

NO. 36032-2-II

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

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

LIONEL DIMITRI GEORGE,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

PM 1-31-08

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A. ASSIGNMENTS OF ERROR

1. The court's refusal to order a competency evaluation denied appellant due process.

2. The Judgment and Sentence incorrectly indicates that appellant's offense includes a firearm enhancement.

Issues pertaining to assignments of error

1. Where there was evidence appellant was hearing voices which prevented him from working with counsel, appellant testified against the advice of counsel, and his testimony raised questions about his ability to understand the nature of the proceedings and assist in his defense, was there reason to doubt his competency to stand trial? Did the court's refusal to order a competency evaluation deny appellant due process?

2. The amended information contains no firearm allegation, and the jury was not asked to decide whether appellant was armed with a firearm. Where the Judgment and Sentence incorrectly indicates appellant's offense includes a firearm enhancement, is remand for correction of the error appropriate?

B. STATEMENT OF THE CASE

1. Procedural History

On March 27, 2006, the Pierce County Prosecuting Attorney charged appellant Lionel George with first degree robbery, alleging that George was armed with a firearm during the commission of the crime. CP 1; RCW 9A.56.200(1)(a)(ii). The Information was later amended, adding accomplice language and dropping the firearm allegation. CP 38-39. The case proceeded to jury trial before the Honorable Frank E. Cuthbertson, and the jury entered a guilty verdict. CP 95.

Although the firearm allegation was dropped from the information and never submitted to the jury, the description of the offense on the Judgment & Sentence indicates that George was found guilty by jury verdict of first degree robbery with a firearm sentence enhancement. CP 112. The court imposed a standard range sentence of 171 months, with no sentence enhancement. CP 115.

George filed this timely appeal. CP 125.

2. Substantive Facts

George was charged in separate cause numbers with three counts of first degree robbery. 2RP¹ 11. After an evaluation at Western State

¹ The Verbatim Report of Proceedings is contained in eight consecutively-paginated volumes (1RP—12/5/06; 2RP—12/6/06; 3RP—1/9/07; 4RP—2/26/07; 5RP—2/27/07;

Hospital, the court determined George was competent to stand trial, and he was tried in back to back trials. CP 4-7, 13-14. George was convicted on the first charge and acquitted on the second charge. 2RP 45, 48. This appeal is from his conviction on the third charge.

At the start of the third trial, counsel informed the court that George reported he was still hearing voices, and this condition was affecting his ability to work with counsel because the voices were suggesting that defense counsel and the prosecutor had hidden agendas. 2RP 7-8. George felt he was unable to control the voices and asked for help, and counsel asked the court to send him back to Western State Hospital for another competency evaluation. 2RP 8. 2RP 7-8.

The court responded that it had reviewed the competency hearing from July 14, 2006, which found that George suffered from a schizo-affective disorder, bipolar type, but also found him rational and coherent, able to assist counsel, and able to understand legal concepts. 2RP 10. The court did not believe George had decompensated since that evaluation, taking judicial notice that he had been in the courtroom on two other matters in the past two weeks. 2RP 11. The court denied the request for another competency evaluation. Id.

6RP—2/28/07; 7RP—3/1/07; 8RP—3/2/07) and a ninth volume from the sentencing hearing (9RP—3/6/07).

Prior to trial, defense counsel moved to exclude evidence of the robbery conviction with a firearm enhancement, attempt to allude, unlawful possession of a firearm, and intimidation of a public servant convictions resulting from the first trial (the Fife case). 2RP 45. Counsel argued that the details of those offenses were inadmissible under ER 404(b). 2RP 46. The state agreed that the details of that case should be excluded, although it believed the fact that George was convicted of robbery would be admissible under ER 609 if George testified. 2RP 46.

Defense counsel also moved to exclude evidence of the firearm admitted in the first trial, arguing that the state could not establish it was the same firearm allegedly used in the robbery charged in this case. 2RP 48. The state agreed that the witnesses would not be able to identify the gun and that it would not attempt to admit the gun at trial. 2RP 49.

