

couldn't see who it was. Id. It wasn't until the person said something that Lester recognized his voice as Mark Taylor's. Id. at 92.

Lester claimed that when he asked who was there, Mr. Taylor said "You know who I am. I'm gonna stab you; I'm gonna kill you." Id. at 85. Lester started to pull his arm back with the intention of punching Mr. Taylor, but claimed he then decided to turn around and leave. Id. at 85. He maintained that Mr. Taylor then grabbed his coat, causing him to stumble, and then he got up and ran away. Id. at 85. As Lester was turning to run away, he felt a pinching sensation in his back and believed Mr. Taylor had pinched him when he grabbed his jacket. Id. at 86. Lester then ran from the park and headed back to his house. Id. at 86, 94. When he arrived at his house he went to his roommate Roy's room to tell him about the fight and realized he was still feeling a sensation in his back. Id. at 94. He reached behind his back and realized he was bleeding. Id. Believing he had been stabbed he called for an ambulance. Id. He did not, however, take the ambulance to the hospital because he didn't want to pay for the ambulance ride. Id. at 95. Lester's roommate, Roy, took him to the hospital. Id. at 96. At no time during the altercation did Lester see a knife in Mr. Taylor's hands. Id. Lester did not fear for his life as a result of this wound. Id. at 101.

Mr. Taylor was originally charged with Assault in the First Degree. CP 1. The charge was amended ten days later to Attempted Murder in the First Degree. CP 3. On the morning of trial, the State moved to amend the information to include one count of Attempted Murder in the First Degree and one count of Assault in the First Degree. CP 22-23. Both charges alleged that the defendant was armed with a deadly weapon. CP 22-23. Defense counsel objected to the late amendment of the charge. RP Vol. II, 60. His objection was based, among other reasons, on the fact that he had prepared a defense based on the State's inability to prove premeditation. RP Vol. II, 68-70. The State essentially agreed that it would likely be unable to prove premeditation, but believed, until just days before trial, that they would be entitled to an instruction on Assault in the First Degree as a lesser included offense. RP Vol. II, 66. The State, having put itself in an "all or nothing situation," argued that it would be unfair to force it to proceed solely on the charge of Attempted Murder in the First Degree. RP Vol. II, 66. The court, in granting the motion to amend, ruled that Attempted Murder in the First Degree "requires more burden on the State than assault," so there could be no prejudice to Mr. Taylor because defense counsel "should have prepared" his case for "the one that requires a heavier burden of proof, and that is the attempted murder." RP Vol. II, 70.

At trial, Deputy Robison of the Skamania County Sheriff's Department testified that he was unable to find the weapon which caused the injury to Lester. RP Vol. II, 144-147. Deputy Robison testified on re-direct examination that Mr. Taylor told him, during the course of his interrogation on the evening of the altercation, that his shirt had been ripped. RP Vol. II, 156. Deputy Robison then opined "I didn't see anything to indicate that that part of his story was correct." Id. He also testified that he examined the jacket Mr. Taylor had been wearing during the altercation and that it was very wet on the inside. Id. He testified Mr. Taylor told him that his cat's water dish had tipped over and spilled on his jacket. Id. at 157. The prosecutor then asked "Did that make sense to you based on the level of wetness inside the jacket?" Id. Deputy Robison said "No, it would have had to have been a half-gallon size cat dish to do that." Id.

Forrest Hofer, a physician's assistant at Skyline Hospital, testified that he treated Lester in the emergency room after the altercation. Id. at 160. He testified that Lester's stab wound did not penetrate the body cavity, meaning that Lester's ribs had stopped the object before entering the body cavity. Id. at 163. He testified it was consistent with a knife wound. Id. at 164. The wound was at least a few centimeters deep. Id. at 165. The primary medical concern, according to Mr. Hofer, is whether a

wound such as this penetrates the body cavity. Id. at 165. The prosecutor asked whether this wound could have been fatal if it had been inflicted in a vulnerable part of the body, to which Mr. Hofer reiterated that had such a wound entered the body cavity, which this would didn't, it could have been life-threatening. Id. at 166. Mr. Hofer "couldn't rule out" that this wound was cause by a loose, sharp piece of glass. Id. at 167.

