

No. 44115-2-II  
(Consolidated with 44118-7-II)

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

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STATE OF WASHINGTON,

Respondent,

v.

GORDON DICKSON,  
JUSTIN DICKSON,

Appellants.

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

The Honorable Chris Wickham, Judge  
Cause No. 11-1-01751-0, 12-1-00023-2

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BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUES.

1. Whether there was sufficient evidence to prove beyond a reasonable doubt that the actions of one or both defendants caused serious bodily harm to the victim.
2. Whether the defendants were deprived of the effective assistance of counsel when the defense chose not to propose a jury instruction on a lesser included offense.

B. STATEMENT OF THE CASE.

1. Procedural facts.

The state accepts the Appellant's statement of the procedural facts of the case.

2. Substantive facts.

On November 10, 2011, Craig Ripley left work in his Ford pickup, alone, shortly after 3:00 in the afternoon. RP 57.<sup>1</sup> He turned onto old Highway 99, and as he proceeded on that road a gray Saturn Ion sedan pulled out in front of him from a gas station, and fearing that the Saturn was about to hit Ripley's truck, Ripley honked his horn. RP 65-66. The Saturn continued onto the roadway and the driver of the Saturn "flipped off" Ripley. RP 65-66. In frustration, Ripley returned the gesture. RP 65-66.

Ripley could see there were two males in the front of the Saturn as that vehicle proceeded in front of him. RP 65-67. The

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<sup>1</sup> Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the three-volume trial transcript dated October 15-18, 2012.

driver appeared to be an older male while the front passenger was younger. RP 65-67. Both males continued to gesture back at Ripley, flipping him off and gesturing for Ripley to pull over to the side of the road as if they wanted to fight with him. RP 67. The Saturn did pull over to the side of the road, but Ripley continued driving. RP 66-67. The Saturn then pulled immediately behind him, and Ripley could see that the two males were continuing to gesture angrily towards him. RP 67-73. Ripley reached a location on Bonniewood Drive where a friend lived. RP 60-62, 68-69, 73. Once Ripley made it to the house, the two men in the Saturn, who had followed him, parked behind Ripley in such a manner that he could not leave. RP 69, 73-75.

Both males began yelling at Ripley, but Ripley stayed in his vehicle and did not respond. RP 74-76, 97. The younger male then got out on the passenger side and walked over to Ripley's driver side door. RP 74-75. He began beating on the window of the driver's door and yelling for Ripley to get out. RP 74-75, 77. To prevent his window from being broken, Ripley got out and asked the young man to stop. RP 74-77. The young man began yelling that he was going to beat up Ripley. RP 74-77. Ripley then grabbed a pen and something to write on and wrote down the license plate

number of the Saturn. RP 78, 151. The older driver of the Saturn then got out and approached, and also began yelling at Ripley. RP 367. The younger man then punched Ripley in the face multiple times. RP 80-82. As Ripley was being struck, his knee was also injured. RP 84-85. His lip was split, he was covered with blood, and his glasses were broken. RP 85. While it was difficult for Ripley to be sure which of the two men struck particular blows after the young man started striking him, he said that he had experienced no pain in his knee before the incident and could barely limp after the assault was over. RP 81-84, 371. Ripley grabbed onto the pickup bed and the defendant's shirt to keep himself from going all the way to the ground due to the pain in his right knee. RP 81.

As this was happening, Ripley became aware of a young female who had emerged from the Saturn and was screaming at the two men, telling them to stop hitting Ripley. RP 81-84, 312-315. He also saw that a male had driven in an excavator down the road from the bark store across the street, and that man was also yelling at the men to stop beating on Ripley. RP 83, 169, 174. At that point, the two men got back into the Saturn and drove away. RP 177.

When Ripley woke the next morning, he was unable to stand on his right leg, the one that had been kicked during the beating the day before. RP 105. He went to Westcare Clinic to have his knee checked, and explained what had happened the day before. RP 106. It was determined that his right knee was fractured in addition to an abrasion to his mouth, bruising around the left eye, two broken teeth and one broken crown. RP 106, 120, 126, 223. Ripley was referred to an orthopedic surgeon who informed him that his knee cap had been broken, RP 223, 227, and he needed immediate surgery<sup>2</sup>. RP 218-220. After the surgery, Ripley was unable to move the leg for a month, he needed a walker for three months, and still suffered some limitation of movement at the time of trial. RP 114-116.