Counsel moved to exclude testimony that a detective interviewed George about this robbery while he was being held in jail on another matter, including testimony that George asked the detective whether a new charge would be filed. 2RP 57. The state agreed to have the detective limit his testimony to work around the jail issue, and the court ruled that there would be no indication that George was in custody at the time of the interview. 2RP 57-58. The court specifically excluded testimony that George asked about a new charge. 2RP 58.

In addition, defense counsel moved to exclude all George's criminal history except as admissible under ER 609. 2RP 60. Counsel argued as well that the Fife robbery conviction should be excluded because it was too close in time to the offense in this case and George had other crimes of dishonesty which could be used to impeach him. Under the circumstances, any evidence about the Fife robbery would be unduly prejudicial. 2RP 59-60. The court reserved on this issue until after the state rested. 2RP 61.

The state presented evidence at trial that on March 6, 2006, George was observed entering the Puyallup Kmart with a woman and a younger man. 6RP 138, 140, 166. The three people separated after entering the store, and security personnel observed the woman in the cosmetics department, selecting numerous items without regard to price and peeling off the alarm tags. 6RP 140-41, 167, 202. One of the guards saw her place all the items in a carrying case, which she hid inside her jacket. 6RP 145.

The woman then walked to the electronics section, where she bumped into George and the younger man. 6RP 146, 204. After speaking with George, the woman walked to the restroom area, came back out, and headed for the front doors. 6RP 147, 205. The woman passed all the cash

registers, making no attempt to pay for any merchandise, and left the store. 6RP 147.

The security guards contacted the woman, identifying themselves and asking her to come back in the store. 6RP 151, 206-07. At that point, a man came out of the store, asked "What the fuck?" and pulled out a gun. 6RP 153-54, 208. The security guards ran, and the man and woman got in a van and drove away. 6RP 155, 210. The police were called, and both guards prepared written statements. 5RP 107, 109. A few weeks later, the guards selected George's photograph from a montage, identifying him as the man with the gun. 6RP 162, 221.

Defense counsel established on cross examination that the woman was alone in the cosmetics department when she was selecting merchandise and removing the alarm tags. 6RP 234-35. She did not meet up with George in electronics until after she had concealed the items. 6RP 235-36. The woman had other items in her hands, which she handed to George before she went into the restroom area, but there was no indication those items were removed from the store. 6RP 237, 242. Further, the guards had written in their statements that the man with the gun was wearing a red sweat jacket, while the store surveillance video showed that George was wearing a brown jacket. 6RP 186, 233; 7RP 342-43.

Before the detective testified about his interview with George, the court reminded the prosecutor of the limits on that testimony. Defense counsel also argued that, while the detective had told George in the interview that he was on video stealing sunglasses, there was no evidence to support that claim, and any reference to stealing sunglasses should be excluded. 6RP 261. The state agreed that the detective's claim was unduly prejudicial, and the court granted the defense motion to exclude. 6RP 263.

Following the state's case, defense counsel told the court that she still had serious concerns about George's competency and his ability to understand the proceedings and assist counsel. Counsel told the court that she had explained to George at length that it was not in his best interests to testify, but he was electing to do so anyway. Counsel argued that George's decision to testify against counsel's advice demonstrated his lack of competency. 6RP 277-78.

The court again referred to the evaluation from July 14, 2006, which concluded that George was competent. The court noted that the evaluation indicated George had correctly identified the charges he was facing, he was able to determine the role of the judge, attorneys, and others, and he understood his right to a jury. 6RP 278. The court also stated it had observed George during trial, his behavior seemed

appropriate, and he appeared competent to make the decision whether to testify. 6RP 279.

Counsel then moved again to exclude any evidence regarding the Fife robbery. Counsel argued that because the Fife incident was so close in time to the incident charged in this case, the prejudicial effect outweighed any probative value as impeachment. 6RP 280. The court disagreed and allowed the state to impeach George with evidence that he had been convicted of robbery in 2006. 6RP 283.

George testified on direct examination that he was at the Puyallup Kmart on the day in question with his girlfriend and two other people. 7RP 304. His girlfriend was the woman who had attracted the security guards' attention, but he did not see her shoplift and did not know she was shoplifting. In fact, she had asked him for money in the electronics section, and he had given her some. 7RP 305. George said his girlfriend had handed him some things while she went into the bathroom, but he put the items down before leaving the store. He testified he was in the van when the security guards stopped his girlfriend, and he did not really see the altercation. 7RP 306-07. George denied pulling a gun on the security guards. 7RP 307.

