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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion by admitting, without objection, the result of Pulaski's blood-alcohol concentration ("BAC") test;

Pulaski did not suffer ineffective assistance of counsel because the State established sufficient prima facie evidence of foundation prior to moving for admission of the test and because his high blood alcohol result was consistent with the defense theory of the case;

Pulaski waived any claim to ineffective assistance of counsel because of his delay in obtaining counsel;

The trial court did not abuse its discretion in denying Pulaski's motion for mistrial, because the offending juror had been excused and the two jurors who heard her make comments assured the court that her comments would not influence their decision.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- a. Did the trial court err in admitting the result of Pulaski's BAC test when no objection to its admission was raised at trial?**
- b. Was Pulaski's attorney ineffective for choosing not to object to the admission of his BAC result when the State had already laid the proper foundation and this result was consistent with the defense theory that although**

Pulaski had consumed alcohol, he was not intoxicated at the time of the collision?

- c. May Pulaski claim ineffective assistance of counsel when his own efforts to obstruct the judicial system created a situation where his attorney was required to try his case the day after entering a notice of appearance?**
- d. Did the trial court abuse its discretion in denying Pulaski's motion for a mistrial, when there was no showing that the 12 jurors who decided the case were influenced by the excused juror's comments?**

III. STATEMENT OF THE CASE

On June 17, 2007, shortly before 6:00 pm, Thomas Pulaski drove his Chevy pickup truck out of an apartment complex parking lot at high speed across three lanes of traffic directly into the driver's side of a Ford Escape SUV driven by Clayton Jagoo, pinning Mr. Jagoo's vehicle against a median. RP at 214-25, 239. As a result of this collision, Mr. Jagoo suffered a concussion with loss of consciousness, a broken arm, and a skull fracture. RP at 153. Each of these injuries constituted substantial bodily harm. RP at 153. Witness Nakuma Hudak observed the collision occur directly in front of him as he drove in the opposite direction on Grade Street. RP at 222.

Officer Jeff Brown of the Kelso Police Department arrived on scene and observed that Pulaski's truck was perpendicular in the roadway, having impacted the driver's side door of the SUV driven by Mr. Jagoo.

RP at 239. When Officer Brown contacted Pulaski in his truck, he noticed the smell of alcoholic beverages. RP at 241. At the time, Officer Brown's primary concern was ensuring that everyone on scene received the necessary medical attention, so he did not conduct an immediate investigation of Pulaski's intoxication. RP at 241. While being extracted from his truck, an aid crew member asked Pulaski if he had been drinking and he responded, "Oh, yeah." RP at 256.

Because Officer Brown was charged with clearing the collision scene, Kelso Police Officer Craig Christianson contacted Pulaski at the hospital. RP 257-58, 313. Officer Christianson observed that Pulaski exhibited obvious physical signs of intoxication: bloodshot and watery eyes, droopy eyelids, slurred speech, delayed responses, a flushed and reddish face, poor coordination, and a smell of alcoholic beverage on his breath that was so strong that it filled his entire hospital room. RP 313-16. Pulaski refused to take the blood test, even when he was read the implied consent warning which informed him that his refusal to take the test would result in the loss of his driver's license for at least a year. RP at 325-26. Further, when he attempted to sign his implied consent warning, Pulaski could not contact his pen to the paper without help, and he signed an inch above the line designated for his signature. RP at 326.

After it was determined that Pulaski was being arrested for the charge of Vehicular Assault, Pulaski's blood was drawn by nurse assistant Brenda Brown under the supervision of Officer Brown. RP at 264, 272. The blood draw occurred at 10:30 p.m.¹ RP at 341. The blood was collected into two gray-topped vials issued by the Washington State Patrol. RP at 273. These vials were provided to Assistant Brown by Officer Brown. RP at 274. Inside the vials was a white powder to prevent the blood from clotting. RP at 274. After the blood was collected into the vials, Officer Brown returned them to the Styrofoam packaging they had been received in and logged them into evidence at the Kelso Police Department. RP at 274. Pulaski's blood was then sent to the Washington State Crime Laboratory for testing. RP at 274. The result of Pulaski's blood test was 0.21 g/100mL. RP at 380.

On June 19, 2007, Pulaski was charged with Vehicular Assault. CP 1-2. Pulaski's jury trial was first set for September 24, 2007. RP at 1. The court initially appointed attorney Dan Morgan to represent Pulaski, however because he intended to hire attorney John Hays, Pulaski moved to continue his trial date and entered a speedy trial waiver on September 6, 2007. RP at 1-2. On September 18, 2007, Pulaski appeared with attorney John Hays and his trial was scheduled for December 12, 2007. RP at 4, 6.

¹ Thus, the blood was drawn approximately 4½ hours after the collision.

On November 13, 2007, Pulaski filed a speedy trial waiver and his trial was continued to February 13, 2007. Supp. Desig. Papers, Clerk's Minutes at 3. On January 15, 2007, Pulaski filed a speedy trial waiver and his jury trial was continued to March 12, 2008. Supp. Desig. Papers, Clerk's Minutes at 3. On March 4, 2008, Pulaski moved for a continuance, filed a speedy trial waiver, and a new trial date was scheduled for May 28, 2008. RP at 8-9. On May 13, 2008, Mr. Hays proposed that the trial be struck and set over two weeks for Pulaski to plead guilty. RP at 11. The parties agreed to strike the trial date and Pulaski filed a speedy trial waiver; the jury trial was rescheduled for June 30, 2008. RP at 11-12.

