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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The state's action eliciting evidence that the defendant refused to speak with the police and that her refusal constituted evidence of guilt, denied the defendant her right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

2. Trial counsel's failure to object when the state elicited evidence that the defendant had refused to speak with the police and that this refusal constituted evidence of guilt, denied the defendant her right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

### ***Issues Pertaining to Assignment of Error***

1. Does a prosecutor's actions eliciting evidence that a defendant refused to speak with the police and that her refusal constituted evidence of guilt deny, that defendant her right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment?

2. Does a trial counsel's failure to object when the state elicits evidence that the defendant refused to speak with the police and that this refusal constituted evidence of guilt, deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

## STATEMENT OF THE CASE

### *Factual History*

In July of 2008, the defendant Inna Bochkareva, an immigrant from the former Soviet Union, rented a house at 110 South Blanford Drive in Vancouver from Viktor and Liliya Gromysh, immigrants from the Ukraine. RP 33-37, 297-303.<sup>1</sup> The house at that location includes a large garage, in which Mr. Gromysh continued to store materials for his flooring and cabinet installation business. RP 37-43. Those materials included 5,526 square feet of pre-finished hardwood flooring Mr. Gromysh had purchased at a large discount from a supplier in Portland who was retiring and closing out his business. RP 43-48. Mr. Gromysh paid \$6,000.00 for the flooring, although it was worth anywhere from two to five times that much, depending upon timing and whether it was purchased wholesale or retail. RP 43-48, 113-120. He later used about 1,100 square feet of that flooring on one of his construction projects. RP 49-52.

In August of 2009, the defendant and her two children moved out of the house on Banford. RP 53-57. After they moved, Viktor Gromysh and his wife entered the garage and noted that the remaining wood flooring was gone. *Id.* After discussing this, they called and asked the defendant what had

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<sup>1</sup>The record on appeal includes three volumes of continuously numbered verbatim reports, referred to herein as “RP [page #].”

happened to the flooring. *Id.* According to Viktor Gromysh, the defendant told him that one of her friends had taken it, that it was gone, and that he could “go to hell.” *Id.* The defendant denied ever making such a statement or knowing anything about what happened to the flooring. RP 296-304. However, regardless of which claim was correct, following this conversation, Mr. Gromysh called the police, and then called the defendant to tell her that the police were going to arrest her and that if she would return the flooring, she could avoid any trouble. RP 58-59, 296-303.

Following this second telephone conversation, the defendant went back over to the house on Banford and met with Viktor and Liliya. RP 60-68. At that time, she wrote out and signed a short statement in Russian at Viktor’s request. *Id.* This statement read as follows:

I, Inna Bochkareva, will take two weeks to clean the house and to return the floors which is approx 4000 square feet and I will do so on 10/1/09 to 10/15/09.

RP 249-251.

According to Viktor Gromysh, the defendant composed and wrote this statement of her own free will. RP 68-69. According to the defendant, Viktor Gromysh dictated this statement to her, it was untrue, and she only wrote and signed it because she was afraid of him. RP 297-303. After writing the statement, the defendant left. RP 68-69. Viktor Gromysh then called the police, and waited for an officer to respond. RP 60-65. A short

time later, a Vancouver Police Officer arrived and Mr. Gromysh told the officer his version of what had happened. RP 218-223. At the officer's request, Viktor called the defendant, and handed over his cell phone to the officer. RP 223-228. The officer then identified herself and stated that she wanted to talk to the defendant about the flooring. *Id.* According to the officer, the defendant immediately hung up and refused to talk to her about Mr. Gromysh's allegations. *Id.*

After the defendant hung up the phone, the officer had Viktor Gromysh use his cell phone to call the defendant a second time. RP 223-228. This time, the defendant refused to answer. *Id.* The officer then had Liliya Gromysh use her cell phone to call the defendant at the same telephone number. *Id.* This time, the defendant answered and engaged in a short conversation with Liliya in Russian. *Id.* After this call was over, the officer used Viktor Gromysh's cell phone a third time to call the defendant, who again refused to answer. *Id.* This time, the officer left a message telling the defendant to call the police station and come in to talk about the missing flooring. *Id.* According to the officer, the defendant never did come into the police station to talk to her. *Id.*