When defense counsel finished questioning him, George asked the court if he was going to get to say what he wanted to say concerning the

case. 7RP 307. The court responded that it assumed he had, and the state proceeded with cross examination. 7RP 307-08.

The prosecutor questioned George about who was in the store with him. George answered the question and was about to explain further, when the court interrupted and told him he needed to wait for a question. 7RP 308. This pattern continued throughout cross examination.

When the prosecutor showed George some photographs taken from the surveillance video and asked about his clothing, George responded, “now that you’re showing the coat, how come you don’t show the gun? How come you guys have the gun and you don’t show that?” 7RP 309. The court again admonished George that he had to wait for a question. 7RP 309.

Next, the prosecutor asked George if he had stopped to look at some sunglasses, and George responded that he was wearing a pair of \$190 Ray Bans and did not need any glasses. When the prosecutor asked again if he had stopped to look at sunglasses, George responded, “Yeah. But I didn’t steal nothing. I had money.” 7RP 310. The prosecutor asked, “Did I ask if you stole anything?” to which George responded, “That’s apparently why I’m sitting up here, sir. I robbed something. If I took something, I had to take something physically.” Id. Again, the court told George to wait for the question. Id.

The prosecutor then asked questions about when George left the store and who was in the van with him. When the prosecutor asked where store security got into a tussle with the woman, George responded,

I don't know. I got tinted windows on the side and the back. I came around to the side, got on, and then they got on, and I got in the front seat, and the person who had the gun – I didn't know at the time because I've been found guilty on a prior robbery to this, just not too long ago at the Fife robbery, I didn't know nothing about that, about that gun, until we got to Fife because this was in a crime spree of three different robberies, and I got found not guilty on one, but that gun was the same gun you guys have. It's the same statement of the individual that was in the store admitting to pulling the gun at Safeway and Kmart, and you guys have that statement and won't bring it in.

7RP 313-14.

The prosecutor then tried to establish whether George had seen a struggle between the woman and the security guards and had to keep directing George to answer the question. 7RP 314. George stated that there were no "burnout marks," and the court interrupted, telling George again to wait for the question. 7RP 315.

George again referred to the Fife robbery when the prosecutor asked about his interview with the detective. 7RP 316. In response to defense counsel's objection, the court again admonished George to wait for the question and then answer the question that was asked, explaining that defense counsel could ask further questions on redirect. 7RP 316-17.

In response, George asked the court, “Am I going to be able to say what I want to say without being questioned like my input? This concerns my life.” 7RP 317. The court told him he did not get to make narrative statements, and the prosecutor asked the court to admonish George to stop rambling. Id. At the prosecutor’s request, the court instructed the jury to ignore George’s nonresponsive comments. Id.

Cross examination continued with the prosecutor asking George about his prior convictions. When the prosecutor asked if he had a conviction for first degree robbery from 2006, George responded, “Yeah. The gun that was used—.” 7RP 318. The prosecutor cut off George’s response and ended cross examination. Id.

The jury was excused for a recess, and the court told George that he was only allowed to answer the questions he was asked. George responded that he was just stating the facts. 7RP 319.

Defense counsel again raised the question of George’s competency, arguing that his testimony, which was given against the advice of counsel, demonstrated the concern about his lack of competency. 7RP 319-20. Counsel stated that she had explained the issues to him, and he did not appear to understand the proceedings and certainly was not able to assist counsel. Counsel told the court she did not think George was competent and asked it to reconsider the issue. 7RP 320. The court

responded that it believed George understood the questions but chose not to answer them, and his responses did not indicate a lack of competence. 7RP 320.

C. ARGUMENT

1. THE COURT'S REFUSAL TO ORDER A COMPETENCY EVALUATION VIOLATED GEORGE'S RIGHT TO DUE PROCESS.

The Due Process clause of the Fourteenth Amendment prohibits conviction of a person who is not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). The constitutional standard for competency to stand trial is whether the accused has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and to assist in his defense with “a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Washington law provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. To determine whether a criminal defendant is legally competent to stand trial, a trial court must ask (1) whether the defendant understands the nature of the charges, and (2) whether he is capable of assisting in his defense. In re Personal Restraint

of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (citing State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986)). A defendant need not be able to suggest a particular trial strategy or choose among alternative defenses to be competent. State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986). Thus, disagreement with counsel as to the manner in which to proceed does not, by itself, raise the issue of competency. State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991).