On May 27, 2008, Pulaski moved to continue the trial and filed another speedy trial waiver. RP at 14, 17. On July 15, 2008, Pulaski moved to continue the trial and filed another speedy trial waiver; his jury trial was rescheduled for November 19, 2008. RP at 19-20. On October 28, 2008, Mr. Hays announced that Pulaski was going to resolve the case but wanted to delay entering his plea until after he had eye surgery. RP at 21-22. Pulaski moved to continue the trial date and filed a speedy trial waiver and his jury trial was rescheduled for December 17, 2008. RP 21-25. Pulaski filed a motion without the assistance of his attorney. RP at 26. On December 10, 2008, Mr. Hays withdrew as Pulaski's attorney and his jury trial was stricken. RP at 40.

At a hearing on January 21, 2009, Pulaski appeared without an attorney but indicated that he was represented by Robert Brungardt. RP at 45. On February 24, 2009, the court appointed the Office of Public Defense to represent Pulaski subject to full reimbursement. RP at 53. On March 4, 2009, Pulaski appeared with his appointed attorney Josh Baldwin, moved for a continuance, and filed a speedy trial waiver; Pulaski's jury trial was scheduled for June 3, 2009. RP at 54-55. On April 29, 2009, Pulaski stated it was his intention to hire private counsel. RP at 57.

On May 28, 2009, Pulaski filed another motion without the assistance of his attorney, asking that Mr. Baldwin be terminated as his attorney. RP at 62-63. Pulaski told the court he was not indigent and that he was saving money to have a "non-bar attorney" represent him. RP at 63, 68. Pulaski wanted an attorney who was not a member of the bar association because members of the bar association take an oath making them officers of the court. RP at 64-65. Pulaski reasoned that an attorney who is a member of the bar has a duty to the court that is in conflict with the attorney's duty to his or her client. RP at 64-65. Based on Pulaski's unequivocal statement that he was not indigent and his claim that he wanted to hire an attorney of his own choosing, the court permitted Mr. Baldwin to withdraw. RP at 71. The court told Pulaski he needed to

appear on June 9, 2009 with counsel, warning Pulaski that a trial date would be set on June 9, 2009, regardless of whether or not he appeared with counsel. RP at 71. The court also went through a colloquy advising Pulaski of the risks of self-representation. RP at 74-82.

On June 9, 2009, Pulaski appeared without an attorney and his jury trial was scheduled for August 17, 2009. RP at 83, 86. At this time, the court scheduled a pretrial for July 22, 2009, and warned Pulaski that if he did not obtain an attorney, he would have to represent himself. RP at 87. On July 22, 2009, Pulaski appeared without an attorney; the court advised Pulaski that he was not indigent and still had the right to hire an attorney. RP at 94. On August 13, 2009, the State moved to continue because Mr. Jagoo was living in Trinidad and the State could not secure his appearance for trial except during October of 2009. RP at 97. Pulaski told the court he needed Mr. Jagoo for the trial and agreed to the continuance; the court rescheduled the jury trial for October 28, 2009, and scheduled a final readiness hearing for October 22, 2009. RP at 97, 100.

On October 22, 2007, Pulaski again appeared for his readiness hearing without an attorney. RP at 102. The court denied several motions filed by Pulaski including, a "Special Appearance in Admiralty" motion claiming the court did not have jurisdiction, a motion claiming that the Revised Code of Washington was not the law, a motion demanding Mr.

Hays be prosecuted for perjury, and a second “Special Appearance in Admiralty” motion to dismiss. RP at 121-24. The court held that Pulaski’s failure to obtain counsel was caused entirely by his own doing and that it was not cause to continue or dismiss the case. RP at 124. The court again went through a colloquy advising Pulaski of the risks of self-representation. RP 136-42. The court found that Pulaski had been dilatory in obtaining an attorney and that he had waived his right to be represented by counsel. RP at 136, 142. A review hearing was scheduled for October 27, 2009. RP at 143.

On October 27, 2009, attorney Robert Brungardt appeared on behalf of Pulaski. RP at 145. Because Mr. Jagoo had been flown in from Trinidad for the trial, the parties agreed that a continuance was not practical, however to accommodate Mr. Brungardt it was agreed that the trial would begin at 1:00 p.m. rather than 9:00 a.m. on October 28, 2009. RP at 145-46, 150.

At trial, Mr. Hudak testified to observing Pulaski’s truck pull out of a side driveway and cross three lanes of travel before colliding into the side of the SUV driven by Mr. Jagoo. RP at 214-25. Officer Christianson testified about his interactions with Pulaski, this included his observations of the physical signs of Pulaski’s intoxication and Pulaski’s refusal to take a voluntary blood test. RP at 313-26. Officer Brown testified both to his

interactions with Pulaski and to Pulaski's involuntary blood draw. RP at 272-76. Officer Brown testified that Pulaski's blood was collected into gray-topped vials came from a box provided by the Washington State Patrol. RP at 275. He testified that they were the same as the gray-topped vials that he always used for blood draw scenarios. RP at 275. Officer Brown testified that the powder in the vials was an anti-coagulant that prevented the blood from solidifying or clotting. RP at 276. The prosecutor asked if there was also an enzyme poison in this powder. RP at 276. Officer Brown stated, "It's an enzyme. Yes." RP at 276.

Forensic Toxicologist Brian Capron tested Pulaski's blood to determine its alcohol content. RP at 378. He testified that he received the blood samples in two vials with gray stoppers on top. RP at 377. When the vials were received they had not leaked and were both sealed and labeled. RP at 377. The method of testing was free from interference native to blood samples. RP at 372. The vials met all of the standards required for testing. RP at 377. Mr. Capron also testified about how alcohol is absorbed into the human body, explaining that when alcohol is consumed it takes 30 – 60 minutes to fully absorb. RP at 396-97. Mr. Capron explained that a person's blood alcohol concentration is at its highest level at full absorption. RP at 397.