After the officer's unsuccessful attempts to talk to the defendant, she returned to the police station and passed all of her information to a second officer who speaks Russian as his first language. RP 230. About a week

later, this officer responded to the house on Blanford after Viktor Gromysh called to say that the defendant was there. RP 253-255. Once the officer arrived, he saw the defendant standing in the driveway speaking to Viktor and Liliya. *Id.* The officer then had the defendant come over to the patrol car so they could speak privately. *Id.* During this conversation, which was in Russian, the defendant told the officer that she had rented the house from Viktor and Liliya Gromysh, that there had been flooring in the garage, and that she had written the note for Viktor because she was afraid of him. RP 255-256. Following this conversation, the officer placed the defendant under arrest. RP 256-257.

### ***Procedural History***

By information filed October 16, 2009, the Clark County Prosecutor charged the defendant Inna Vyacheslavovna Bochkareva with one count of first degree theft. CP 1-2. The case eventually came on for trial before a jury with the state calling seven witnesses, including Viktor Gromysh, his wife, two of his employees, Officer Miranda Ross (the first officer who did the initial investigation), and the second officer who interviewed the defendant in Russian and arrested her. RP 32, 104, 136, 152, 204, 217, 238. The defendant then called one witness before taking the stand on her own behalf. RP 270-296. These witnesses testified to the facts set out in the preceding Factual History. *See* Factual History.

In addition, Viktor Gromysh and Officer Ross detailed to the jury that the defendant had repeatedly refused to talk about the allegations with Officer Ross, including (1) having hung up on the officer after she identified herself and asked the defendant to respond to the claims that she stole the flooring, (2) having refused a second time to answer the phone even though the officer knew the defendant was receiving the call since Liliya was able to call the defendant right after the officer hung up on her call, (3) having refused a third time to answer the phone even though the officer knew that the defendant was receiving the call since Liliya had just finished her telephone conversation with the defendant, and (4) having refused to call the officer back or come to the police station to be interviewed even though the officer had left her a voice message telling her to come to the police station to talk. RP 58-59, 223-228. In Viktor's words, this evidence showed that "Inna was not cooperating with the police officer." RP 58-59. At no point during any of this testimony did the defendant's attorney object that this evidence violated both Washington Constitution, Article 1, § 9, as well as United States Constitution, Fifth Amendment. RP 58-59, 223-228.

Following the reception of evidence and instruction by the court, the prosecutor presented closing argument, which included a specific claim that the jury should infer guilt from the defendant's repeated refusal to speak with Officer Ross. RP 367. This argument included the following statements by

the prosecutor:

Officer Ross testified that she was unable to talk to the defendant, the defendant hung up on her. Not once but at least twice. She tried from Viktor's cell phone twice and she had Liliya call twice. All four times not able to reach the defendant.

RP 367, lines 13-18.

Once again, defendant's counsel failed to make any objection that the prosecutor was commenting on the defendant's exercise of her right to silence under both the state and federal constitutions. *Id.*

The jury eventually returned a verdict of "guilty" in this case, after which the court imposed a standard range sentence of 20 days in jail, along with \$30,000.00 in restitution for the remainder of the flooring that Viktor Gromysh paid \$6,000.00 to purchase. CP 68, 73-82. The defendant thereafter filed timely notice of appeal. CP 83.

## ARGUMENT

### **I. THE STATE'S ACTION ELICITING EVIDENCE THAT THE DEFENDANT REFUSED TO SPEAK WITH THE POLICE AND THAT HER REFUSAL CONSTITUTED EVIDENCE OF GUILT DENIED THE DEFENDANT HER RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.**

The Fifth Amendment to the United States Constitution states that no person “shall ... be compelled in any criminal case to be a witness against himself.” Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or make closing arguments inviting the jury to infer guilt from the defendant’s silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285

(1996), the state charged the defendant with multiple counts of vehicular homicide. At trial the chief investigating officer testified that he found the defendant in a gas station bathroom shortly after the accident and the defendant “totally ignored” him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.”