Mr. Taylor testified that he was living in a trailer park at Skamania Cove. Id. at 203. On the evening of October 18<sup>th</sup>, 2005, he went over to an apartment belonging to his friends Rick and Shannon to take a shower because the bathrooms at his trailer park were not working. Id. at 203-04. He couldn't find a ride home from Rick and Shannon's so he had to walk home, deciding to go by Roy North's house (Lester's roommate) to see if Cindy Moore was at the house. Id. at 205. He wanted to speak to Cindy about removing her stuff from is trailer so he could sell it and move back to Tacoma. Id. He is not allowed to go into Roy's house because he and Roy do not get along, so he hollered for Cindy from outside the house. Id. at 206. Typically when he would holler for Cindy she would then come down and meet him at the park by Roy's house, so Mr. Taylor proceeded in that direction. Id. at 206-07. When Mr. Taylor was walking across the parking lot he saw someone coming up behind him so he moved to the side of the trail and let the person pass. Id. at 207. The person came

across the foot bridge and sat down at a picnic table. Id. Believing it was Cindy, he approached the table. Id. at 207-08.

Upon arriving at the table he realized it was Lester, not Cindy. Id. at 208. He described the incident as follows:

[H]e went to jump off the picnic table, and I actually pushed him, and he came at me and tried to hit me a couple times and then tried to kick me, so I grabbed him and threw him off the edge there.

The “edge” that Mr. Taylor was referring to was a four or five foot embankment that leads down to the beach. Id. at 209. Mr. Taylor testified that this altercation lasted just a few seconds. Id. Mr. Taylor denied being armed with a knife during the altercation or stabbing Lester. Id.

Deputy Robison was called by the State as a rebuttal witness. Robison testified, in summary, that Mr. Taylor had testified inconsistently with the statement he gave after the altercation. Id. at 247-49. Deputy Robison characterized the case as a “he-said-she-said kind of case,” and said the suspect interview is “pivotal to...understanding what happened.” Id. at 248.

Because I have to go back afterwards and reconstruct both of those statements, tie them with any physical evidence from the scene add anything else that I can collect, to make a determination as to who is telling the *correct story*, because the two stories are different. So that's real important that I go back and get every little detail all the way through. And just like dealing with kids...you have to have something, you know, to go off of. *And the truth is the truth. Those stories don't change a whole lot.* (Emphasis added).

Id. at 248-49. At that point the prosecutor questioned Deputy Robison about whether he had made a videotape of his interview of Mr. Taylor, to which he replied he had. Id. at 249. The prosecutor then Deputy Robison if he believed it would be helpful for the jury to see the videotape so they could see “Mr. Taylor’s testimony on that day versus on this day,” to which Robison replied he believed it would. Id. at 250. As the prosecutor attempted to lay the foundation for the videotape, he asked Robison if the taped accurately represented the contents of the interview, and Robison replied “Yes. That’s the nice thing about a video recording; *it doesn’t change at all.*” Id. Defense counsel did not object at any time during this exchange. Id. (Ultimately, the court did not allow the State to present the video tape for reasons not at issue here).

The prosecutor continued this line of questioning, asking: “Again, Sergeant Robison, just with respect to several of the things that Mr. Taylor testified to yesterday and today, was his rendition today of...this altercation with Mr. McDonald, was that different from what he told you back, again, when you interviewed him...two and a half hours after this event? Id. at 257. Deputy Robison replied “Yes, both his testimony today and yesterday were decidedly different than both of the interviews that I did with him immediately following the assault.” Id. Later, the prosecutor asked Deputy Robison more questions about what he believed

to be the differences between Mr. Taylor's post-arrest interview and his trial testimony, and Deputy Robison said "That's all brand new information." Id. at 261.

During closing argument, the prosecutor made the following argument:

So, the upshot of all this, is that in order for you to believe Mr. Taylor's testimony, you don't just have to not believe Lester McDonald, but you have to not believe Lester McDonald, you have to not believe Sergeant Robison, you have to not believe Deputy Helton, you have to not believe Roy North, and you have to not believe Lynea Moat. You have to not believe Forrest Hofer. You have to not believe anyone else who testified in order to believe Mr. Taylor. Id. at 343.