When Pulaski testified, he indicated that he had left the Wild Grizzly Casino at 5:45 p.m., roughly five minutes before the collision took place at 5:50. RP at 410-11. Pulaski testified that his friends at the casino had dared him to “chug some booze.” RP at 427. He said that he consumed three Long Island Iced Teas, all at 5:30. RP at 421. However, he also said that he consumed his last drink right before he left the casino. RP at 426. He said that the Long Island Iced Teas were “all alcohol.” RP at 422. Pulaski agreed that his blood alcohol concentration (from blood draw taken at 10:30) was a 0.21 g/100mL. RP at 422. However, he said he was not intoxicated at the time he entered his truck. RP at 427. He claimed that Mr. Capron’s testimony—regarding the absorption of alcohol and a blood alcohol level that peaks between 30 minutes to an hour after alcohol is consumed—demonstrated that at the time he was driving he was not yet intoxicated. RP at 427-28. Pulaski maintained that as time progressed he became more intoxicated, so he was headed to a friend’s house to get off the street and out of harm’s way before he became intoxicated. RP at 427-28.

During the trial, the bailiff informed the court that a juror, Ms. Culligan, had approached her, stating that the juror sitting to her left, Ms. Hatch, was making comments. RP at 347. Ms. Culligan was called into court and questioned. RP at 349. Ms. Culligan told the court that Ms.

Hatch had said, “yeah, right” a couple of times when the defense attorney was speaking. RP at 350-51. Ms. Culligan informed the court, that Ms. Hatch’s statements would not influence her decision in the case. RP at 352. The court then called the juror who was sitting on the other side of Ms. Hatch, Ms. Taafe into the courtroom. RP at 353. The judge asked Ms. Taafe if she had heard any other jurors making comments during the trial. RP at 354. Ms. Taafe told the judge that she had not heard any comments. RP at 354.

At this point, Pulaski’s attorney moved for a mistrial based on juror misconduct. RP at 355. The court did not immediately rule on the motion, but rather said that Ms. Hatch would be excused and then the rest of the jury panel would be questioned. RP at 356. The court brought Ms. Hatch into the courtroom and excused her from the jury. RP at 356. After Ms. Hatch was excused, the court called the other jurors into the courtroom. RP at 357. The court then asked the entire jury if anyone had heard any other jurors making comments or noises. RP at 357. One of the jurors, Ms. Winans stated that she had. RP at 357-58. Other than Ms. Culligan, none of the remaining jurors had heard any other jurors make comments. RP at 357. The court sent all of the jurors, other than Ms. Winans, back to the jury room. RP at 358.

The court asked Ms. Winans about what she had heard. RP at 358. Ms. Winans told the court that she had heard Ms. Hatch make the comment that “you could already tell by what we have already heard that the defendant was guilty.” RP at 358. Ms. Hatch told the court she had heard Ms. Hatch say this in the jury room. RP at 361. Ms. Winans said that in the jury room there were a lot of people talking and she was sitting quietly across the table from Ms. Hatch, who was standing, when she heard her make this statement. RP at 361. Ms. Winans told the court that what she had heard would not influence her decision, that she could decide the case based on the evidence presented, and be fair to both sides. RP at 359.

After excusing Ms. Winans, Pulaski’s attorney again told the court he believed the panel was tainted to further support his motion for mistrial. RP at 362. The court called the jurors back into the courtroom to inquire about any statements Ms. Hatch had made in the jury room. RP at 363. The court informed the jurors that Ms. Hatch had been excused and asked whether any of them had heard Ms. Hatch or any of the other jurors express any opinions. RP at 363-64. Other than Ms. Culligan and Ms. Hatch, none of the jurors indicated having heard any opinions expressed by Ms. Hatch or any of the other jurors. RP at 364. The court then reminded the jury of its instruction not to discuss the case until it was time

to deliberate. RP at 364. The court further instructed the jury that each juror was to decide for his or herself after discussing the case during deliberations. RP at 364. The court asked if all of the jurors would follow this instruction and keep an open mind until the case was submitted for deliberation. RP at 364. The jurors told the court that they would follow this instruction. RP at 364. The court again asked the jurors, if anyone had heard anything said by Ms. Hatch. RP at 364. Only Ms. Winans and Ms. Culligan raised their hands. RP at 364. The court then proceeded with the trial. RP at 365. After a three-day trial, the jury returned a verdict finding Pulaski guilty of Vehicular Assault while Driving Under the Influence.

IV. ARGUMENT

Pulaski's appeal fails for several reasons. First, because the admission of the result of his blood alcohol concentration ("BAC") test was not objected to at trial, the issue is waived on appeal. Second, his attorney was not ineffective because the necessary foundation for the admission of Pulaski's BAC result was laid prior to it being admitted, so an objection to its admission would have been futile, and Pulaski has not shown that his attorney was ineffective for agreeing to represent him on short notice. Third, because Pulaski waived his right to an attorney through his dilatory conduct, he may not claim ineffective assistance of

counsel based on the fact that his attorney entered a notice of appearance the day before the trial was scheduled. Finally, the trial court did not abuse its discretion in denying Pulaski's motion for a mistrial, when it had excused the offending juror and the only two jurors who heard the excused juror's comments assured the court that hearing these comments would not influence their decision.

a. Because the admission of Pulaski's BAC result was not objected to at trial, the issue is waived on appeal.

Because Pulaski did not object to the admission of his BAC result at trial, the issue is waived on appeal. It is a long-held rule that failure to object to the admission of evidence at trial waives the issue on appeal: "This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial. Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts." *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Further, under the court rule, an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a).