*State v. Easter*, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were “pre-arrest,” and thus not constitutionally protected. The court noted: “[t]he State argues pre-arrest silence may be used to support the State’s case in chief because the Fifth Amendment is designed to deal only with ‘compelled’ testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest.” *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused’s right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* Court, it is equally so before an arrest.

*State v. Easter*, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

The decision in *Easter* is precisely on point with the facts in the case at bar. In *Easter*, a police officer confronted the defendant shortly after the crime was committed and attempted to get the defendant to speak to him about his involvement. In the case at bar, a police officer confronted the defendant shortly after the officer became aware of the claims that the defendant had committed the crime and the officer also attempted to get the defendant to speak to her about the defendant's involvement. In *Easter*, after the initial refusal to speak, the officer again tried to get the defendant to answer questions about his involvement in the alleged crime and the defendant again refused to respond to the officer. In the case at bar, after the defendant's initial refusal to speak (by hanging up the phone), the officer again twice tried to get the defendant to answer questions about her involvement in the alleged crime and the defendant again twice refused to respond to the officer. In *Easter*, the officer knew that the defendant had heard the officer's requests to answer questions because the officer was speaking face to face with the defendant. In the case at bar, the officer knew that the defendant was getting the telephone calls and refusing to speak

because the first time she identified herself, Viktor Gromysh had just been speaking with her on the telephone, and between the following two occasions when she refused to answer her phone, Liliya Gromysh was able to speak with the defendant over her cell phone.

In fact, the case at bar includes evidence not present in the *Easter* case. This evidence was the testimony of the officer that she left a message for the defendant to come to the police station to give a statement and that the defendant had failed and refused to do so. In addition, in the case at bar, as in *Easter*, the prosecutor also argued to the jury that it could infer guilt from the fact that the defendant had repeatedly refused to cooperate with the police. Thus, in the same manner that the state violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment in *Easter* by commenting on the defendant's refusal to answer the officer's questions, so the state violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment in the case at bar by commenting on the defendant's refusal to answer the officer's questions.

In this case, the state may well admit the error in repeatedly eliciting evidence that the defendant exercised her right to silence, but argue that under RAP 2.5(a) the defendant may not raise this issue for the first time on appeal. Subsection (a) of this rule states:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

In *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), the court stated the following concerning what was and was not a “manifest” error of constitutional magnitude. The court stated:

[T]he asserted error must be “manifest” – i.e., it must be “truly of constitutional magnitude.” The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.

*State v. McFarland*, 127 Wn.2d at 333 (citations omitted).

As the previous notations to the testimony of both Viktor Gromysh and Officer Ross’s trial testimony reveals, the “claimed error” is clearly within the record. Furthermore, this error directly affected the defendant’s right to silence and punished her for exercising it. One might well ask what the relevance of this line of questioning was. In other words, why did the state elicit this evidence? The answer is that the state was arguing to the jury that the defendant must be guilty of theft because, were it not so, she would not have refused to answer Officer Ross’s questions and would not have

refused to come to the police station and give a statement as the officer instructed her to do. Not only did this evidence directly impinge upon the defendant's right to silence, it also caused significant prejudice to the defendant's case.

As a complete review of the record reveals, the evidence of theft at all, or that the defendant was the one who committed the theft, was far from overwhelming. Rather, it turned almost exclusively on the credibility of Viktor Gromysh. Thus, by eliciting this evidence, the state was able to strengthen its argument that the defendant did commit the theft. Consequently, in the context of RAP 2.5(a), the state's comment on the defendant's exercise of her right to silence not only significantly prejudiced that right, but it also thereby prejudiced the defendant's right to a fair trial. As such, the error was "manifest" and the defendant may raise it for the first time on appeal.