Defense counsel did not object to this argument. Id. Later, the prosecutor continued this line of argument: "So, in order, again, to believe Mr. Taylor's testimony, you have to disbelieve everybody else." Id. at 344-45. Defense counsel again did not object. Id.

The jury convicted Mr. Taylor of Assault in the First Degree while armed with a deadly weapon. CP 133, 134.

#### **D. ARGUMENT**

##### **I. MR. TAYLOR WAS DENIED A FAIR TRIAL WHEN THE COURT GRANTED THE STATE'S MOTION TO AMEND THE INFORMATION TO ADD THE CHARGE OF ASSAULT IN THE FIRST DEGREE.**

Mr. Taylor was denied a fair trial when the trial court allowed the State to amend the Information on the morning of trial to add the charge of

Assault in the First Degree. Although the trial court may generally permit the State to amend the information any time before a verdict, the amendment is not allowed where it will prejudice the substantial rights of the defendant. CrR 2.1 (d). An inexcusable delay by the State in amending an information to add new charges prejudices the defense where the late amendment forces the defendant to choose between the right to a speedy trial and the right to effective assistance of counsel. *State v. Michielli*, 132 Wn.2d 229, 244-45, 937 P.2d 587 (1997); *State v. Earl*, 97 Wn.App. 408, 410-11, 984 P.2d 427 (1999).

The State's delay in amending the information is inexcusable where the State fails to use due diligence in bringing the additional charges. *Earl* at 411. In *Earl*, the State moved to amend the information on the day of trial to add a second charge. Because the new charge was based on the same information the State had when it filed the original charge, however, there was no excuse for the State's delay in amending the information. *Earl* at 411. Similarly, in *Michielli*, the defendant was originally charged with one count of theft but three days before trial, the State sought to add four additional charges. The State's delay in amending the information constituted governmental misconduct because the additional charges were based on information contained in the original affidavit of probable cause. *Michielli* at 243-45.

Here, as in *Earl* and *Michielli*, the amended information was based on information which the State possessed from the inception of the case. The reason for the amendment in this case can be summarized as follows: The State failed to keep abreast of the law. The State believed that Assault in the First Degree was a lesser included offense of Attempted Murder in the First Degree, in spite of Supreme Court precedent law decided in 1993 which clearly held it is not. See *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993). In *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987), the Supreme Court recognized the State's need to amend the information where new evidence is developed:

During the investigatory period between the arrest of a criminal defendant and the trial, the State frequently discovers new data that makes it necessary to alter some aspect of the information. It is at this time amendments to the original information are liberally allowed, and the defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.

Here, in stark contrast to *Pelkey*, no new information developed which would have justified the late amendment of the information. The only development was the State's realization that it had been operating under an assumption that hadn't reflected the true state of the law in at least twelve years.

In objecting to the motion to amend, defense counsel argued that he had been prepared to defend Mr. Taylor on the point of law on which

the State possessed the weakest evidence: Premeditation. The State confirmed that the defense had good grounds to be optimistic about its poor chance of proving premeditation because it all but begged the court not to force it to proceed on an “all or nothing” strategy of proving the crime that it chose to charge. The court, in ruling that the State was entitled to amend the information, applied an incorrect analysis. Rather than addressing the obvious prejudice to Mr. Taylor in forcing his attorney to defend an additional charge, which is one of the most serious in the entire Revised Code of Washington and has totally different elements than the single charge he had been facing for the three previous months, the court instead focused on its belief that defense counsel *should* have prepared a defense to the uncharged assault.

The Court ruled that Attempted Murder in the First Degree had a heavier burden of proof than Assault in the First Degree and that because defense counsel should have been prepared to defend against the charge with the heavier burden of proof, then it was necessarily prepared to defend against the charge with the lower burden of proof. And if the defense wasn't prepared, it should have been. The problem with this analysis is that first, Attempted Murder in the First Degree does not impose a higher burden of proof than Assault in the First Degree. The burden of proof is the same for both crimes: Proof beyond a reasonable

doubt. Second, it ignores the fact that the two crimes have completely different elements.<sup>1</sup> Attempted Murder in the First Degree carries the potential for a longer term of incarceration than Assault in the First Degree, and it was on that basis that the court concluded there could be no possible prejudice to Mr. Taylor. This was an abuse of discretion.