Here, when the State moved to admit Pulaski's BAC result, his attorney stated that the defense had no objection. RP at 380. Because Pulaski did not object to the admission of his BAC result, the trial court did not err in admitting it. Pulaski appears to recognize this problem in his appeal, stating: "Should the State argue that defense counsel's failure to object to the admission of the result constituted a waiver of this issue by Mr. Pulaski, defense counsel was ineffective for failing to object...." See Brief of Appellant at 8. While Pulaski can argue that he received ineffective assistance based on his attorney's decision not to object, he cannot raise this issue directly for the first time on appeal. Accordingly, Pulaski has waived his right to appeal this issue.

b. Pulaski did not suffer ineffective assistance of counsel because his defense attorney chose not to object to the admission of his BAC test result or because his attorney agreed to represent him on short notice.

Pulaski did not receive ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102

Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show “there is a

reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173.

Here, Pulaski did not suffer ineffective assistance for the following reasons: First, the State established the necessary foundation for the BAC result prior to moving for its admission. Second, the admission of Pulaski's BAC result was consistent with his own testimony that he shotgunned multiple Long Island Iced Teas just prior to driving and attempted to get home before his BAC rose above the legal limit, therefore he was not intoxicated at the time of the collision. Third, Pulaski's attorney's decision to represent him on short notice does not establish a per se claim of ineffective assistance of counsel. Finally, Pulaski has not shown that he suffered any prejudice.

- i. The defense attorney's decision not to object to the admission of Pulaski's BAC result was not ineffective because prior to moving for its admission the State established a prima facie foundation; therefore objecting would have been futile.**

Because the evidence presented by the State established a prima facie foundation for Pulaski's BAC result, it would have been admitted even if Pulaski's attorney had objected. "Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that an objection would likely have been sustained." *State v.*

Fortun-Cebada, 2010 WL 4193029, ___ Wn.App. ___, ___ P.3d ___ (2010) (citing *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998)). Thus, to show that his attorney was ineffective in failing to object, he must show that the objection would have been sustained.² However, because the State made a prima facie showing of compliance with the foundational requirements for the admission of Pulaski’s BAC result, it was admissible.

“Before blood alcohol tests results can be admitted into evidence, the State must present prima facie proof that the test chemicals and the blood sample are free from adulteration that could conceivably introduce error to the test results.” *State v. Wilbur-Bobb*, 134 Wn.App. 627, 630, 141 P.3d 665 (2006) (citing *State v. Clark*, 62 Wn.App. 263, 270, 814 P.2d 222 (1991)). To ensure that blood is preserved for testing, WAC 448-14-020(3)(b) requires: “[b]lood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration.” Among the foundational requirements for admitting a BAC result, the State must establish a prima facie showing of compliance with this requirement. Because the State established a prima facie showing of

² Further, had an objection been sustained, Pulaski cannot show that the State would not have simply laid additional foundation to establish the admissibility of the result. There is no indication in the record that there was any type of problem with the blood draw or blood test—making such a showing highly improbable.

compliance with this requirement at trial, Pulaski's BAC result was properly admitted.

In *State v. Brown*, 145 Wn.App. 62, 69, 184 P.3d 1284 (2008), the Court of Appeals dealt with the question of whether a prima facie showing had been made for admission of a blood test result. During trial, Brown's BAC result was admitted over defense objections to lack of foundation for admissibility. *Id.* at 68. The Court of Appeals explained that it would have been an abuse of discretion for the trial court to admit (over Brown's objection) evidence of his blood test result in the face of insufficient prima facie evidence. *Id.* at 69 (citing *State v. Bosio*, 107 Wn.App. 462, 468, 27 P.3d 636 (2001)). The driving under the influence statute defines "prima facie evidence" as "evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." *Id.* (citing RCW 46.61.506(4)(b)).³ Prima facie proof requires the State to show the test chemicals and the blood sample are free from any adulteration; a blood sample analysis is admissible only when it is performed according to the WAC requirements. *Id.* at 69 - 70 (internal citations omitted). The court noted that the purpose of requiring the use of anticoagulants and an enzyme poison was to prevent clotting. *Id.* The

³ In a footnote, the Court of Appeals stated: "Subsections (4)(b) and (c) apply to the entire section of RCW 46.61.506, which includes breath and blood tests." *Id.* at 69 n.1.

court then stated: “Once a prima facie showing is made, it is for the jury to decide the weight to be attached to the evidence.” *Id.*

In Brown’s case, no one with firsthand knowledge testified as to what was contained in the vials used for Brown’s blood draw. *Id.* at 71. The phlebotomist who drew the blood testified that she believed the powdery substance in the vials used was “sodium oxalate.” *Id.* at 70. The toxicologist who tested the blood testified that vials used for the collection of samples are provided by the manufacturer and contain the chemicals potassium oxalate and sodium fluoride. *Id.* at 71. The toxicologist also testified that if those chemicals had not been present, the blood would have been clotted and no alcohol would have been detected in the samples. *Id.* The Court of Appeals explained: “there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State’s evidence and all reasonable inferences in a light most favorable to the State.” *Id.* Because the blood was not clotted and alcohol was able to be detected, the State provided sufficient prima facie evidence that the vials contained the WAC-approved substances. *Id.*