Detective Haller of the Thurston County Sheriff's Office, who had been assigned to the case, was able to identify the two men who had beaten Ripley as Gordon and Justin Dickson; RP 256, 257-258; Haller then located and interviewed Michael McNulty, who had driven his excavator from his place of work to stop the fight. RP 166-167. McNulty stated he was driving a piece of heavy

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<sup>2</sup> The surgeon mentioned that although such an injury is usually inflicted by high impact events such as car collisions or falls, he had seen and treated the same injury which had been inflicted by a kick during a fight. RP 227.

equipment that day, and observed two men assaulting a third male. RP 166-167. He then drove his vehicle down the street, yelling at the two men to leave the third man alone. RP 172. As he observed what was happening, he saw both the older and younger men striking the third man in the face and the body with their fists. RP 82-84, 168, 172-177. McNulty was also yelling at them to stop, saying that “two on one isn’t fair.” RP 172-175. In response, they finally did stop, got into the gray car, and drove away. RP 188.

### C. ARGUMENT.

1. Gordon and Justin Dickson’s Fourteenth Amendment rights were not violated because the evidence was sufficient to prove beyond a reasonable doubt that the defendants inflicted serious bodily harm.

The appellants argue that there was insufficient evidence to prove that either of them caused the victim’s broken knee, the injury the State generally relied upon to prove second degree assault.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, supra, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Assault in the second degree occurs when (1) a person “intentionally assault(s) another and thereby recklessly inflicts substantial bodily harm;” or (2) acting as an accomplice, with knowledge that it would promote or facilitate the crime of assault, one of the defendants encouraged or aided the other in intentionally assaulting the victim. RCW 9A.36.021(1)(a); Instruction 19, CP 30-31. A person is reckless or acts recklessly when, “[H]e knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.” State v. R.H.S., 94 Wn. App. 844, 847 P.2d. 1253 (1999). Further, “Substantial bodily harm includes bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.” CP 21; WPIC 2.03.01; RCW 9A.04.110(2)(b). Because Ripley

suffered harm that caused substantial disfigurement, impaired the function of a body part and suffered a fracture, Justin and Gordon were properly convicted of assault in the second degree.

First, even apart from the broken kneecap, injuries such as bruising, abrasions, cuts, broken teeth and/or cartilage are sufficient to show substantial bodily harm. State v. McKague, 159 Wn. App. 489, 504 P.3d 558 (2011). Therefore, substantial bodily harm occurs even when the victim has not suffered a broken bone. R.H.S., 94 Wn. App. at 847. Breaking the victim's teeth is considered substantial bodily harm; "Without question, any reasonable person knows that punching someone in the face could result in [broken] teeth... which would constitute substantial bodily harm." Id. In this case, Ripley saw a dentist to treat the injuries he sustained including two broken teeth, one broken crown and contusions around the mouth. RP. 120-126. These injuries alone would therefore be enough to show Ripley suffered substantial bodily harm. In addition, bruising around the eye and face is sufficient to show substantial bodily harm. "The presence of bruise marks indicates temporary but substantial disfigurement." State v. Ashcraft, 71 Wn. App. 444, 455 859 P.2d 60 (1993). In this case Ripley's wife, who saw him on the day of the beating, noted

bruising and abrasions on and around his face. RP 207-208. Ripley's dentist also mentioned that he "looked pretty beat up." RP 120.<sup>3</sup> Therefore, because Ripley showed signs of temporary but substantial disfigurement in the form of bruising, abrasions, and broken teeth, Justin and Gordon inflicted substantial bodily harm sufficient to support a second degree assault charge.

