

No. 43215-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Thomas Miller,**

Appellant.

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Lewis County Superior Court Cause No. 11-1-00721-3

The Honorable Judge Richard Brosey

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Miller's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Miller's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
3. The trial court violated the constitutional requirement of an open and public trial by holding a pretrial conference in chambers.
4. The trial court violated Mr. Miller's Sixth and Fourteenth Amendment right to be present by holding a pretrial conference in chambers.
5. Mr. Miller's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove a violation of former RCW 46.12.210 (2010).
6. The prosecution failed to prove that Mr. Miller applied for or assigned a "certificate of ownership," as required for conviction under RCW 46.12.210 (2010).
7. The prosecution failed to prove that Mr. Miller's statement was "false," rather than merely misleading.
8. The trial judge commented on the evidence, in violation of Wash. Const. Article IV, Section 16.
9. The trial court erred by giving Instruction No. 19 over Mr. Miller's objection.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge met with counsel in chambers to discuss the applicability of certain statutes to the case. Did the trial judge violate the constitutional requirement that criminal trials be open and public by meeting with counsel in chambers, without first conducting any portion of a Bone-Club analysis?

2. An accused person has the constitutional right to be present at all critical stages of trial. In this case, the court met with counsel in chambers in Mr. Miller's absence. Did the trial judge violate Mr. Miller's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Section 22?
3. To obtain a conviction on Count II, the prosecution was required to prove (inter alia) that Mr. Miller made a false statement in an application for a certificate of ownership. Here, the prosecution proved only that Mr. Miller made a misleading statement in an application for a certificate of registration. Did the conviction on Count II violate Mr. Miller's Fourteenth Amendment right to due process because the evidence was insufficient?
4. A trial judge is absolutely prohibited from commenting on the evidence at trial, and any judicial comment is presumed to be prejudicial. In this case, the trial judge instructed jurors on the procedure for acquiring found property, implying that he believed Mr. Miller hadn't followed proper procedures for obtaining an interest in the trailer. Did the trial judge's comment on the evidence violate Mr. Miller's rights under Article IV, Section 16?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Yirong Wu owned the Great Wall Restaurant in Centralia. RP (1/27/12 am) 42. Because he was not a native English speaker, he used his friend and agent Thomas Miller to help him with business transactions. RP (1/27/12 am) 43, 52. In fact, Mr. Miller was an officer for the corporation that ran the restaurant. RP (1/26/12) 98.

In July of 2010, Aubrey Cole parked his trailer in the lot owned by the restaurant. RP (1/26/12) 64.

Mr. Miller contacted the police about having the trailer removed in September. Deputy McKnight told him that he could use a towing company to have it removed, and that it was a civil matter. RP (1/26/12) 47-50, 53; RP (1/27/12 am) 56.

Mr. Miller contacted Chuck Norris, an acquaintance of his who also bought and sold trucks and trailers. RP (1/26/12) 27-28. Mr. Miller asked him about the trailer on the property, and about what Mr. Miller needed to do to be able to sell the trailer. RP (1/26/12) 27-29. Mr. Miller didn't know how to establish ownership of the trailer, and sought help from Norris. RP (1/26/12) 40-41. Norris told him that he needed to go to the Department of Licensing regarding a title and registration. RP (1/26/12) 45.

A couple weeks later, Mr. Miller stopped by the deputy's home, which was close to the restaurant, to ask additional questions about the ownership and registration procedures, but McKnight told him that he (Mr. Miller) was not welcome on his (McKnight's) property and to leave. RP (1/26/12) 50-51, 54; RP (1/27/12 am) 65-66.

Mr. Miller did go to the Department of Licensing, as well as the local auditor's office. RP (1/26/12) 99; RP (1/27/12 am) 58, 72.

Mr. Miller sent Cole a letter about the trailer, and when he got no response, he sent a certified letter. RP (1/27/12 am) 63. Cole called Mr. Miller, and the two met outside the restaurant. RP (1/26/12) 66-69, 105. They were unable to come to an agreement. RP (1/26/12) 70-71; RP (1/27/12 am) 68-72, 105.

The staff at the Department of Licensing worked with Mr. Miller and filled out a form stating that the trailer was abandoned and that there was "no reply" to a certified letter. Mr. Miller explained that he talked to Cole but Cole had not responded in writing and the issues had not been resolved, which was summarized on the form by staff as "no reply." RP (1/27/12 am) 72-75, 77, 96-97; Ex. 4, Supp. CP. Mr. Miller received a three year registration with ownership in doubt, which was what Department of Licensing staff told him applied. RP (1/27/12 am) 76-77.

