

COURT OF APPEALS

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No. 35011-4-II

JWR

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Javier Cruz,

Appellant.

Clallam County Superior Court

Cause No. 06-1-00025-0

The Honorable Judge George Wood

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

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ASSIGNMENTS OF ERROR

1. Mr. Cruz was denied a fair trial because the government withheld exculpatory evidence.
2. The trial court erred by determining that Mr. Cruz was not prejudiced by the failure to disclose exculpatory evidence.
3. The trial court erred by denying Mr. Cruz's motions to dismiss.
4. The trial court erred by instructing the jury with an erroneous definition of knowledge.
5. The trial court erred by giving Instruction No. 10, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Supp. CP. Instruction 10.

6. The court's "knowledge" instruction contained an improper mandatory presumption.
7. The court's "knowledge" instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
8. Mr. Cruz was denied the effective assistance of counsel when his attorney failed to object to the improper "knowledge" instruction.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Javier Cruz was charged with delivery of methamphetamine. His attorney repeatedly requested information relating to the confidential informant who would be the state's main witness at trial. The Forks Police Department withheld information (including the informant's name), delaying the trial.

During trial, defense counsel learned that discovery was still incomplete. The Forks Police Department had failed to disclose benefits the informant had received for her cooperation, had withheld computer records relating to the informant, and had failed to turn over paperwork relating to the chain of custody.

Mr. Cruz repeatedly moved to dismiss the case, but the trial court denied his motions.

1. Did the government violate Mr. Cruz's right to due process by withholding exculpatory information? Assignments of Error Nos. 1-3.
2. Is there a reasonable probability that timely disclosure of the exculpatory material would have yielded a different outcome? Assignments of Error Nos. 1-3.
3. Did the trial court err by refusing to dismiss the case? Assignments of Error Nos. 1-3.

The court's "knowledge" instruction inappropriately included a mandatory presumption, requiring the jury to find knowledge if Mr. Cruz acted intentionally (without explaining what kind of intentional act could give rise to the presumption). The instruction also misstated the law, defining knowledge to mean awareness "of a fact, circumstance or result which is described by law as being a crime." Defense counsel did not object to the erroneous instruction.

4. Using a *de novo* standard of review, did the trial court's "knowledge" instruction create an impermissible mandatory presumption? Assignments of Error Nos. 4-8.

5. Using a *de novo* standard of review, did the trial court's "knowledge" instruction misstate the law and mislead the jury? Assignments of Error Nos. 4-8.

6. Using a *de novo* standard of review, was Mr. Cruz denied the effective assistance of counsel by his lawyer's failure to object to the erroneous "knowledge" instruction? Assignments of Error Nos. 4-8.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In May of 2005, Judith Smith approached the Forks Police Department and offered to work as a confidential informant. RP (6/5/06) 42-45. She entered a one-month contract on May 3, 2005 to purchase methamphetamine from three targets. Javier Cruz was not one of these listed targets. RP (6/5/06) 51.

On June 13, 2005, the informant went to trailer number 25 at 1205 South Forks to purchase methamphetamine from Andrew Davila. She spoke to Javier Cruz at the door, and left without making a purchase. RP (6/5/06) 54; RP (6/6/06) 188. On June 14, 2005, she returned to the trailer and went inside. When she came out, she claimed that she purchased methamphetamine from Mr. Cruz. RP (6/5/06) 58, 60-61, 53. Mr. Cruz was charged with delivery of a controlled substance on January 17, 2006. CP 17-18.

Mr. Cruz remained in custody pending trial. RP (3/20/06) 9; RP (6/5/06) 4.

Defense counsel requested information about the informant and her contract on January 20, February 1, February 17, March 3, 2006, and March 13, 2006. RP (1/20/06) 7; RP (2/17/06) 5-6; RP (3/3/06) 5; RP (3/13/06) 4-5; Supp. CP. As of March 13, 2006, 8 days before the

expiration of speedy trial, defense counsel had still not been told the name of the informant, and had not been given any information about the contract under which she was working. RP (3/13/06) 4-5. On the afternoon of March 14, 2006, the state provided defense counsel with the informant's name. RP (3/20/06) 7.

Mr. Cruz filed a Motion to Dismiss, arguing that it was impossible prepare for trial given the late and incomplete discovery provided by the prosecution. Supp. CP. At a hearing on March 20, 2006, the prosecutor indicated that he had been requesting the information for some time: "I can't tell you why Forks was not immediately forthcoming, but I can tell you that we didn't no [sic] the identity of the informant until fairly recently. So, I don't have a good reason, no, Your Honor." RP (3/20/06) 9.