Once there is a reason to doubt a defendant's competency, the court must follow the procedures set forth in the competency statute to determine whether the defendant may be tried. RCW 10.77.060²; City of

² RCW 10.77.060 provides as follows:

(1) (a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled. Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the examination be conducted at the jail or other detention facility.

(b) When a defendant is ordered to be committed for inpatient examination under this subsection (1), the court may delay granting bail until the defendant has been evaluated for competency or sanity and appears before the court. Following the evaluation, in determining bail the court shall consider: (i) Recommendations of the expert or professional persons regarding the defendant's competency, sanity, or diminished capacity; (ii) whether the defendant has a recent history of one or more violent acts; (iii) whether the defendant has previously been acquitted by reason of insanity or found incompetent; (iv) whether it is reasonably likely the defendant will fail to appear for a future court hearing; and (v) whether the defendant is a threat to public safety.

(2) The court may direct that a qualified expert or professional person retained by or appointed for the defendant be permitted to witness the examination authorized by subsection (1) of this section, and that the defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional person shall have the right to file his or her own report following the guidelines of subsection (3) of this section. If the defendant is indigent, the court shall upon the request of the defendant assist him or her in obtaining an expert or professional person.

(3) The report of the examination shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the mental condition of the defendant;
- (c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;
- (d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;
- (e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;
- (f) An opinion as to whether the defendant should be evaluated by a *county designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

(4) The secretary may execute such agreements as appropriate and necessary to implement this section.

Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). These procedures are mandatory, not merely directive. Fleming, 142 Wn.2d at 863 (citing State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982)). A court's failure to follow these procedures denies the defendant due process. State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570, (citing Drope, 420 U.S. at 162; Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)), review denied, 93 Wn.2d 1002 (1979).

The determination that there is a reason to doubt the defendant's competency lies within the discretion of the trial court. Fleming, 142 Wn.2d at 863. In determining whether to order a competency evaluation, the court may consider the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." Id.

The role of counsel in determining the competency of his client is unique. The attorney represents his client, but he is also an officer of the court. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). Since the lawyer has "the closest contact with the defendant," the court must give considerable weight to the lawyer's representations regarding his client's competency and ability to assist in the defense. Israel, 19 Wn. App. at 779 (quoting Drope, 420 U.S. at 177 n.13).

In Fleming, the defendant had undergone two pre-trial psychological evaluations. The first evaluator concluded that Fleming was psychotic at the time of the charged offenses and marginally competent to stand trial. Fleming, 142 at 858. A second expert concluded, however, that Fleming “is presently unable to cooperate in a rational manner with counsel in presenting a defense and is not able to prepare and conduct his own defense in a rational manner without counsel and therefore is judged presently mentally incompetent to stand trial.” Id. at 859. Neither of these evaluations was presented to the trial court, and counsel never raised the issue of Fleming’s competency. Id. at 860. The trial court accepted Fleming’s guilty plea, imposed sentence, and denied his motion to withdraw that plea. Id.

The Washington Supreme Court granted Fleming’s personal restraint petition and vacated his guilty plea. It held that because the psychological evaluation concluded that Fleming was unable to cooperate with counsel in a rational manner in presenting his defense, Fleming was arguably incapable of assisting in his defense, and might have been incompetent to stand trial. Id. at 863. Trial counsel’s failure to raise the issue of competency therefore constituted ineffective assistance of counsel. Id. at 866.

Here, as in Fleming, there was evidence that George was unable to cooperate in a rational manner with counsel in presenting his defense. This evidence created a reason to doubt George's competency to stand trial. Unlike in Fleming, the court was made aware of this evidence through counsel's repeated motions for a competency evaluation and George's decision to testify and performance on the stand.

