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COURT OF APPEALS

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STATE OF WASHINGTON

BY ks

CLERK

NO. 34894-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBBIE PHILLIP HOELDT,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

pm 11-10-06

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for second degree assault because substantial evidence does not support this charge.

2. Trial counsel's failure to object when a police officer gave an opinion on guilt violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for a crime unsupported by substantial evidence?

2. Does a trial counsel's failure to object when a police officer gives an opinion on guilt violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

During the evening of March 20, 2006, Vancouver Police Officers Bryan Acee and Brent Donaldson were out with a number of other officers attempting to arrest persons with outstanding warrants. RP 22-25. At about 6:30 that evening these officers went to an address on N.E. 52nd Street in Vancouver seeking a person named Lonnie Anderson. RP 25. Just before going to this address the officers received information that the defendant Robbie Hoeldt was next door. *Id.* The defendant had a number of outstanding misdemeanor warrants and so the officers decided to arrest him also. *Id.*

When the officers arrived in the neighborhood, Acee and Donaldson led the group walking up to the defendant's house while other officers walked up to Mr. Anderson's house. RP 29-30. As this happened, Mr. Anderson came out of the defendant's house and immediately confronted the officers concerning the legal basis for their presence. *Id.* Officers Acee and Donaldson then assisted the other officers in taking Mr. Anderson into custody. RP 29-30, 51-56. During the arrest of Mr. Anderson, Officers Acee and Donaldson looked up to see a person they believed to be the defendant standing in the window and closing the blinds. RP 28, 56. Upon seeing this they approached the front door, which was slightly ajar from Mr. Anderson's

exit. RP 31, 59. At the door Officer Acee called out that they were police and that the defendant should come out of the house. RP 57. Officer Acee also knocked loudly on the door thereby causing it to open fully. *Id.*

As the door opened Officer Acee looked into the dark house. RP 32-33. Using both his flashlight as well as light coming through the door, he saw the defendant standing about 25 feet away holding the collar of a large dog that appeared to be a pitbull. *Id.* The dog immediately began growling and barking. RP 36-38. According to Officer Acee, the defendant then let go of the dog, which immediately ran towards the officer and jumped at him. RP 38-40. Although he could not see what was happening, Officer Donaldson could hear the feet and nails of the dog as it ran towards Officer Acee. RP 62-63. Fearing for his life, Officer Acee took one step back, said "Oh S---,"¹ pulled out his handgun, and shot. RP 38-42. The dog was so close by the time the officer fired that it fell dead on top of the officer's feet and lower legs. RP 43, 62-63.

Procedural History

By information filed on March 22, 2006, the Clark County Prosecutor charged the defendant with one count of Second Degree Assault, alleging as

¹The dashes in the quote "Oh S---" do not come from the officer or the appellant's reticence in stating the obvious expiative intended. Rather, the incident occurred so quickly that the "S" was the only part of the word that Officer Acee got out of his mouth before he shot the dog. RP 38-42.

follows:

That he, ROBBIE PHILIP HOELDT, in the County of Clark, State of Washington, on or about March 20, 2006, did knowingly and intentionally assault Vancouver Police Officer Bryan Acee, a human being, with a deadly weapon, to-wit: a pit bull dog; contrary to Revised Code of Washington 9A.36.021(1)(c).

CP 9.

The state later amended the information to add an alternative count of third degree assault. CP 9. At a trial before a jury the state called three witnesses, including Officers Acee and Donaldson. CP 22, 51. This testimony including the following from the state's direct of Officer Acee.

A. Again, the -- the -- the defendant was holding the dog like this and looking about the area. Within a split second, he moved his arm like this and in that manner, sending the dog toward me, and took off into the depths of the house, where it was darker (indicating throughout).

Q. Okay. You've described a motion where it looked like your left hand traveled or forced the dog to travel forward in your direction. Is that accurate?

A. Yes. There was no mistake in my mind that that was a direction, a physical direction for which way the dog was to go while he went the other way (indicating).

RP 38-39.