Here, as in *Brown*, if all reasonable inferences are assumed in the light most favorable to the State, the State presented prima facie evidence that the vials contained the WAC-approved substances—an anticoagulant and an enzyme poison. After Officer Brown testified that the powdery

substance was an anticoagulant, the prosecutor asked Officer Brown if the powder also contained an enzyme poison. Officer Brown responded, “It’s an enzyme, yes.” The most obvious way to interpret this response is that the white powdery substance was both an anticoagulant and an enzyme poison. Thus, Officer Brown’s testimony established that the vials contained both an anticoagulant and an enzyme poison. The possibility of different interpretations of Officer Brown’s response does not change the fact that at least one way to interpret his response is that the white powdery substance contained both an anticoagulant and an enzyme poison. Taken in the light most favorable to the State, the court was required to follow this interpretation. Further, Mr. Capron testified that the vials met all standards for testing. Had the blood clotted due to the lack of an enzyme poison, the vials would not have met all standards.⁴ Because the State established prima facie foundation for the BAC result, it was admissible and would have been admitted even if Pulaski’s attorney had objected.⁵ Thus, Pulaski has not shown that by choosing not to object his attorney failed to exercise the customary skills and diligence that a

⁴ The WAC requirement is not that the vials contain an anti-coagulant and an enzyme poison, but that they are “preserved with an anti-coagulant and an enzyme poison *sufficient to prevent clotting and stabilize alcohol concentration.*” WAC 448-14-020(3)(b) (emphasis added). In *Brown*, the court noted that testing would not be possible if the blood were clotted, therefore the fact that the blood was preserved for testing was additional evidence of the presence of the necessary chemicals. 145 Wn.App. at 71-72.

⁵ Especially considering that in *Brown*, prima facie evidence of an enzyme poison was established even without any testimony from a witness with firsthand knowledge that the vial contained an enzyme poison. *Id.* at 72.

reasonably competent attorney would exercise under similar circumstances.

- ii. Because Pulaski's BAC result was consistent with the defense theory that he was not intoxicated at the time of driving but would have been at the time of the blood draw, it was not ineffective for his attorney not to object to its admission.**

Because Pulaski's testimony was that he drank three Long Island Iced Teas in rapid succession prior to driving and then attempted to drive before the alcohol was fully absorbed into his blood, there was no point to objecting to the results of a test that was conducted on blood drawn over four hours after the collision. The Washington State Supreme Court has stated: "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The defense theory of the case was that Mr. Jagoo was the cause of the collision due to his blood alcohol concentration ("BAC") of 0.12 g/100mL, and that although Pulaski had consumed a substantial quantity of alcohol, his BAC had not yet rose to the point where he was affected at the time of the collision. Thus, the admission of Pulaski's BAC result from a blood draw

taken well after full absorption of the alcohol was consistent with the defense theory of the case.

In *State v. Sardinia*, 42 Wn.App. 533, 534, 713 P.2d 122 (1986), the defendant Leandro Sardinia was convicted of indecent liberties and first degree statutory rape. Sardinia filed a personal restraint petition arguing that he did not receive effective representation because his attorney did not call numerous witnesses. *Id.* at 535, 541. At trial Sardinia had maintained that he had not committed any of the alleged acts. *Id.* at 542. Although the testimony of these witnesses would have raised questions about the victim's credibility, it was also likely that they would testify that the acts probably had occurred. *Id.* Because Sardinia maintained complete innocence, his attorney chose not to call these witnesses. *Id.*

The Court of Appeals applied the *Strickland* test to determine whether Sardinia's counsel had been effective.⁶ *Id.* at 540. Under the first prong of the *Strickland* test, Sardinia was required to show that his attorney's decision not to call the witnesses fell below an objective standard of reasonableness. *Id.* at 542. The court noted that the decision not to call witnesses was a strategic one and then stated: "[s]uch decisions, though perhaps viewed as wrong by others, do not amount to ineffective

⁶ At the time of this case, the *Strickland* test was relatively recent; the Court of Appeals held that the *Strickland* test applied to Washington's courts.

assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). The court then held that, “in light of the wide latitude defense counsel has in making tactical decisions,” Sardinia’s attorney’s decision not to call these witnesses was reasonable. *Id.* The court also stated that because it would have been impossible to show that but for counsel’s errors Sardinia would not have been convicted, he also failed under the second prong of the *Strickland* test. *Id.* at 543.

Here, Pulaski’s testimony was that he consumed three Long Island Iced Teas⁷ at a rapid rate and then drove before he became intoxicated. He testified that he had consumed these drinks at 5:30 and had finished his last drink right before he left the casino at 5:45. Mr. Capron testified that full absorption occurs 30 to 60 minutes after consuming an alcoholic beverage. Pulaski’s testimony was consistent with having a blood alcohol concentration (“BAC”) of 0.21 g/100mL, when the blood draw took place well after full absorption occurred.⁸ Thus, there was no point to objecting to the admission of his BAC result, when the defense theory was that

⁷ A Long Island Iced Tea normally contains ½ ounce of each of the following: vodka, gin, tequila, rum, and triple sec. BRIAN LUCAS, 365 COCKTAILS: THE COMPLETE BARTENDER’S GUIDE 42 (2003). Pulaski’s testimony that he shotgunned three of these drinks on a dare just before driving means that by his own admission he had drunk the equivalent of 7½ ounces of hard liquor. Pulaski himself stated that these drinks were “all alcohol.” RP at 422.

⁸ Further, Pulaski even acknowledged that his BAC result was correct. RP at 422.

although Pulaski was intoxicated at the time of the blood draw, he was not intoxicated at the time of driving.

iii. Pulaski did not suffer ineffective assistance of counsel merely because his attorney agreed to represent him on short notice.

Without a specific showing in the record that his attorney failed to adequately represent him, Pulaski cannot show that he suffered ineffective assistance of counsel. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, a claim of ineffective assistance of counsel must be “based on the record.” Other than his allegation regarding the admission of his BAC result, Pulaski’s claims regarding ineffective assistance of counsel are not based on specific examples in the record. Pulaski broadly asserts that his attorney’s performance was deficient simply because he chose to represent him on short notice. According to this line of reasoning, no attorney could ever agree to represent a client on short notice. However, Pulaski provides no legal support for this assertion.