Concerned about Mr. Cruz's right to a speedy trial, the court suggested that he be released pending trial. However, the Immigration and Naturalization Service had put a hold on Mr. Cruz, and if he were released, Mr. Cruz would be deported prior to trial. RP (3/20/06) 9-10. The following day, Mr. Cruz waived his right to a speedy trial, and trial was rescheduled to commence on April 10, 2006. RP (3/21/06) 4-5.¹

¹ The trial did not occur on April 10, 2006. While no transcript is available for that date, trial was apparently reset by agreement of the parties. RP (4/10/06).

On May 8, 2006, the defense again moved to dismiss, and described additional discovery problems. RP (5/8/06) 4. Forty-four pages of discovery had been received that morning, and defense counsel still lacked significant information, including documentation reviewed by the judge who issued a search warrant and information about the informant's activities while on electronic home monitoring. Furthermore, a defense interview with the informant had yet to be arranged. RP (5/8/06) 7, 9, 15. The court denied the motion to dismiss. RP (5/8/06) 18.

Trial began on June 5, 2006. Sergeant Munger testified that she supervised the informant and oversaw the alleged controlled buy from Mr. Cruz. According to Munger, the informant served a felony sentence on Electronic Home Monitoring (EHM) during her work as an informant. Munger arranged with EHM staff for the informant to leave her house, but did not keep any records relating to these arrangements. RP (6/5/06) 73-75. She also extended the informant's one-month contract until February 2, 2006, at which time she considered it successfully completed, despite the fact that the informant had had a positive UA and admitted buying and using drugs while under supervision. RP (6/5/06) 72, 74, 79, 80, 103.

When questioned about benefits received by the informant pursuant to her contract, Munger testified that the Forks Chief of Police had worked out a deal relating to the cost of EHM. RP (6/5/06) 105.

When this was revealed, defense counsel objected. He'd suspected that the informant had received assistance financing her EHM, but the arrangement was not disclosed to the defense, either in the police reports or during two pre-trial interviews with Munger. RP (6/5/06) 105-107.

Defense counsel was given time to interview Forks Chief of Police Powell, who revealed that he'd arranged a deal with the informant to help her with EHM. The arrangement was more favorable than the department's sliding scale policy, but the Chief had no records of the details. RP (6/6/06) 7. Defense counsel moved for dismissal, arguing that it was not Mr. Cruz's responsibility to discover impeaching information, that it was the prosecutor's obligation to provide it in a timely manner, and that the late disclosure during trial prejudiced the defense. RP (6/6/06) 6-8. The trial judge decided that there was no prejudice (since defense counsel had uncovered the information on his own during trial) and denied the motion. RP (6/6/06) 11-12.

The state presented the testimony of Forks' evidence custodian Officer Davis. She testified about the chain of custody, relying (in part) on documentation on the back of a form. RP (6/6/06) 52-53. Defense counsel objected and again moved for dismissal. He had not received a copy of this documentation prior to trial. He also pointed out that her notes used a different exhibit number for a specific item, and that certain

documents had been altered after they were provided to the defense. RP (6/6/06) 53-58, 61-63. The court denied the motion, finding that the mismanagement did not prejudice the defense. RP (6/6/06) 66, 92-93.

Sergeant Klahn testified that he supervised the Forks EHM program. RP (6/7/06) 63. He indicated that he had been instructed by the prosecutor to turn over records of the times that the informant was excused from EHM, but that he had not provided the information (which appeared in the computer system) because it had not occurred to him to print it out. RP (6/7/06) 73, 74. The Forks Chief of Police testified that he had given the informant a break on her EHM fees because she was working as an informant and because she did not have the money to pay. RP (6/7/06) 92-94. He did not keep any record of the arrangement. RP (6/7/06) 98. Sgt. Munger was present and helped to set up the deal. RP(6/5/06) 105-106, 111; RP(6/6/06) 207. Records of payments for the informant's EHM showed that the payments were made on days when the informant did not leave her home, suggesting that the payments were made by a third party (such as the police department). RP(6/7/06) 134. The informant claimed to have personally made cash payments to Sergeant Klahn; however, he had no recollection of accepting cash payments. RP (6/7/06) 16, 77.

Defense counsel again moved for dismissal because of the government's failure to provide the computer records (showing the times

the informant was excused from EHM) and its failure to provide the chain-of-custody notes from Officer Davis. RP (6/7/06) 138. Again, the court denied the motion. RP (6/7/06) 141-143.