The defense made no objection to this testimony as either speculation or an opinion of guilt. *Id.* Following the remainder of the state's evidence the defendant took the stand on his own behalf. RP 87. In essence, he denied ever holding the dog or attempting in any way to get the dog to attack Officer

Acee. RP 87-118. After the defendant's testimony the state called brief rebuttal. RP 110-111. The court then instructed the jury without objection or exception from with party and counsel presented closing argument. RP 135-177. During deliberation the jury sent out the following somewhat cryptic question.

Does the defense have to disclose evidence to the prosecution prior to trial.

CP 65.

The record does not reflect whether or not the court informed counsel concerning this question. RP 1-177. However, the court answered the question as follows:

I am not able to answer your question. Please continue your deliberations.

CP 65.

The jury did continue their deliberations under the court's instruction and eventually returned a verdict of guilty on both charges. CP 66-67. The court later sentenced the defendant to 38 months on Count I, which was within the standard range. CP 75. However, the court did not sentence the defendant on Count II, finding that it merged with Count I. CP 75. The defendant then filed timely notice of appeal. CP 86. The state did not cross-appeal from the court's finding of merger. CP 1-87.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR SECOND DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CHARGE.

As a part of the due process rights guaranteed under both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In this case at bar the state charged the defendant by amended information in Count I with second degree assault under the third alternative in RCW 9A.36.021(1)(c). The information alleges:

That he, ROBBIE PHILIP HOELDT, in the County of Clark, State of Washington, on or about March 20, 2006, did knowingly and intentionally assault Vancouver Police Officer Bryan Acee, a human being, with a deadly weapon, to-wit: a pit bull dog; contrary to Revised Code of Washington 9A.36.021(1)(c).

CP 9.

Paragraph one of the cited statute sets out six alternative methods of committing second degree assault, listed as (a) through (f). It states:

(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.

RCW 9A.36.021(1).

In RCW 9A.04.110(6) the legislature set a specific definition for the term “deadly weapon” as it is used in Title 9A, including its use in RCW 9A.36.021(1)(c). This definition states:

(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;

RCW 9A.04.110(6).

The legislature did not provide definitions for the terms “weapon, device, instrument, article, or substance.” As a result, in defining these terms the courts should employ the “common or ordinary meaning” of the words as

may be found in a dictionary. *State v. Sunich*, 76 Wn.App. 202, 206, 884 P.2d 1 (1994). Webster's New Collegiate Dictionary defines these five terms as follows:

- (1) Weapon: "an instrument of offense of defensive combat,"
- (2) Device: "something devised or contrived,"
- (3) Instrument: "a means whereby something is achieved, performed, or furthered,"
- (4) Article: "a thing of a specific or particular kind,"
- (5) Substance: "physical material from which something is made or which has discrete existence."

Webster's New Collegiate Dictionary (1977), pages 1326, 311, 598, 64, 1161 (respectively).

In addition, in cases in which the legislature provides a list of terms or requirements to define a specific word or status, the courts also employ the principle of *inclusio unius est exclusio alterius* or *expressio unius est exclusio alterius*. The former is translated as "the inclusion of one is the exclusion of another," while the latter is translated as "the expression of one thing is the exclusion of another." *Blacks Law Dictionary*, 5th Edition (1979), pages 687 and 521 respectively. This principle of statutory construction states that if the legislature uses a list of terms to define a specific work or condition, it thereby excludes all other terms or conditions. The decisions in *State v. Swanson*, 116 Wn.App. 67, 65 343 (2003), and *State v. Kazeck*, 90 Wn.App.

830, 953 P.2d 832 (1998), illustrate this primary rule of statutory construction.

In *State v. Swanson, supra*, a convicted felony appealed the trial court's refusal to restore his right to possess firearms in spite of the fact that he had met the requirements the legislature set in RCW 9.41.040(4)(b)(ii) for the restoration of such rights. In reply the state argued that while the defendant did meet the several requirements of the statute, the trial court still had inherent discretion to deny his petition, even though the statute did not explicitly grant the court that authority. In addressing these arguments the court relied upon the principle of *expressio unius est exclusio alterius*, which it defined as follows:

Expressio unius est exclusio alterius, a common maxim of statutory construction, also aids our decision. The maxim holds that, "[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature." *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969).