Even more troubling, the State had already succeeded in having Mr. Taylor's case continued, over his objection, beyond the expiration of his original time-for-trial period because one of its officers scheduled a vacation during the original trial date. Mr. Taylor never executed a waiver of his right to speedy trial, nor did he request a continuance. Generally, the failure to request a continuance "is persuasive of lack of surprise and prejudice." *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982), citing *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968). However, Supreme Court precedent strongly disfavors forcing a defendant to choose between the right to a speedy trial and the right to prepared counsel where the choice is made necessary by the dilatory conduct of the State.

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<sup>1</sup> RCW 9A.32.030 (1) (a) defines Murder in the First Degree as follows: "A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

RCW 9A.36.011 (1) (a) and (c) define Assault in the First Degree as follows: "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or (c) Assaults another and inflicts great bodily harm.

In *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980), the Supreme Court recognized the importance of a defendant's right to a speedy trial. The Court condemned conduct by the State which forced a defendant to waive this important right where the conduct of the State is inexcusable. Further, the Court held in *Michielli* that CrR 8.3 (b) authorizes the trial court dismiss additional charges where the delay in bringing the additional charge or charges resulted from the State's lack of due diligence and the defendant's right to a fair trial is prejudiced. *Michielli* at 239-40. Applying these principles to Mr. Taylor's case, the State cannot seriously suggest that its failure to keep abreast of a legal principle in place for twelve years was excusable, or that it acted with due diligence in preparing this case. The prejudice to Mr. Taylor is obvious by the verdicts in this case: The jury agreed with the State that its proof of premeditation was deficient and convicted Mr. Taylor of Assault in the First Degree. In the absence of the untimely amendment of the Information, which arose from the State's inexcusable negligence, Mr. Taylor would have been acquitted. The State's untimely amendment of the information unfairly prejudiced Mr. Taylor's right to a fair trial, and the court abused its discretion in granting the State's motion to amend.

**II. MR. TAYLOR WAS DENIED A FAIR TRIAL BY  
NUMEROUS INSTANCES OF MISCONDUCT BY THE  
STATE, INCLUDING THE ELICITATION OF**

**TESTIMONY FROM DEPUTY ROBISON ON MR. TAYLOR'S CREDIBILITY AND ARGUMENT OF THE PROSECUTOR THAT IN ORDER TO BELIEVE MR. TAYLOR, THE JURY WOULD HAVE TO DISBELIEVE EVERY STATE WITNESS.**

**1. TESTIMONY ON MR. TAYLOR'S CREDIBILITY**

In *State v. Kirkman*, the Court of Appeals reiterated the well-settled prohibition on witnesses, particularly police officers, expressing an opinion about the veracity of another witness. The court stated: "This is significant because a police officer's testimony may particularly affect a jury because of its 'special aura of reliability.'" *State v. Kirkman*, 107 P.3d at 137. Such error is of constitutional magnitude and can be raised for the first time on appeal. *State v. Kirkman*, 107 P.3d at 137. Allowing one witness to testify about the truthfulness of another witness invades the fact-finding process of the jury and violates a defendant's right to a jury trial. *State v. Kirkman*, 107 P.3d at 137, citing *State v. Dolan*, 118 Wn.App. 323, 73 P.3d 1011 (2003).