The State relied primarily on the broken knee to constitute the substantial bodily harm element, and the evidence was sufficient to prove that however the kneecap got broken, one of the defendants had to have done it. Ripley's orthopedic surgeon, Dr. Wood, said that a broken knee is not an injury one can ignore; this means if Ripley somehow had this injury before the fight he would have known it due to immobilizing pain.<sup>4</sup> RP 233. Wood also testified that Ripley's broken knee was a fresh break, meaning it could not have occurred any significant amount of time before the fight. RP 233. He further testified that he had seen and treated a patient who had sustained the same knee injury from a fist fight in

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<sup>3</sup> Dr. Barker said at trial. 'I remember distinctly he looked pretty beat up. His lip was really swollen. He had a black eye, and he had some crusty blood on his lip where he had been bleeding, I think, and he was walking on crutches. RP 119

<sup>4</sup> When Wood was asked about a patient's ability to ignore such an injury, he responded by saying that with a broken knee, mobility is impossible; once the bone displaces (breaks) you know when you have it. RP 233

the past.<sup>5</sup> RP 227. Finally, although Wood testified that such an injury normally occurs during high impact events, he said that it was possible that such an injury could result from a kick during a fight. RP 223. In this case Ripley had no pain in his right knee before the fight; in fact he had finished a work day which required his full mobility and use of his knee. RP 55, 84, 104, 105, 207-208. It was not until immediately after his beating that Ripley limped and felt pain in the leg. RP 81-84, 371. Ripley then returned home; his adrenaline subsided and he was unable to put weight on his knee due to the extreme pain. RP 104-105. The evidence shows that Mr. Ripley could only have suffered the broken kneecap during the altercation with the Dicksons.<sup>6</sup>

There was ample evidence to show that the broken kneecap occurred as a result of the actions of the defendants. A broken bone constitutes substantial bodily harm. The evidence was sufficient to support the convictions.

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<sup>5</sup> Defense focuses on the fact that Wood has only seen one broken knee resulting from fight. Defense fails to note, however, that the frequency of an event has little to do with the possibility of its occurrence. Appellant's Brief at 16.

<sup>6</sup> Ripley testified that his knee was in pain directly after the fight and said he had to limp around afterwards. RP 84. Both Ripley and his wife further testified that when he got home he immediately went to bed, only to wake up the next morning to discover his knee injury was much worse than he thought. RP105. Therefore, defense's argument is narrowed to two highly unlikely possibilities: either Ripley hurt his knee at work and was magically able to walk and ignore the pain all day, or he fractured his knee the moment he rolled out of bed the next morning.

2. Gordon and Justin Dickson were not deprived of their Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reviewing court, however, is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . [then] that course should be followed." Strickland, 466 U.S. at 697. In this case however, defense counsel showed effective assistance by objecting when appropriate, proposing fitting jury instructions and otherwise zealously advocating for the defendant.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of

legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that,

under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696.

a. Failure of counsel to request a lesser-included instruction for fourth degree assault.

Both appellants claim ineffective assistance of counsel because neither defense attorney requested a jury instruction for the lesser included offense of fourth degree assault.

The State does not dispute a defendant's right to a lesser included instruction when the law and the facts of the case permit. Amendments V, VI, and XIV of the federal constitution require the trial court to give a requested instruction when the lesser included offense is supported by the evidence. Vujosevic v. Rafferty, 844

F.2d 1023 (1988). This right protects a defendant who might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because it wishes to avoid setting him free. Keeble v. United States, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 93 S. Ct. 1993 (1973).

In Washington the defendant's right to a lesser included instruction is, in addition to his federal rights, a statutory right. RCW 10.61.006 provides:

In all other cases [those not involving crimes with inferior degrees, RCW 10.61.003] the defendant may be found guilty of any offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

See also State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990). This right applies when (1) each element of the lesser offense is a necessary element of the crime charged, and (2) the evidence supports an inference that only the lesser included crime was committed. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997). This two-prong test reflects consideration for the specific constitutional rights of the defendant, particularly his right to know the charges against him and to present a full defense. Peterson, 133 Wn.2d at 889. An inference that only the lesser

offense was committed is justified “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000) (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

It is this second prong of Workman that the Dicksons cannot satisfy. Both were charged with second degree assault. Justin Dickson CP 5, Gordon Dickson CP 3. That crime requires the infliction of substantial bodily harm. Justin Dickson CP 30-31. Fourth degree assault is defined in RCW 9A.36.041 as any assault not amounting to some other degree of assault. While under the legal prong of the Workman test fourth degree assault is a lesser included offense of second degree assault, in this case it factually is not. There must be substantial evidence which affirmatively shows that the lesser offense was committed to the exclusion of the greater before the lesser included instruction may be given. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). “It is not enough that the jury might simply disbelieve the State’s evidence. Instead, some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser

included offense before an instruction will be given.” State v. Perez-Cervantes, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000).