State v. Swanson, 116 Wn.App. at 75 (italics added).

Applying this maxim, the court of appeals reversed the trial court on the basis that the legislature's failure to specifically grant the trial court discretion to deny a petitioner who met the listed requirements thereby prohibited the court from exercising that discretion. The court of appeals held:

Expressio unius est exclusio alterius commands that RCW 9.41.040(4) imposes no burden beyond the three enumerated, threshold requirements set forth at RCW 9.41.040(4)(b)(ii). The maxim also refutes the State's argument that the restoring court is free to impose conditions that were not imposed at the petitioner's sentencing. Several of the statutes discussed above illustrate that the Legislature has considered and imposed conditions other than sentencing conditions; but, in those statutes, the extra conditions are express. The sole mention of "conditions" at RCW 9.41.040(4)(b)(ii) concerns "conditions of the sentence." RCW 9.41.040(4)(b)(ii). Thus, *expressio unius est exclusio alterius* commands that no other conditions are required.

State v. Swanson, 116 Wn.App. at 76-77 (italics added).

Similarly, in *State v. Kazeck*, *supra*, the defendant appealed his conviction for felony possession marijuana. At the time of his arrest the marijuana in his possession weighed slightly over 40 grams. However, by the time of trial most of the moisture had evaporated and it weighed less than 40 grams. Following conviction, the defense argued on appeal that at the time of his arrest, the defendant had actually possessed less than 40 grams of marijuana which had enough water in it to put the combined weight just over 40 grams. Thus, the court of appeals was faced with the question of just what the term "marijuana" meant.

In addressing this question the court first noted that the legislature had defined the term "marijuana" to include "all parts of the plant Cannabis, whether growing or not" with a number of listed exceptions. "Water" or "moisture" were not listed as part of the exceptions. Thus, employing the

principle of *expressio unius est exclusio alterius*, the court refused to include these terms as part of the exception. The court held:

This may also be expressed in the maxim of statutory construction, “*expressio unius est exclusio alterius*.” That is to say, “the mention of one thing implies the exclusion of another thing.” “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*--specific inclusions exclude implication. “Where a statute provides for a stated exception, no other exceptions will be assumed by implication.”

Had the Legislature intended to exclude water from the definition of marijuana, it would have listed water as an exception. The Legislature did not; ergo, we will not.

State v. Kazeck, 90 Wn.App. at 833 (citations omitted).

In the case at bar the defendant argues that he did not commit the crime of second degree assault because his dog does not fall within the legislature's definition of a “deadly weapon.” In other words, the defendant argues that a dog does not qualify under the legislature's definition of “deadly weapon” because a dog is not a “weapon, device, instrument, article, or substance.”

In addressing the defendant's argument, it should first be noted that the term “dog” does not fit within any of the dictionary definitions of the terms “weapon, device, instrument, article, or substance.” Neither would a person normally interpret the terms “weapon, device, instrument, article, or

substance” to include the term dog. An even more compelling argument comes from the fact that in defining the term “deadly weapon” the legislature could just as easily have rewritten the definition to deadly weapon as follows:

(6) “Deadly weapon” means any **thing** ~~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;

Under this definition there would be no question that a dog would be a “thing” which would constitute a “deadly weapon” if used in an manner “readily capable of causing death or substantial bodily harm.” Under this “all inclusive” any number of innocuous or odd things might qualify as a deadly weapons. However, the legislature did not define the term “deadly weapon” to include any “thing.” Rather, it limited deadly weapons to firearms, explosives, weapons, devices, instruments, articles, or substances.” Under the principle of *expressio unius est exclusio alterius* this court cannot rewrite RCW 9A.04.110(6) to include that which the legislature did not include.