Generally, defense counsel is not required to conduct an exhaustive investigation or contact all possible witnesses, the standard is one of reasonableness. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 900,

952 P.2d 116 (1998) (citing *Burger v. Kemp*, 483 U.S. 776, 794-95, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)). Choosing to interview and call witnesses is a question of trial tactics. *In re Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). At minimum, a defendant seeking relief under a “failure to investigate” theory must show a reasonable likelihood that the investigation would have produced useful information not already known to his or her trial counsel. *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir.2001) amended by 253 F.3d 1150 (2001) (“When the record clearly shows that the lawyer was well-informed, and the defendant fails to state that additional information would be gained by the discovery she or he now claims was necessary, an ineffective assistance claim fails.”). When evaluating prejudice, “ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.” *Id.* at 1088 (quoting *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir.1986)).

Here, Pulaski’s appeal attempts to paint of picture of his attorney failing to competently represent him, yet in the entire record he can find only a single example of this alleged ineffectiveness—not objecting the admission of his BAC result.⁹ Thus, Pulaski broadly asserts that his

⁹ For the reasons previously stated, such an objection would not have been sustained and was also consistent with the defense theory of the case. *See supra* B-1, B-2.

attorney was ineffective for representing him in trial the day after entering his notice of appearance. However, this argument fails to take into account the experience of the attorney, the circumstances involved, or the simplicity of the issues presented.¹⁰ *See infra* B-4. Further, there is always a strong presumption that defense counsel's conduct constituted sound trial strategy. *See Barragan*, 102 Wn.App. at 762.

Mr. Brungardt's level of preparation cannot be ascertained simply by the fact that he entered a notice of appearance the day before trial. As far back as January 19, 2009, Pulaski had told the court he was hiring Mr. Brungardt to represent him. RP at 45. Therefore it is quite possible that Mr. Brungardt had discussed this case and put time and thought into how to represent Pulaski long before entering his notice of appearance. On October 27, 2009, when Mr. Brungardt entered his notice of appearance, he did not move for a continuance.¹¹ There were sound tactical reasons for proceeding to trial. The issues in the case were relatively simple and it was imperative to Pulaski's defense that Mr. Jagoo be called as a witness, because the defense theory was that Mr. Jagoo's intoxicated driving was the cause of the collision. RP at 428. Mr. Jagoo had already been flown

¹⁰ An eyewitness saw Pulaski drive directly into Clayton Jagoo's vehicle, Jagoo suffered a fractured skull and broken arm, and Pulaski exhibited obvious physical signs of intoxication and had a BAC of 0.21.

¹¹ However, to accommodate Mr. Brungardt, the trial was rescheduled to begin at 1:00 pm rather than 9:00 am.

out for trial from Trinidad, and it was unclear whether the State would be able to secure his return for another trial after October of 2009. Considering the risk of not having Mr. Jagoo as a witness, Mr. Brungardt made the sensible decision to proceed, reasoning that Pulaski had the best hope of succeeding at trial if Mr. Jagoo was available for cross examination.

In his appeal, Pulaski berates his attorney, stating: “Just sitting next to Mr. Pulaski while having an active bar number does not constitute representation by counsel.” Brief of Appellant at 11. Thus, he implies that his attorney failed to make efforts on his behalf during the trial. Yet, when there was a potential instance of juror misconduct, Pulaski’s attorney moved for a mistrial—a decision that Pulaski now argues was correct on appeal. Mr. Brungardt’s performance must be judged according to the circumstances in which the case was undertaken. A continuance was unlikely and had a continuance been granted, there was no guarantee that Mr. Jagoo would have been available to testify at a later date. Mr. Brungardt’s willingness to represent a client on short notice who (by his own doing) was faced with the prospect of representing himself should be esteemed rather than demeaned. On appeal, it is Pulaski’s burden to show that his representation fell below an objective standard of reasonableness, and he has simply failed to show that here.

iv. Pulaski has not shown that he suffered any prejudice.

Pulaski has not shown that he suffered any prejudice. In addition to showing that counsel's performance fell below an objective standard of reasonableness, to sustain a claim for ineffective assistance it must also be shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 446 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Even if Pulaski could show that his attorney's performance fell below an objective standard of reasonableness, satisfying the first prong of the *Strickland* test, he would still need to show that there is a reasonable probability that if his attorney had not made these errors the outcome of the trial would have been different. Because there is not a reasonable probability of a different outcome, Pulaski cannot show that he suffered any prejudice.

In *State v. McFarland*, 127 Wn.2d 322, 327, 899 P.2d 1251 (1995), James McFarland and Michael Fisher argued that their attorneys were ineffective for failing to move for the suppression of evidence obtained following their warrantless arrests. The Supreme Court found that neither McFarland nor Fisher could "demonstrate actual prejudice resulting from

counsel's failure to move for suppression of evidence obtained following a warrantless arrest." *Id.* at 338. The Court noted that neither of the defendants had shown "actual prejudice sufficient to satisfy the second prong of the *Strickland* test." *Id.* *McFarland* demonstrates that it is the defendant's burden to show actual prejudice. Therefore, a defendant claiming ineffective assistance bears the burden of showing that the outcome of a trial would have been different had his or her attorney not made an error.

Here, Pulaski has not shown how there is a reasonable probability that the outcome of his trial would have been different, had his attorney not erred as he has alleged.¹² In contrast there was overwhelming evidence of his guilt, even in the absence of his BAC result. At trial, the State demonstrated causation by presenting both photographic evidence and eyewitness testimony that Pulaski had driven his truck directly into the driver's side of Mr. Jagoo's vehicle. Because Mr. Jagoo suffered a fractured skull and a broken arm, substantial bodily harm was not at issue.