There was no evidence, let alone substantial evidence, that the Dicksons committed only fourth degree assault. There was no question but that the victim suffered substantial bodily harm. Neither defendant argued otherwise. Both claimed self-defense. See e.g., RP 554, 586. Under the factual prong of the Workman test, neither defendant was entitled to a lesser included instruction of fourth degree assault. Therefore, it cannot be ineffective assistance of counsel to fail to request it.

b. Failure to object to his co-defendant’s argument.

Appellant Justin Dickson raises the claim that his counsel failed to object to the improper argument misstating the burden of proof for self defense. This argument has no merit, however, because even if Gordon Dickson’s argument were error, which is not at all apparent, the jury instructions and the State’s argument were correct. Any misstatement by Gordon Dickson’s counsel was harmless error. An error is harmless “unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Smith, 106 W.2d

772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

Counsel for Gordon Dickson referred to self defense several times in his argument. Among other statements, counsel said:

Once he does that, then I have a right to defend myself. That's what this is about. It's the defense of others, okay. Now, what we say is self-defense goes to the assault, not to what happens afterwards. So if the self-defense, if you find self-defense, and you don't have to find that beyond a reasonable doubt, because we are the ones putting self-defense in front of you. There is actually not a standard there, but if you find self-defense, okay, then the State's (sic) has to disprove self-defense beyond a reasonable doubt. You can't have a doubt for which a reason exists for their use of self-defense. So it puts a big burden on the State where it should be. Okay?

RP 554-55.

[S]elf-defense negates the assault. Self-defense says that the use of force was lawful. So before you get to the "to-convict," I think you should talk about whether or not self-defense applies to this case. If self-defense applies to this case, then you have to be satisfied beyond a reasonable doubt that it didn't exist, and that's a huge burden to put on the State.

RP 565.

While this argument is not especially articulate, it makes it clear that the State must disprove self defense beyond a reasonable doubt. The jury was correctly instructed on self defense. Justin Dickson's CP 25-29. Justin Dickson argues that

the jury does not need find that self-defense applies before they determine if the State has disproved self-defense beyond a reasonable doubt. His argument is more semantics than substance. Whether the jury first finds that self defense does not apply, or whether it finds it applies and that the State has disproved it beyond a reasonable doubt seems to be a distinction without a difference. The jury is going to get to the same result either way. The State has not been able to locate any cases which address the logic the jury is required to follow during deliberation, but it is difficult to imagine a situation in which a jury would need to consider a defense that they found to be irrelevant.

Justin Dickson cites to State v. McCreven, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) to support his argument. Justin Dickson's Opening Brief at 20. The arguments therein are not disputed by the State. The State does not dispute the court's ability to decide whether self defense should be included in the jury instructions; the State also acknowledges its burden to prove the absence of self-defense beyond a reasonable doubt. The issue the defense raises on appeal does not relate to the case law cited, rather defense's claim of error deals with the reasoning of the jury during deliberations.

During closing argument, the prosecutor discussed self defense, and said this:

[T]his is the way you do this is to analyze this from the subjective position of Justin Dickson really, because he is the one who used the force here.

So you kind of have to kind of stand in his shoes, figuratively speaking, as you look at this, but stand in his shoes not necessarily as he describes it but as you determine the facts to be.

RP 537. Using this analysis, to which Justin Dickson does not assign error, it really doesn't matter which approach the jury takes.

The Strickland standard for evaluating the performance of counsel is "highly deferential." State v. Breitung, 173 Wn.2d 393, 400-01, 267 P.3d 1012 (2011). Counsel's performance is presumed to be reasonable and Dickson bears the burden of showing it was not. He has not carried that burden.

#### D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm the convictions of both Gordon Dickson and Justin Dickson.

Respectfully submitted this 2d day of July, 2013.

  
\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

*Electronically filed at Division II*

TO: DAVID C. PONZOHA, CLERK  
COURTS OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
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--AND--

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LISA E. TABBUT, ATTORNEY FOR APPELLANT (JUSTIN  
DICKSON), LISA.TABBUT@COMCAST.NET

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

Dated this 2d day of July, 2013, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**July 02, 2013 - 1:38 PM**

## Transmittal Letter

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