As a result, in the case at bar the trial court erred when it found the defendant guilty of the crime of second degree assault because the defendant’s dog does not qualify as a deadly weapon. Since the state only alleged second degree assault in this case under the “deadly weapon”

alternative, the defendant's conviction should be vacated and the case remanded with instructions to enter judgement of conviction against the defendant for the lesser included offense of fourth degree assault.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A POLICE OFFICER GAVE AN OPINION ON GUILT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state elicited from Officer Acee that the defendant acted with the intent to assault. This occurred during the state’s direct examination of Officer Acee as follows:

A. Again, the -- the -- the defendant was holding the dog like this and looking about the area. Within a split second, he moved his arm like this and in that manner, sending the dog toward me, and took off into the depths of the house, where it was darker (indicating throughout).

Q. Okay. You've described a motion where it looked like your left hand traveled or forced the dog to travel forward in your direction. Is that accurate?

A. Yes. There was no mistake in my mind that that was a direction, a physical direction for which way the dog was to go while he went the other way (indicating).

RP 38-39.

The error in this testimony does not come from the officer's description of what happened. In other words, the officer's description of the defendant's arm coming up and the dog coming toward him was competent and relevant evidence. However, the officer's further testimony that these actions proved that the defendant was intentionally setting the dog on him was highly objectionable as both speculation and opinion. In essence, this testimony constituted the officer opinion that the defendant intentionally set the dog on him as opposed to the dog unintentionally coming loose. Thus, in the officer's opinion the defendant was guilty of the crime charged. In this case the defendant's intent was the critical fact at issue before the jury.

Although there are many tactical reasons for a defense attorney to fail to object to certain testimony, there is not possible tactical reason to fail to object when a police officer gives an improper opinion as to the defendant's state of mind when that opinion is that the defendant intended to commit a crime. This conclusion has particular force when the defendant's intent is the critical issue before the jury as it was in the case at bar. Thus, trial counsel's failure to object to Officer Acee's testimony as to what the defendant intended fell below the standard of a reasonable prudent attorney.

In this case the state's evidence on the defendant's intent and his evidence on how the dog got loose was far from compelling. It is true that the defendant did have outstanding warrants but the state's own witnesses

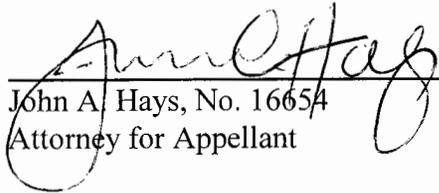
admitted that they were for minor traffic offenses. In addition, Officer Acee himself admitted that the incident occurred very quickly and that his focus was on the defendant's right hand, which he could not see, not on the defendant's left hand, which was holding the dog. Thus, had trial counsel properly objected to this testimony it is more likely than not that the jury would have returned a verdict of acquittal. Consequently, trial counsel's failure to object caused prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

CONCLUSION

The trial court violated the defendant's right to due process because the state failed to present substantial evidence on the crime of second degree assault. In addition, trial counsel's failure to object when the officer gave an opinion on the defendant's guilt deprived the defendant of effective assistance of counsel. As a result, this court should reverse the defendant's conviction and remand with instructions to grant a new trial on the lesser charge of fourth degree assault.

DATED this 10th day of November, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.04.110

In this title unless a different meaning plainly is required:

(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;

RCW 9A.36.021

(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.

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STATE OF WASHINGTON

BY [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 ROBBIT PHILLIP HOELDT,)
10 Appellant,)

CLARK CO. NO.06-1-00566-0
APPEAL NO: 34894-2-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 10TH day of
14 NOVEMBER, 2006, affiant deposited into the mails of the United States of America, a
properly stamped envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

ROBBIE P. HOELDT - #746350
WA STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA, WA 99362

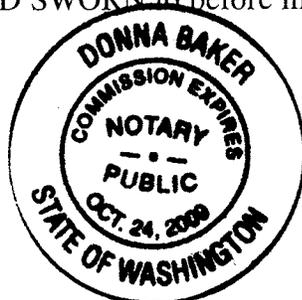
18 and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 10TH day of NOVEMBER, 2006.

[Signature]
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 10th day of NOVEMBER, 2006.



[Signature]
NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso, WA 98626
Commission expires: 10-24-09