Several months before the trial in this case, defense counsel raised the issue of competency, and George was evaluated at Western State Hospital. Although George was found to be competent at that time, the evaluation indicated that George suffered from a schizo-affective disorder, bipolar type. 2RP 10. George was then tried on the first two causes. Prior to the third trial, defense counsel informed the court that George was hearing voices which he could not control, despite the fact that he was on medication, and these voices were telling him he could not trust or work with defense counsel. 2RP 7-8. The court did not think George appeared incompetent, based on his courtroom behavior, and the case proceeded to trial. 2RP 11.

Counsel made a further record of her competency concerns following the state's case. She explained that George was insisting on testifying, even though counsel had explained at length that it was against his interests to do so. 6RP 277-78. The court referred back to the

previous competency evaluation which concluded George had correctly identified the charges he was facing, he was able to determine the role of the judge, attorneys, and others, and he understood his right to a jury. 6RP 278. It determined that George appeared competent to decide whether to testify. 6RP 279.

George then took the stand. Throughout cross examination he was incapable of following the court's repeated admonishments to answer the questions asked of him. 7RP 308, 309, 310, 314, 315, 316-17. Instead, he rambled on about other charges he faced and evidence he felt the state should present. In these ramblings, he introduced evidence which defense counsel had successfully moved to exclude as unfairly prejudicial.

The court had granted counsel's motion to exclude any mention of the details of the other robbery charges for which George was tried or the fact that he faced those charges when he was arrested for this offense. As a result, the state presented no evidence that there were three armed robberies occurring within a short period of time or that the state was in possession of the gun George was found to have used in the Fife robbery. The court also granted counsel's motion to exclude reference to an allegation that George was shoplifting sunglasses in this incident, because there was no evidence to support that allegation, and it was not referred to in the state's case.

When George testified, however, he told the jury that the Puyallup Kmart robbery was part of a crime spree, which included the Fife robbery. And, although he claimed he did not commit the offenses, he told the jury he had been convicted of the Fife robbery and the state had the gun he was found to have used. 7RP 313-14, 316, 318. He also raised the allegation that he had been stealing sunglasses. 7RP 310.

At the close of both direct and cross examination, George told the court that he was still waiting for his opportunity to say what he wanted to say. 7RP 307, 317. Even after the court explained that he could only respond to the questions asked of him, George did not appear to understand, saying he was just stating the facts. 7RP 317, 319.

George's inability to follow the court's directions and comprehend courtroom procedure raises questions about his competency. See Fleming, 142 Wn.2d at 862 (defendant must understand nature of proceedings and be able to assist in defense). In addition, his testimony calls into question whether he possessed a factual understanding of the proceedings. See Dusky, 362 U.S. at 402 (defendant must be able to assist in defense with rational and factual understanding of proceedings). A person is not competent to stand trial if he is "incapable of properly appreciating his peril and of rationally assisting in his own defense." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). It was certainly doubtful that

George understood certain evidence had been excluded as unduly prejudicial to him and that his defense rested on having the jury consider only evidence relevant to this count, so that it would not convict him based on his criminal propensities. See ER 404(b). Considering George's testimony, as well as his diagnosis and the fact that he was hearing voices which prevented him from working with counsel, there was reason to doubt his competency, and the court's unwillingness to heed counsel's concerns and order a further competency evaluation denied George due process.

2. **A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED.**

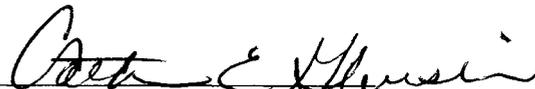
George was originally charged with first degree robbery, with an allegation that he was armed with a firearm. CP 1. Prior to trial, the state amended the information, dropping the firearm allegation, and that allegation was never submitted to the jury. CP 38. Nonetheless, paragraph 2.1 of the Judgment and Sentence indicates that George was found guilty by jury verdict of first degree robbery with a firearm enhancement. CP 112. This error must be corrected. The proper remedy is remand to the trial court for correction of the scrivener's errors in the Judgment and Sentence. In re Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

Because there was reason to doubt George's competency to stand trial, the court should have ordered a competency evaluation, and its failure to do so denied George due process. His conviction must be reversed. In addition, remand is appropriate to correct a scrivener's error in the Judgment and Sentence.

DATED this 31st day of January, 2008.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Lionel George*, Cause No. 36032-2-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Lionel George, DOC# 975696
Unit B Tier E Cell 3
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 31, 2008

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