In *Kirkman*, the Court of Appeals reversed the defendant's conviction for first degree child rape where a doctor and a police officer offered improper opinion testimony on the credibility of the child victim. *State v. Kirkman*, 107 P.3d 133. The prosecutor in that case asked the doctor: "Based upon the physical examination, can you tell us whether you have an opinion within a reasonable degree of medical certainty of

whether the physical examination was consistent with the girl's explanation of what occurred?" *State v. Kirkman*, 107 P.3d at 135. The doctor replied that he found nothing in the victim's physical exam that would either confirm or negate the victim's allegation. *State v. Kirkman*, 107 P.3d at 135. The doctor further testified that the victim "...gave a clear and consistent history of sexual touching with appropriate affect ('sad when one would expect her to be sad, and reluctant to talk about things that were embarrassing...and the vocabulary seemed to be appropriate for a young lady of her age') and her history was clear and consistent with plenty of detail. *State v. Kirkman*, 107 P.3d at 136. The court, in reversing Kirkman's conviction, said "The physician was clearly commenting on A.D.'s credibility." *State v. Kirkman*, 107 P.3d at 136.

A witness may not render an opinion on an ultimate issue of fact to be decided by the jury. *State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999). "Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference." *State v. Farr-Lenzini*, 93 Wn.App at 459-60. A prosecutor commits misconduct when he elicits testimony from a witness which calls for an opinion on a defendant's guilt. *State v. Jones*, 117 Wn.App 89, 68 P.3d 1153 (2003). When the defendant fails to object to the testimony or request a curative

instruction, as happened here, he must demonstrate that the misconduct was so flagrant and ill-intentioned that a curative instruction could not have cured the resulting prejudice. *State v. Jones*, 117 Wn.App at 90-91, citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Here, the first instance of Deputy Robison commenting on Mr. Taylor's veracity occurred during direct examination. First, in regard to Mr. Taylor's statement during his interrogation that his shirt had been ripped, Deputy Robison stated "I didn't see anything to indicate that that part of his *story was correct.*" RP Vol. II, 156 (Emphasis added). He also testified, with regard to Mr. Taylor's jacket being wet, that Mr. Taylor's version of the water spilling from the cat dish didn't make sense because it would have to have been a half a gallon of water to make the jacket that wet. RP Vol. II, 157.

The rebuttal testimony of Deputy Robison consisted almost entirely of the prosecutor eliciting testimony from him in which he commented on Mr. Taylor's veracity. Instead of confining Deputy Robison's testimony to factual statements about what Mr. Taylor said during his post-arrest interrogation, and leaving the question of whether those statements conflicted with Mr. Taylor's trial testimony to the jury, the prosecutor instead repeatedly asked Deputy Robison to comment on

Mr. Taylor's credibility by stating his opinion that Mr. Taylor's pre-trial statements were inconsistent with his trial testimony.

Specifically, Deputy Robison testified that Mr. Taylor had testified inconsistently with the statements he made during the post-arrest interrogation, and offered that is his job (not the jury's) to determine who was telling the "correct story" and "the truth is the truth. *Those stories don't change a whole lot.*" RP Vol. III, 248-49. The clear message of this testimony was that Deputy Robison had already determined that Mr. Taylor's trial testimony was inconsistent with his prior statement and that this meant Mr. Taylor was lying because the truth doesn't change. This is flagrantly improper.

Next, the prosecutor asked Deputy Robison about a videotape he had made of the post-arrest interrogation, and testified that it accurately reflected the contents of the interview. Specifically, he said "That's the nice thing about a video recording; *it doesn't change at all.*" Id. This was an unsolicited and gratuitous comment by a police officer who should know better, and was offered for the sole purpose of calling Mr. Taylor a liar in front of the jury.

The prosecutor persisted with this line of questioning (which should have been objected to by defense counsel for a number of reasons, not the least of which this testimony was irrelevant and largely

cumulative), asking Deputy Robison directly whether his “rendition” of the events in his trial testimony differed from his pre-trial statements, to which Robison replied that the two accounts were “decidedly different” and that Mr. Taylor’s trial testimony was “all brand new information.” RP Vol. III, 257-261.

There was no point to Deputy Robison’s rebuttal testimony but for the prosecutor to have Robison give his opinion on ultimate issues to be decided by the jury. Whether Mr. Taylor’s statements were inconsistent, whether the truth never changes, and whether Mr. Taylor’s trial testimony consisted of brand new information were questions to be decided by the jury. The prosecutor was free to argue, in his closing, that Mr. Taylor gave inconsistent statements. It was not necessary to have Deputy Robison re-take the witness stand to make sure the jury knew that he, a trained law enforcement officer, didn’t believe a single word that Mr. Taylor said. Credibility determinations are to be made solely by the jury. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is difficult to imagine why, if the prosecutor and Deputy Robison felt that the case against Mr. Taylor was so strong that they had to resort to flagrantly improper tactics such as having Deputy Robison testify, over and over again, that Mr. Taylor was, in essence, a liar.