Since the state's comment on the defendant's exercise of her right to silence constituted an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when

confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). If the defendant in this case is correct that the error was “manifest” under RAP 2.5(a)(3) as explained in *McFarland*, then it was necessarily prejudicial and not “harmless beyond a reasonable doubt.” As an error that affected the outcome of the trial, it entitles the defendant to a new trial.

**II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT THE DEFENDANT HAD REFUSED TO SPEAK WITH THE POLICE AND THAT THIS REFUSAL CONSTITUTED EVIDENCE OF GUILT DENIED THE DEFENDANT HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

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

First, a convicted defendant must show that trial counsel’s

performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims that she was denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when trial counsel failed to object (1) when the state elicited evidence that the defendant had repeatedly refused to speak with a police officer over the telephone and had hung up on that officer, (2) when the defendant failed to come to the police station and give a statement, and (3) when the state argued to the jury that these refusals constituted evidence of guilt. The following presents this argument.

In the case at bar, the state repeatedly elicited the fact that the defendant refused to speak with Officer Ross or meet with her for an interview. Defense counsel did not object to this evidence. The error in failing to object is that this evidence constituted a direct comment on the defendant's failure to cooperate with and talk to the police under circumstances in which she not only had no duty to cooperate and speak, but in which she had the constitutional right to remain silent.

Given this conclusion, the question arises as to the "relevance" of the testimony concerning the fact that the defendant failed to speak with the officer. Under ER 401, "relevance" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, for evidence to be relevant, there must be a "logical nexus" between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a "tendency" to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

In the case at bar, the "logical nexus" between the defendant's failure to respond to the officer's repeated questions and phone calls was that her failure to respond and speak to the police was a tacit admission of guilt that contradicted her later protestations of innocence. In other words, her initial

failure to respond or speak when confronted by the police is relevant because one can logically infer guilt from it, and this is precisely why the state elicited this evidence. The evidence has no other “relevance.” The problem with this evidence is that while highly relevant, it was also highly prejudicial because it draws an inference of guilt from the defendant’s exercise of her right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

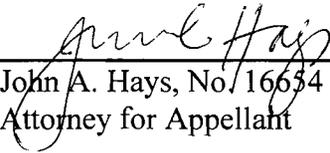
No reasonable defense counsel would fail to object to the state’s actions in eliciting evidence concerning the defendant’s exercise of such a fundamental constitutional right, particularly when the only relevance the evidence held was the inference that the defendant was guilty. In other words, there was no tactical reason for the defense to fail to object. Thus, trial counsel’s failure to object fell below the standard of a reasonably prudent attorney. In addition, as was stated in the previous argument, the evidence in the case was far from overwhelming. Thus, trial counsel’s failure to object caused prejudice since, but for the admission of the improper comments on the defendant’s exercise of her right to silence, the jury would have returned a verdict of acquittal. As a result, trial counsel’s failure to object denied the defendant effective assistance of counsel and she is entitled to a new trial.

**CONCLUSION**

The defendant is entitled to a new trial based upon the state's comments on her constitutional right to silence and based upon trial counsel's failure to object to this evidence.

DATED this 31<sup>st</sup> day of January, 2011.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16634  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

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

**RAP 2.5(a)**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

**ER 401**

**DEFINITION OF “RELEVANT EVIDENCE”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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

STATE OF WASHINGTON,  
Respondent,

NO. 40957-7-II

vs.

AFFIRMATION OF SERVICE

INNA BOCHKAREVA,  
Appellant.

STATE OF WASHINGTON )  
County of Clark ) : ss.

DONNA BAKER, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On January 31, 2011, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

ARTHUR D. CURTIS  
CLARK COUNTY PROSECUTING ATTY  
1200 FRANKLIN ST.  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

MS. INNA BOCHKAREVA  
13314 S. E. 19<sup>TH</sup> ST. APT. G6  
VANCOUVER, WA. 98683

Dated this 31st day of JANUARY, 2011 at LONGVIEW, Washington.

[Signature]

DONNA BAKER  
LEGAL ASSISTANT TO JOHN A. HAYS

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John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084