Mr. Miller and Norris spoke a few more times, and eventually agreed that Norris would buy the trailer for \$1000. He estimated the wholesale value at \$1500, and the retail value at about \$2300. RP (1/26/12) 30-32, 93. Mr. Miller had a three year registration without title, and Norris bought the trailer. RP (1/26/12) 32-33. Norris fixed the brakes on the trailer and it was sent to California. RP (1/26/12) 33-34, 36.

Cole reported the trailer stolen, and police contacted Mr. Miller. He provided copies of the documents, including the application for three-year registration, as well as the voicemails he'd received from Cole. RP (1/27/12 am) 8-10, 18; Ex. 4, Supp. CP.

The state charged Mr. Miller with Theft in the Second Degree, and Certificate of Ownership False Statement or Illegal Transfer. CP.

On the first day of trial, the judge referred to discussions the attorneys had in chambers regarding statutes. This discussion was not further explained, and there is no indication that Mr. Miller was present for it. RP (1/26/12) 22. This happened again later regarding jury instructions. RP (1/27/12 am) 60.

Mr. Miller testified that he had taken all of his actions in good faith, and never with any intent to steal. He said that he followed recommendations and never claimed to have clear title to the trailer. RP (1/27/12 am) 92-93, 98.

The court gave an instruction regarding “found property” over defense objection. RP (1/27/12 pm) 3-5; Court’s Instructions No. 19, Supp. CP. That instruction stated that

A person may lawfully claim found property only if the following circumstances are satisfied:

- (1) the owner of the property is unknown;
- (2) within seven days of the finding, the finder acquires a signed statement setting forth an appraisal of the current market value of the property prepared by a qualified person engaged in buying or selling like items or by a district court judge; and
- (3) within seven days of the find, the finder reports the find of property and surrenders, if requested the property and a copy of the evidence of the value of the property to the chief law enforcement officer, or his or her designated representative, of the governmental entity where the property was found, and serves written notice upon the officer of the finder’s intent to claim the property if the owner does not make out his or her right to it.

If circumstances (1), (2), and (3) are satisfied, the found property becomes the property of the finder sixty days after the find was reported to the appropriate officer if no owner has been found, or sixty days after the final disposition of any judicial or other official proceeding involving the property, whichever is later.

If any one of circumstances (1), (2), or (3) are not satisfied, the finder forfeits all right to the property.

A finder’s claim to found property is extinguished if the owner satisfactorily establishes, within sixty days after the find was reported to the appropriate officer, the owner’s right to possession of the property.

Instruction No. 19, Supp. CP.

The jury convicted Mr. Miller on all counts. RP (1/27/12 pm) 53-

54. The court denied his motions to set aside the verdict and for a new

trial. RP (2/16/12) 2-3; RP (3/1-12) 131-145. After sentencing, Mr. Miller timely appealed.

## **ARGUMENT**

### **I. THE TRIAL COURT VIOLATED MR. MILLER'S RIGHT TO AN OPEN AND PUBLIC TRIAL AND HIS RIGHT TO BE PRESENT.**

#### **A. Standard of Review**

Alleged constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. *State v. Njonge*, 161 Wash.App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.*, at 576.

#### **B. The trial court violated both Mr. Miller's and the public's right to an open and public trial by meeting with counsel in chambers.**

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, \_\_\_, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper

analysis requires reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-262, 257.<sup>1</sup> In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007). The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly de minimis, for hearings that address only legal matters, or for proceedings are merely “ministerial.” See, e.g., *Strode*, at 230.<sup>2,3</sup>

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<sup>1</sup> See also *State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

<sup>2</sup>“This court, however, ‘has never found a public trial right violation to be [trivial or] de minimis’” (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

In this case, the court met with counsel in chambers without the required analysis and findings. The hearing apparently included a discussion on the applicability of RCW 63.021.010, and argument on the parties' proposed jury instructions. RP (1/26/12) 22; RP (1/27/12 am) 137. This in camera hearing violated Mr. Miller's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. It also violated the public's right to an open trial. Id. Accordingly, the convictions must be reversed and the case remanded for a new trial. Id.

C. The trial court violated Mr. Miller's right to be present by meeting with counsel in Mr. Miller's absence.

A criminal defendant has a constitutional right to be present at all critical stages. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wash.App. 784, 788, 797-799, 187 P.3d 326 (2008). A stage is critical if it presents a possibility of prejudice to the defendant. *State v. Harell*, 80 Wash. App. 802, 804, 911 P.2d 1034 (1996).