It is settled law in Washington that where a prosecutor asks a witness during cross examination to comment on the veracity of another witness's testimony, the prosecutor commits reversible misconduct. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994), *State v. Jones*, 117 Wn.App. 89, 68 P.3d 1153 (2003). This is so even where the improper questions and answers are not objected to by the defense. *Jones*, 117 Wn.App. 89, *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996), *Suarez-Bravo*, 72 Wn.App. at 367.

## **2. CLOSING ARGUMENT OF THE PROSECUTOR**

During closing argument, the prosecutor told the jury that in order to believe Mr. Taylor, they had to “not believe” (i.e. conclude they were lying) Deputy Robison, Deputy Helton, physician's assistant Forrest Hofer, and every other witness who testified on behalf of the State. A long line of cases holds that it is misconduct for the prosecutor to deliberately pit the veracity of police officers against the veracity of the accused. *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209 (1991); *State v. Castaneda-Perez*, 61 Wn.App. 354, 810 P.2d 74 (1991); *State v. Wright*, 76 Wn.App. 811, 888 P.2d 1214 (1995); *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996); *State v. Stith*, 71 Wn.App. 14, 856 P.2d 415 (1993). As the Court observed in *Castaneda-Perez*, in the context of a prosecutor attempting to get a defendant to comment on the veracity of a

police officer during cross examination, “the prejudicial aspect of this line of questioning...is that it equates an acquittal with false testimony on the part of the police officers. *Castaneda-Perez* at 364.

In *State v. Barrow*, Division I held that the prosecutor committed reversible misconduct where he argued that in order to acquit the defendant, they must disbelieve the officers’ testimony. *Barrow* at 875-76. In *State v. Wright*, Division I attempted to distinguish its holding in *Barrow* by holding that where a prosecutor simply says in order to *believe* (as opposed to *acquit*) the defendant, the jury must believe the State’s witnesses were *mistaken* (as opposed to *lying*), a prosecutor has not necessarily committed reversible misconduct. *Wright* at 824.

Here, the hair-splitting of the *Wright* Court is not terribly helpful in that the prosecutor in this case did not use the word “lie,” or the word “mistaken,” but instead said that in order to “believe” Mr. Taylor, the jury would have to “disbelieve” all of the State’s witnesses. With all due respect to the *Wright* Court, there simply is no meaningful difference between telling a jury that in order to “believe” the defendant they must disbelieve the State’s witnesses and telling a jury that in order to “acquit” the defendant they must disbelieve the State’s witnesses. The import of the prosecutor’s argument is the same. Further, the prosecutor here did not use the word “mistaken” with regard to the State’s witnesses, but

instead said "disbelieve." Mr. Taylor submits that telling a jury that in order to believe the defendant they must "disbelieve" the State's witnesses is no different than telling the jury that in order to believe the defendant they must conclude the State's witnesses are "lying."

In Mr. Taylor's case, the jury was not only told by the prosecutor that in order for Mr. Taylor to be telling the truth, the two officers must be lying, but that *all* of the State's witnesses must be lying, including physician's assistant Forrest Hofer. This was flagrant, intentional, and incurable misconduct. When combined with the improper and repeated opinion testimony offered by Deputy Robison on Mr. Taylor's veracity, it is clear that Mr. Taylor was denied his right to a fair trial under both the United States Constitution and the Washington State Constitution. That Mr. Taylor was prejudiced evidenced by Deputy Robison's characterization of this case as a "he-said-she-said" type of case. Both Robison and the prosecutor characterized this case as a battle between the credibility of two witnesses, Mr. McDonald and Mr. Taylor. In exercising his right to a jury trial, Mr. Taylor was entitled to have the jury consider his side of the story without having Deputy Robison and the prosecutor characterize him as a liar. Mr. Taylor was denied a fair trial by the flagrant and repeated misconduct of the State and he is entitled to a new trial.