Pulaski exhibited obvious physical signs of intoxication including bloodshot and watery eyes, droopy eyelids, slurred speech, delayed responses, a flushed and reddish face, poor coordination, and a smell of alcoholic beverage on his breath that was so strong that filled his entire

¹² Pulaski also cannot show that had the court granted an objection to the BAC result, the State would have been unable to establish sufficient foundation for its admission.

hospital room. RP 313-16. Pulaski refused to take the blood test, even when he was read the implied consent warning which informed him that his refusal to take the test would result in the loss of his driver's license for at least a year. RP at 325-26. Further, when he attempted to sign his implied consent warning, he could not contact his pen to the paper without help, and he signed an inch above the line designated for his signature. RP at 326. Finally, Pulaski himself testified that he shotgunned three Long Island Iced Teas—hard alcoholic beverages that Pulaski described as consisting of “all alcohol”—just prior to driving. RP at 421. Under the weight of this evidence, there is simply not a reasonable probability that had Pulaski's BAC result not been admitted, the outcome of his trial would have been any different. Under these circumstances, he cannot show that he suffered any prejudice.

c. Pulaski cannot claim ineffective assistance of counsel when his own delay in securing the services of counsel was the reason his attorney was forced to represent him on short notice.

Pulaski cannot claim it was ineffective for his attorney to try his case the day after entering his notice of appearance when Pulaski waited until the day before trial to obtain representation. “A defendant may not ‘manipulate his right to counsel for the purpose of delaying and disrupting the trial.’” *State v. Johnson*, 33 Wn.App. 15, 22, 651 P.2d 247 (quoting

United States v. Sperling, 506 F.2d 1323, 1337 n.19 (2d Cir. 1974) *cert. denied*, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975)). Pulaski was informed of the dangers of proceeding to trial without counsel, however he delayed obtaining counsel until the day before his trial was scheduled to begin. Prior to his obtaining counsel, the court found that he had waived his right to counsel by his dilatory conduct. Pulaski cannot now argue on appeal that his attorney was ineffective because he was inadequately prepared, when by his own actions he forced his attorney into a situation where the case needed to be tried the day after he began representation.

A defendant in a criminal prosecution has a right to assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. This right to counsel may be waived, but a waiver must be knowing, voluntary, and intelligent. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984) (citing *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)). To waive the right to counsel the defendant must be “made aware of the dangers and disadvantages of self representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” *Id.* at 209 (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (citation omitted)). However, “[a]lthough a defendant has an absolute right to trial, that right does not allow a defendant to ‘delay a trial either deliberately or

inadvertently because he has made little effort to engage an attorney.” *City of Tacoma v. Bishop*, 82 Wn.App. 850, 856 920 P.2d 214 (1996) (citing *Johnson*, 33 Wn.App. at 22 (quoting *United States v. Merriweather*, 376 F.Supp. 944, 945 (E.D.Pa. 1974))). “[A]n accused who is able to employ counsel and fails to do so after being afforded an opportunity, thereby waives the right and may not urge lack of counsel as an excuse for delay.” *Johnson*, 33 Wn.App. at 24 (quoting *Spevak v. United States*, 158 F.2d 594, 596 (4th Cir. 1946), *cert. denied*, 330 U.S. 821, 67 S.Ct. 771, 91 L.Ed. 1272 (1947)). The right to counsel may be waived by conduct if (1) the defendant is dilatory in securing counsel and (2) the defendant is warned about the consequences of his or her actions, including the risk of proceeding pro se. *See Bishop*, 82 Wn.App. at 859.

Here, Pulaski was warned that his trial, which had been continued for over two years, would not be continued again if he did not obtain counsel. Yet, even at his final readiness hearing, Pulaski did not appear with counsel.¹³ On two separate occasions, the court went through a colloquy with Pulaski advising him of the potential risks he was facing and the dangers of proceeding without counsel. The court found that Pulaski had been dilatory in obtaining counsel and by his conduct had

¹³ Obviously, Pulaski’s requirement that his attorney not be a member of the bar association made it unlikely he would ever obtain counsel.

waived his right to counsel. At this point, Pulaski's right to counsel was waived by conduct.

If it is true that Mr. Brungardt had only one day to prepare for the trial,¹⁴ then this was caused by Pulaski's own dilatory action of failing to secure the services of an attorney until the day before his trial was to begin. It was not the attorney's fault that his client created a situation where he had minimal time to prepare for trial. It would circumvent justice to allow Pulaski to use his deliberate delay in hiring an attorney until the day before trial as justification for his argument that his attorney was ineffective because he only had one day to prepare for trial. Further, Pulaski himself acknowledged that he was not skilled and would have a difficult time representing himself. RP at 106. Yet had he not hired Mr. Brungardt, Pulaski would have proceeded to trial pro se. Surely Pulaski was better off being represented by an experienced attorney than he would have been attempting to represent himself. Because Pulaski waived his right to counsel through his own dilatory conduct, he cannot claim his attorney was ineffective for lack of preparation when he did not hire his attorney until the day before his trial was set to begin.

d. The trial court did not err in denying Pulaski's motion for a mistrial, because there was no evidence that the 12

¹⁴For reasons previously stated, it was entirely possible that Mr. Brungardt had been preparing for this trial for more than a day.

jurors who decided the case were “tainted” and unable to decide the case based on the evidence presented.