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<sup>3</sup> The Court of Appeals has held that the public trial right only extends to evidentiary hearings. See, e.g., *State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, review granted, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered. *Momah*, at 148; *Strode*, at 230.

Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *United States v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

Here, the trial court met with counsel in chambers to hear argument on the applicability of certain statutes. RP (1/26/12) 22. These issues were of significant importance to Mr. Miller. Motion (filed 2/6/12), Supp. CP; RP (2/16/12) 2-3; RP (3/1/12) 131-146. Furthermore, he and his attorney had conflicting views on how these statutes related to his defense. Motion (filed 2/6/12), Supp. CP; RP (2/16/12) 2-3; RP (3/1/12) 131-146. By excluding him from this conference, the trial court violated Mr. Miller's right to be present. *Gagnon*, at 526; *Tureseo*, at 83. His convictions must be reversed and his case remanded for a new trial. *Id.*

**II. MR. MILLER’S CONVICTION ON COUNT II VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.**

A. Standard of Review

Alleged constitutional violations are reviewed de novo. E.S., at 702. The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Kirwin*, 166 Wash.App. 659, 670 n. 3, 271 P.3d 310 (2012).

B. The prosecution was required to prove that Mr. Miller made a “false” statement in an application for or assignment of a “certificate of ownership.”

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

A statute that involves a deprivation of liberty must be strictly construed. *In re Detention of Hawkins*, 169 Wash.2d 796, 801, 238 P.3d 1175 (2010). In interpreting a statute, the court’s duty is to “discern and implement the legislature’s intent.” *State v. Williams*, 171 Wash.2d 474,

477, 251 P.3d 877 (2011). The court’s inquiry “always begins with the plain language of the statute.” *State v. Christensen*, 153 Wash.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad*, 163 Wash.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wash.2d 196, 202, 172 P.3d 329 (2007).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009); see also *State v. Punsalan*, 156 Wash.2d 875, 879, 133 P.3d 934 (2006) (“Plain language does not require construction.”). A court “will not engage in judicial interpretation of an unambiguous statute.” *State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011).

On the other hand, if a criminal statute is ambiguous, the ambiguity must be interpreted in favor of the defendant. *Id.*; see also *Seattle v. Winebrenner*, 167 Wash.2d 451, 462, 219 P.3d 686 (2009); *State v. Failey*, 165 Wash.2d 673, 677, 201 P.3d 328 (2009). A statute is ambiguous when the language is susceptible to multiple interpretations. *Davis*, at 477.

Mr. Miller was convicted of violating former RCW 46.12.210 (2010). The statute reads (in relevant part): “Any person who knowingly makes any false statement of a material fact, either in his or her application for the certificate of ownership or in any assignment thereof... is guilty of a class B felony.”<sup>4</sup> Former RCW 46.12.210 (2010). The evidence was insufficient to establish two of these essential elements.

- C. The prosecution failed to prove that the allegedly false statement was made in an application for or assignment of a “certificate of ownership.”

Chapter 46.12 RCW deals with certificates of ownership and certificates of registration. The requisites for a certificate of ownership are set forth in RCW 46.12.050. The requirements for a certificate of registration are not specifically set forth in the chapter. It is clear, however, that the two kinds of certificate are distinct. See RCW 46.12 generally.

At trial, the state urged the jury to convict based on an alleged misstatement contained in the document admitted into evidence as Exhibit 4. RP (1/27/12) 21-31, 48-51. But Exhibit 4 was not an application for a certificate of ownership; instead, it was an application for a “[t]hree year

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<sup>4</sup> Mr. Miller was charged with three alternative means of committing the offense; however, the jury was not able to reach a verdict as to two of the alternatives. Special Verdict Form B, Supp. CP.

registration without title.” Ex. 4, Supp. CP (emphasis added). Indeed, the document goes on to state that an unrestricted title will be issued to the legal owner only “upon proper application” after the passage of three years. Ex. 4, Supp. CP.

Because the allegedly false statement was not made in support of an application for a “certificate of ownership,” the evidence was insufficient for a conviction under former RCW 46.12.210 (2010). Accordingly, the conviction must be reversed and the charge dismissed with prejudice. Smalis, at 144.