In its instructions, the court defined “knowledge” as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally. Supp. CP. Instruction 10.

Defense counsel did not object to the instruction. RP (6/8/06) 5-7.

The jury convicted Mr. Cruz as charged and he was sentenced within his standard range on July 14, 2006. CP 6-15. This timely appeal followed. CP 5.

ARGUMENT

I. THE GOVERNMENT FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.

The state’s failure to disclose material exculpatory evidence, whether intentional or inadvertent, violates a criminal defendant’s constitutional right to due process. *Brady v. Maryland*, 373 U.S. 83 at 87.

83 S. Ct. 1194 10 L. Ed. 2d 215 (1963). Evidence is considered suppressed for *Brady* purposes if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence. *Boss v. Pierce*, 263 F.3d 734 at 740 (7th Cir., 2001). When the evidence is known to a witness but is not part of a report, it is not available through the exercise of reasonable diligence:

[T]he question is whether defense counsel [has] access to *Brady* material contained in a witness's head... Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document... This stretches the concept of reasonable diligence too far.

Boss v. Pierce, at 741.

Any evidence that is favorable to the defense falls within the rule, whether it is exculpatory or merely impeaching. *Banks v. Dretke*, 540 U.S. 668 at 691, 24 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). Evidence is material and reversal is required whenever there is a reasonable probability that disclosure would have led to a different result:

[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.”

Kyles v. Whitley, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), quoting *United States v. Bagley*, 473 U.S. 667 at 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The duty to disclose does not depend on a request by the defense. *Bagley*, at 676, 681-682. The prosecutor is responsible for any favorable evidence known to others acting on the government's behalf in the case, including the police. *Strickler v. Greene*, 527 U.S. 263 at 275 n. 12, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), citing *Kyles v. Whitley* at 437.

In this case, the government failed to disclose material information that was favorable to the defense.² Defense counsel repeatedly argued for dismissal based on the Forks Police Department's failure to provide information regarding the informant. The Forks Police Department's footdragging resulted in continuances beyond Mr. Cruz's speedy trial period, and when the disclosure finally occurred the week before trial, it was incomplete. RP (3/20/06) 7-9, 10-11. Through cross-examination, defense counsel was able to establish that additional benefits-- the reduction in EHM fees-- were given to the informant, but not disclosed. RP (6/7/06) 92.

² It appears that the prosecutor was also kept in the dark by the Forks Police Department. RP (3/13/06) 4.

This information was “suppressed” within the meaning of *Brady* because the state did not provide it to defense counsel prior to trial. Although revealed before the end of trial, the disclosure was nonetheless disclosed “too late for the defendant to make use of it.” *Boss v. Pierce*, *supra* at 740. Without knowledge of the additional benefits provided to the informant for her cooperation (including the financial benefits), Mr. Cruz was unable to investigate the issue prior to trial, unable to explore the issue on *voir dire*, and unable to discuss it in his opening statement. Furthermore, defense counsel was unable to prepare a thorough cross-examination of the informant, the detective who supervised her, and the other officers involved in the case (including the police chief).

The exculpatory nature of the information was also readily apparent. The additional benefits gave the informant extra incentive to lie to the police, to ensure that she continued receiving a discount on her EHM fees.

Finally, the evidence was material. The informant’s credibility was central to the case. No transaction was observed, and no recording was made; thus the state’s case rested entirely on her testimony. The failure to disclose facts affecting her credibility until mid-trial hampered the Mr. Cruz’s opportunity to prepare for trial and present his case to the jury. Accordingly, the failure to disclose the information prior to trial

could reasonably have affected the outcome of the trial. Confidence in the outcome is undermined, and Mr. Cruz's convictions must be reversed and the case remanded for a new trial. *Kyles v. Whitley, supra*, at 434.

Confidence in the outcome is further undermined because the evidence strongly implies that even more benefits were provided and *never* disclosed. Specifically, Munger denied knowledge of the EHM arrangement, but the informant testified that Munger was present and helped to set up the deal. RP(6/5/06) 105-106, 111; RP(6/6/06) 207. The police did not ever memorialize the arrangement in writing. In addition, records of payments for the informant's EHM showed that the payments were made on days when the informant did not leave her home, suggesting that the payments were made by a third party (such as the police department). RP(6/7/06) 134. The informant claimed to have personally made cash payments to Sergeant Klahn; however, he had no recollection of accepting cash payments. RP (6/7/06) 16, 77.