The trial court did not err when it denied Pulaski’s motion for mistrial, because the 12 jurors who decided the case demonstrated that they could be fair in deciding the case based on the evidence presented and the law provided. With regard to questions of juror misconduct, “[a] new trial is only warranted when (1) the juror’s actions actually constituted misconduct and (2) the misconduct affected the verdict.” *State v. Williamson*, 131 Wn.App. 1, 7, 86 P.3d 1221 (2005) (citing *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 271, 796 P.2d 737 (1990)). This requires a “strong, affirmative showing” of juror misconduct. *Id.* (citing *Richards*, 59 Wn.App. at 271). “Whether the alleged misconduct exists, whether it is prejudicial and whether mistrial is declared are all matters for the discretion of the trial court.” *Id.* “Unless it clearly appears the court abused its discretion, the ruling will not be disturbed.” *State v. Kerr*, 14 Wn.App. 584, 591, 544 P.2d 38 (1975) (citing *Fleenor v. Erickson*, 35 Wn.2d 891, 215 P.2d 885 (1950)). Abuse of discretion only occurs when the trial court’s discretion is “manifestly unreasonable” or is exercised on “untenable grounds or for untenable reasons.” *Williams*, 131 Wn.App. at 7 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482

P.2d 775 (1971)). The defendant bears the burden of proving abuse of discretion. *See id.*

In *Kerr*, prior to voir dire one of the jurors commented, “Here comes the enemy,” as Kerr’s defense attorney entered the courtroom. 14 Wn.App. at 591. This comment did not come to light until after the jury had been sworn in. *Id.* The court denied a motion for mistrial, noting that the remark had been made laughingly and that the juror had responded with humor during voir dire. *Id.* The court reasoned that although the juror had failed to be “properly solemn” during voir dire, he was questioned by both sides and stated he had no prejudice against the defendant or his attorney. *Id.* Kerr appealed his conviction, arguing that the mistrial for juror misconduct should have been granted. *Id.* at 585.

The Court of Appeals explained that under the law: “[a] juror holding certain preconceptions is not disqualified, provided he can put these ideas aside and decide the case on the basis of the evidence and the law as instructed by the court.” *Id.* 591 (citing *State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962)). Because the decision to grant or deny a mistrial is in the discretionary function of the trial court, unless it is clear that the trial court abused its discretion the ruling will not be disturbed on appeal. *Id.* (citation omitted). Because there was no substantiation in the record that the juror harbored bias against the defense, the Court of

Appeals found that trial court's denial of the motion for mistrial had been proper. *Id.*

Here, unlike *Kerr*, where the offending juror actually remained on the jury, Ms. Hatch was excused and was not involved in deciding the outcome of the case. There is no evidence that the jurors who ultimately decided the case were affected by the comments made by Ms. Hatch. Only two jurors had heard Ms. Hatch make any comments. Ms. Culligan, who was seated next to Ms. Hatch stated that she had heard her say "yeah right" when Pulaski's attorney was speaking. Ms. Culligan assured the court that Ms. Hatch's statements would not influence her decision in the case. Ms. Winans stated that a lot of people were talking in the jury room and she heard Ms. Hatch say, "You could already tell by what we have already heard that the defendant is guilty." Ms. Winans assured the court Ms. Hatch's comments would not influence her decision, that she could decide the case on the evidence presented, and be fair to both sides.

The trial court judge's actions were sufficient to ensure a fair jury.¹⁵ Upon being alerted that Ms. Hatch had made comments, the judge

¹⁵ In his brief Pulaski argues that the trial court's inquiry to Ms. Winans was inadequate, maintaining that the court should have asked Ms. Winans open ended questions to determine whether Ms. Winans agreed with Ms. Hatch's comment that Pulaski was obviously guilty. Such an inquiry would be wholly improper—Pulaski appears to be arguing that the trial court judge should have asked Ms. Winans to render her opinion as to the guilt or innocence of Pulaski prior to hearing all of the evidence. This would have violated the court's instruction not to discuss the case or deliberate until hearing all of the evidence.

questioned Ms. Culligan, who had reported to the bailiff and heard these comments. He then questioned Ms. Taafe who had been sitting on the other side of Ms. Hatch. Ms. Taafe told the court she did not hear Ms. Hatch make any comments. Ms. Hatch was excused from the jury. The judge then questioned the entire jury to determine if anyone had heard Ms. Hatch's comments. Ms. Culligan told the court she had heard Ms. Hatch make a comment while everyone was talking back in the jury room. None of the other jurors heard Ms. Hatch make any comments. Both Ms. Culligan and Ms. Winans assured the court that Ms. Hatch's comments would not influence their decision. The entire jury was reinstructed not to discuss the case until it was it was time to deliberate.

Here, there is no showing in the record that the jury was influenced by Ms. Hatch's comments. To the contrary, the only two jurors who heard her make these comments affirmatively stated they would not be influenced by them in reaching their decision. Pulaski overreaches in arguing, that in spite of her assurance, Ms. Winans was tainted simply because she was the foreperson and the jury reached its verdict in a relatively short period of time. Although it was not proper for Ms. Hatch to express an opinion in advance of deliberations, at the beginning and end of every trial, jurors hear the opinions of others and are still trusted to reach a decision based on the evidence presented. Pulaski has made no

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DIVISION II

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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON
BY E
DEPUTY

STATE OF WASHINGTON,)	NO. 40087-1-II
)	Cowlitz County No.
Respondent,)	07-1-00811-7
)	
vs.)	CERTIFICATE OF
)	MAILING
THOMAS ROY PULASKI,)	
)	
Appellant.)	
)	

I, Michelle Sasser, certify and declare:

That on the 29th day of November, 2010, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief and Motion to Supplement Record on Review addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Anne Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625

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

Dated this 29th day of November, 2010.

Michelle Sasser

Michelle M. Sasser