### **III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR ASSAULT IN THE FIRST DEGREE.**

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). This basic constitutional safeguard applies to juveniles as well as adults. *Winship*, 397 U.S. at 364. On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *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. Thereoff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Assault in the First Degree requires proof that the assailant assaulted another with the intent to inflict great bodily harm, and that the

assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death. RCW 9A.36.011 (1) (a). The mens rea of Assault in the First Degree is the intent to inflict great bodily harm. *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994). “Great bodily harm” means “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110 (4) (c).

Under RCW 9A.08.010 (1) (a), a person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. Although specific intent can be inferred as a logical probability from all the facts and circumstances, it can never be *presumed* from a defendant’s actions. *Wilson* at 217. Evidence of intent “is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *State v. Ferreira*, 69 Wn.App. 465, 468, 850 P.2d 541 (1993); quoting *State v. Woo Won Choi*, 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990).

In order to sustain Mr. Taylor’s conviction for Assault in the First Degree, the evidence must show that Mr. Taylor acted with the specific

intent to cause great bodily harm to Lester McDonald. That is, he must have actually *intended* to cause “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110 (4) (c). This intent cannot be presumed simply from his actions. *Wilson*, supra. Further, it is not sufficient to establish simply that he *knew* he would cause great bodily harm or that he was *recklessly indifferent* to the possibility of causing great bodily harm. Rather, the State’s burden was to establish beyond a reasonable doubt that Mr. Taylor’s goal in assaulting Lester McDonald was to cause great bodily harm. RCW 9A.36.011.

The evidence in the record is insufficient to establish that Mr. Taylor formed a specific intent to cause great bodily harm. On the contrary, the evidence suggests that Mr. Taylor was, at most, indifferent to the level of harm caused to Lester McDonald. The injury in this case was not serious and most definitely not life threatening. Had Mr. Taylor intended to cause great bodily harm he could have thrust a knife into Mr. McDonald’s abdomen as he approached the picnic table. Had Mr. Taylor intended to cause great bodily harm to Mr. McDonald he could have done any number of things, while armed with a knife, to accomplish this goal. He certainly would not have engaged Mr. McDonald in an un-productive

shoving match first, only to thrust the knife into Mr. McDonald as he twisted and flailed causing a comparatively minor stab wound. The method of infliction and seriousness of the injury in this case strongly suggest that Mr. Taylor acted out of anger and merely with indifference to the harm caused to Mr. McDonald, not with the *specific intent* to cause great bodily harm.

This is similar to the situation in *Ferreira*, supra, where the defendant and his accomplices had committed a drive-by shooting. They were evidently seeking a juvenile named Justin Cunningham, who was in the area at the time of the shooting. They fired into an occupied dwelling, hitting a six year-old girl. *Ferreira* at 467. The trial court found “it [was] likely apparent that the [target] house was occupied.” *Ferreira* at 469. The Court of Appeals, however, held that the evidence, when viewed in the light most favorable to the State, was “insufficient to establish the shooters’ intent to inflict great bodily harm.” *Ferreira* at 469. This was so even though the defendants shot at least 13 bullets into the home. *Ferreira* at 467. The Court did find that they intended to create in the occupants apprehension or fear, and therefore were guilty of second degree assault. *Ferreira* at 469-70. Likewise, in Mr. Taylor’s case, the evidence, when taken in the light most favorable to the State, demonstrates that the evidence was insufficient for any reasonable trier of fact to find

that he acted with the specific intent to cause great bodily harm, and at most demonstrates that he is guilty of Assault in the Second Degree.

**E. CONCLUSION**

Mr. Taylor's conviction should be reversed and dismissed due to insufficient evidence. Alternatively, Mr. Taylor is entitled to a new trial because he was denied a fair trial by the State's tardy amendment of the information and the State's cumulative misconduct.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2006.