D. The prosecution failed to prove that Mr. Miller’s statement was “false.”

The statute does not define the term “false;” accordingly, it must be given its plain and ordinary meaning. Lilyblad, at 6. The word “false” is an adjective meaning “(1) not true or correct; erroneous... [2] tending to deceive or mislead; deceptive.” Dictionary.com, based on The Random House Unabridged Dictionary, Random House, Inc. 2012. The first definition is narrower than the second. Under the first definition, only incorrect statements are false; the second definition, by contrast, encompasses misleading statements that are literally true but nonetheless deceptive.

The plain words of the statute are thus capable of two reasonable interpretations, one of which punishes only incorrect statements, the other of which punishes both incorrect and misleading statements. The rule of lenity requires application of the narrower definition. Davis, at 477. Accordingly, former RCW 46.12.210 (2010) does not reach statements that are misleading but literally true.<sup>5</sup>

The state's case was based on the following language: “[Mr. Miller] attempted to get ahold [sic] of owner of record by certified mail with return receipt with no reply.” Ex. 4, Supp. CP; RP (1/27/12 pm) 21-31. Although perhaps open to a different interpretation, the statement was literally true: Mr. Miller never received a “reply” to his certified letter. Instead, Mr. Cole contacted him by phone and in person—never by letter or in writing.

Because Mr. Miller's statement was literally true, the evidence was insufficient to prove falsity within the meaning of the statute, even if his intent was to mislead. Because of this, his conviction for violation of former RCW 46.12.210 (2010) must be reversed and the charge dismissed with prejudice. Smalis, at 144.

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<sup>5</sup> For an example of a statement that is misleading but literally true, see *State v. Olson*, 92 Wash. 2d 134, 594 P.2d 1337 (1979) (citing *Bronston v. United States*, 409 U.S. 352, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973)).

**III. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.**

A. Standard of Review

Constitutional violations are reviewed de novo. E.S., at 702. A comment on the evidence “invades a fundamental right” and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

B. The trial judge improperly commented on the evidence by instructing jurors on the proper procedure for acquiring found property.

Under Article IV, Section 16 of the Washington Constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. Article IV, Section 16. A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

In addition, it is improper to instruct the jury on “a theory for which there is insufficient evidence.” *State v. Berube*, 150 Wash. 2d 498, 510-11, 79 P.3d 1144, 1151 (2003); see also *State v. Clausing*, 147 Wash.

2d 620, 626-27, 56 P.3d 550 (2002) (“It is prejudicial error to submit an issue to the jury that is not warranted by the evidence.”)

In this case, the trial judge improperly instructed jurors on a theory unsupported by the evidence, and thereby communicated an improper judicial comment. Mr. Miller did not claim that RCW 63.21.010 applied to excuse his conduct, and there was no evidence suggesting that it did. The property’s owner was known, and Mr. Miller did not argue that he’d undertaken any of the steps required to acquire found property. See Instruction No. 19, Supp. CP; RCW 63.21.010. The only evidence that was even tangentially related was introduced by the state, and consisted of Mr. Miller’s out-of-court statements to Detective Borden that the trailer had been “abandoned” at the Great Wall. RP (1/27/12 am) 94.

The extraneous instruction—Instruction No. 19, Supp. CP—had no applicability to Mr. Miller’s case. By providing it to the jury, the trial judge unintentionally signaled his belief that Mr. Miller hadn’t followed proper procedures to acquire an interest in the property, and thus was guilty of theft.

The error is presumed prejudicial, unless the record affirmatively shows that no prejudice resulted. *Levy*, at 725. The record is devoid of any affirmative indication that the error was harmless under the *Levy* test.

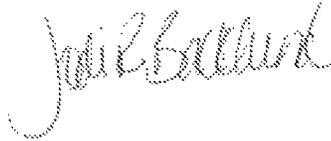
Accordingly, Mr. Miller's theft conviction must be reversed and the case remanded for a new trial. Id.

**CONCLUSION**

For the foregoing reasons, Mr. Miller's convictions must be reversed. Count I must be remanded for a new trial; Count II must either be dismissed with prejudice or remanded for a new trial.

Respectfully submitted on September 12, 2012,

**BACKLUND AND MISTRY**



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

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Thomas Miller  
2911 US Highway 12  
Silver Creek, WA 98585

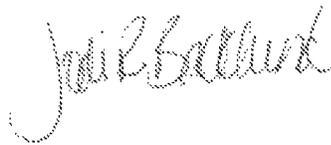
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney  
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on September 12, 2012.



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

# BACKLUND & MISTRY

September 12, 2012 - 9:06 AM

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