Throughout the case, the Forks Police Department sought to conceal information from defense counsel (as well as from the prosecuting attorney). The record suggests that the information that *was* ultimately shared painted only part of the picture. The whole truth will likely never be known. Mr. Cruz was denied a fair trial, and his case must be dismissed. *Kyles v. Whitley, supra*.

II. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT CREATED A MANDATORY PRESUMPTION AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT.

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

‘Knowledge’ is an element of delivery of a controlled substance; to obtain a conviction, the prosecution must prove that the defendant knew that the substance delivered was a controlled substance. *State v. DeVries*, 149 Wn.2d 842 at 850, 72 P.3d 748 (2003). Under RCW 9A.08.010 (1)(b), “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.”

The court’s knowledge instruction (based on WPIC 10.02) included the following (optional) provision:

Acting knowingly or with knowledge also is established if a person acts intentionally.
Instruction No. 10, Supp. CP.

Inappropriate use of this provision relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.³ The trial court’s “knowledge” instruction included

³ Although not an element of the charged offense, knowledge was included in the “to convict” instruction and thus became an element under the law of the case in *Goble*. *Goble at 201*.

the language quoted above. The Court of Appeals reversed the conviction because this language could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it directed the jury to presume that Mr. Cruz knew he'd delivered a controlled substance if he did *any* intentional act.⁴ Under the instruction, a U.S. Postal Service letter carrier would be presumed to know the contents of any packages s/he intentionally delivered, a result forbidden by *State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979):

[W]ithout the mental element of knowledge, even a postal carrier would be guilty of the crime were he innocently to deliver a package which in fact contained a forbidden narcotic. Such a result is not intended by the legislature... [G]uilty knowledge is intrinsic to the definition of the crime itself.
Boyer, at 344.

The inclusion of the optional final sentence of the "knowledge" instruction in this case created a conclusive presumption and violated due

⁴ The instruction was also confusing and misleading; the court told the jury that a person "acts knowingly" when he "is aware of a fact, circumstance or result described by law as being a crime..." This language differed from the statutory language of RCW 9A.08.010 (1)(b); under Instruction No. 10, the information at issue—the "fact, circumstances or result"—must itself be described by law as a crime. This is nonsensical. See RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The *Goble* court criticized WPIC 10.02 on this basis as well. See *Goble* at 203 ("We agree that the instruction is confusing.")

process. *Goble, supra; Savage, supra*. It directed the jury to presume knowledge from any intentional act, and provided no guidance limiting the predicate acts giving rise to the conclusive presumption. Thus, the jury could find guilty knowledge from intentional delivery (as in the postal carrier example raised in *Boyer*), or from any other intentional act such as walking, talking, or sitting. Because of this, the conviction should have been reversed and the case remanded for a new trial. *Goble, supra*.

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S IMPROPER "KNOWLEDGE" INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 107

Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel's performance is evaluated against the entire record. *Lopez, at 275.*

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d

610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, ‘knowledge’ was an essential element of the crime charged. Despite this, Mr. Cruz’s attorney failed to object to the court’s “knowledge” instruction, which distorted the statutory definition found in RCW 9A.08.010 (1)(b) and which contained a mandatory presumption. This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute, would have known that the language of the instruction differed from the language of the statute, and would have been aware that the mandatory presumption was unconstitutional under *Goble, supra*. See, e.g., *State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Cruz was prejudiced by the error. The “knowledge” instruction was misleading and contained an illegal mandatory presumption. As a result, the jury would not have been able to properly interpret the “to convict” instructions, and improperly imputed “knowledge” to Mr. Cruz based on any intentional act he took. Defense counsel’s failure to object to the improper “knowledge” instruction denied

Mr. Cruz the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted.

BACKLUND AND MISTRY


Jodi R. Backlund, No. 22917
Attorney for the Appellant


Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Javier Cruz, DOC 828237
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Clallam County Prosecuting Attorney
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015

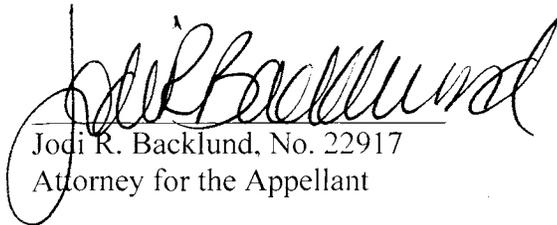
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 5, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 5, 2006.



Jodi R. Backlund, No. 22917
Attorney for the Appellant