  
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ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Taylor

## **APPENDIX**

### **1. § 9A.08.010. General requirements of culpability**

#### (1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(3) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

### **2. § 9A.04.110. Definitions**

In this title unless a different meaning plainly is required:

(1) "Acted" includes, where relevant, omitted to act;

- (2) "Actor" includes, where relevant, a person failing to act;
- (3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;
- (4) (a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
- (b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;
- (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;
- (5) "Building", in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;
- (6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;
- (7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;
- (8) "Government" includes any branch, subdivision, or agency of the government of this state and any county, city, district, or other local governmental unit;
- (9) "Governmental function" includes any activity which a public servant is legally authorized or permitted to undertake on behalf of a government;
- (10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";
- (11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;
- (12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty;
- (13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of

government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

(14) "Omission" means a failure to act;

(15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

(16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

(18) "Place of work" includes but is not limited to all the lands and other real property of a farm or ranch in the case of an actor who owns, operates, or is employed to work on such a farm or ranch;

(19) "Prison" means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest, including but not limited to any state correctional institution or any county or city jail;

(20) "Prisoner" includes any person held in custody under process of law, or under lawful arrest;

(21) "Projectile stun gun" means an electronic device that projects wired probes attached to the device that emit an electrical charge and that is designed and primarily employed to incapacitate a person or animal;

(22) "Property" means anything of value, whether tangible or intangible, real or personal;

(23) "Public servant" means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function;

(24) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto;

(25) "Statute" means the Constitution or an act of the legislature or initiative or referendum of this state;

(26) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor;  
or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;

(27) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(28) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

### **3. § 9A.32.030. Murder in the first degree**

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants: Except that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the

underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.

**4. § 9A.36.011. Assault in the first degree**

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

**5. § 9A.36.021. Assault in the second degree.**

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2) (a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

## **6. Rule 2.1. The indictment and the information.**

(a) Use of indictment or information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) Nature. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) Contents. The indictment or the information shall contain or have attached to it the following information when filed with the court:

(i) the name, address, date of birth, and sex of the defendant;

(ii) all known personal identification numbers for the defendant, including the Washington driver's operating license (DOL) number, the state criminal identification (SID) number, the state criminal process control number (PCN), the JUVIS control number, and the Washington Department of Corrections (DOC) number.

(b) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(c) Bill of particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(e) Defendant's criminal history. Upon the filing of an indictment or information charging a felony, the prosecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

**7. Rule 8.3. Dismissal.**

(a) On motion of prosecution. The court may, in its discretion, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information or complaint.

(b) On motion of court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

COURT OF APPEALS

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STATE OF WASHINGTON

BY [Signature]

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

|                      |   |                                  |
|----------------------|---|----------------------------------|
| STATE OF WASHINGTON, | ) | Court of Appeals No. 34397-5-II  |
|                      | ) | Skamania County No. 05-1-00107-9 |
| Respondent,          | ) |                                  |
|                      | ) | AFFIDAVIT OF MAILING             |
| vs.                  | ) |                                  |
|                      | ) |                                  |
| MARK ANTHONY TAYLOR, | ) |                                  |
|                      | ) |                                  |
| Appellant.           | ) |                                  |

ANNE M. CRUSER, being sworn on oath, states that on the 30<sup>th</sup> day of October 2006, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Peter S. Banks  
Skamania County Prosecuting Attorney  
P.O. Box 790  
Stevenson, WA 98648

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Mark Taylor

1  
2  
3 DOC# 940188  
4 Clallam Bay Correctional Center  
5 1830 Eagle Crest Way  
6 Clallam Bay, WA 98326-9724

7 and that said envelope contained the following

- 8 (1) BRIEF OF APPELLANT  
9 (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. BANKS)  
10 (3) R.A.P. 10.10 (TO MR. TAYLOR)  
11 (4) AFFIDAVIT OF MAILING

12 Dated this 30<sup>th</sup> day of October 2006,

13   
14 ANNE M. CRUSER, WSBA #27944  
15 Attorney for Appellant

16  
17 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
18 Washington that the foregoing is true and correct.

19 Date and Place:

20 October 30<sup>th</sup>, 2006, Kalama, Washington

21 Signature:

22 Anne M. Cruser  
23  
24  
25