

No. 44771-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Kirk Hernandez,**

Appellant.

---

Clark County Superior Court Cause No. 13-1-00236-1

The Honorable Judge John F. Nichols

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Skylar T. Brett  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ARGUMENT..... 1**

**I. The court violated Mr. Hernandez’s right to due process by refusing to instruct the jury on defense of others..... 1**

A. Mr. Hernandez preserved this issue for review. .... 1

B. Defense of others was legally applicable to Mr. Hernandez’s attempted robbery charge. .... 2

C. The facts of Mr. Hernandez’s case supported a defense of others instruction. .... 3

**II. The accomplice liability statute criminalizes protected speech; *Coleman, Ferguson, and Holcomb* were wrongly decided. .... 5**

**III. Mr. Hernandez’s conviction for attempted First-Degree Robbery violated his Fourteenth Amendment right to due process because the court’s instructions relieved the state of its burden to prove the essential elements of the crime..... 8**

**IV. Mr. Hernandez may challenge the scheme for imposing attorney’s fees, which impermissibly chills the exercise of the right to counsel, for the first time on appeal..... 9**

**CONCLUSION ..... 12**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) .....	5, 6, 7
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)	9, 10, 12
<i>Hess v. Indiana</i> , 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)	..... 6
<i>United States v. Freeman</i> , 761 F.2d 549 (9th Cir. 1985)	..... 5

### WASHINGTON STATE CASES

<i>In re Personal Restraint of Fleming</i> , 129 Wn.2d 529, 919 P.2d 66 (1996) .....	10
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	..... 2, 3
<i>State v. Arth</i> , 121 Wn. App. 205, 87 P.3d 1206 (2004)	..... 2
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008)	..... 9
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997)	..... 11
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (2013) <i>review granted</i> , 178 Wn.2d 1010, 311 P.3d 27 (2013)	..... 10
<i>State v. Calvin</i> , --- Wn. App. ---, 316 P.3d 496 (Wash. Ct. App. 2013), <i>as amended on reconsideration</i> (Oct. 22, 2013)	..... 10
<i>State v. Coleman</i> , 155 Wn. App. 951, 231 P.3d 212 (2010)	..... 5, 6, 7, 8
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992)	..... 11
<i>State v. Duncan</i> , 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014)	..... 10

<i>State v. Ferguson</i> , 164 Wn. App. 370, 264 P.3d 575 (2011).....	5, 6, 7, 8
<i>State v. Ford</i> , 137 Wn.2d 427, 973 P.2d 452 (1999).....	9
<i>State v. George</i> , 161 Wn. App. 86, 249 P.3d 202 (2011).....	3, 4
<i>State v. Holcomb</i> , No. 32155-0-III, --- Wn. App. ---, --- P.3d --- (April 10, 2014).....	5, 7, 8
<i>State v. Hunter</i> , 102 Wn. App. 630, 9 P.3d 872 (2000).....	10
<i>State v. McCreven</i> , 170 Wn. App. 444, 284 P.3d 793 (2012) <i>review denied</i> , 176 Wn.2d 1015, 297 P.3d 708 (2013).....	5
<i>State v. Moen</i> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	10
<i>State v. Paine</i> , 69 Wn. App. 873, 850 P.2d 1369 (1993).....	10
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	10
<i>State v. Roche</i> , 75 Wn. App. 500, 878 P.2d 497 (1994).....	10
<i>State v. Stark</i> , 158 Wn. App. 952, 244 P.3d 433 (2010).....	4

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I.....	6, 7, 12
U.S. Const. Amend. VI.....	9, 11, 12
U.S. Const. Amend. XIV.....	8

**WASHINGTON STATUTES**

RCW 9A.08.020.....	6, 7, 8
RCW 9A.28.020.....	2
RCW 9A.56.200.....	2

**OTHER AUTHORITIES**

RAP 2.5..... 9, 11

## ARGUMENT

### **I. THE COURT VIOLATED MR. HERNANDEZ’S RIGHT TO DUE PROCESS BY REFUSING TO INSTRUCT THE JURY ON DEFENSE OF OTHERS.**

A. Mr. Hernandez preserved this issue for review.

Mr. Hernandez proposed a jury instruction on defense of others and argued that it should be given to the jury. RP 269-271. When the state argued against the instruction, defense counsel responded: “I would object.” RP 291. Nonetheless, the state argues that this issue is not preserved for review because defense counsel said “right,” after the court ruled that it would not instruct the jury on lawful use of force. Brief of Respondent, pp. 5-7. The state is incorrect.

Mr. Hernandez argued for a jury instruction on lawful use of force throughout the trial. The context demonstrates that defense counsel’s response of “right,” after the court’s ruling, merely indicated that he understood the ruling. Defense counsel’s next statement was that he excepted to the court’s refusal to give his proposed instruction. RP 294.<sup>1</sup>

---

<sup>1</sup> The court reporter transcribed that defense counsel said: “Just for the record, I’ll accept [sic] to the giving of that.” RP 294. The context – in which defense counsel argued vigorously for the defense of others instruction and pointed out that the case upon which the court relied in refusing to give it was distinguishable -- clarifies that the sentence should have been transcribed as: “I’ll except to the giving of that.”

Mr. Hernandez preserved the issue relating to his proposed defense of others instruction for review.

B. Defense of others was legally applicable to Mr. Hernandez's attempted robbery charge.

The defense of lawful use of force can negate the *mens rea* element of an offense. *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). This includes the *mens rea* elements of charges beyond those typically considered to be subject to self-defense claims like assault. *State v. Arth*, 121 Wn. App. 205, 209, 87 P.3d 1206 (2004). In order to convict for attempted first degree robbery, the state must prove that the accused intended to inflict bodily injury. RCW 9A.28.020; 9A.56.200.

Lawful use of force negates the element of intent to inflict bodily injury. *Acosta*, 101 Wn.2d at 615. Even so, Respondent claims that lawful use of force is not available as a defense to attempted robbery. Brief of Respondent, pp. 11-12. The state points out that defense of others cannot negate the remaining elements of attempted robbery. Brief of Respondent, pp 11-12. But a defense need not negate every element of an offense. In an assault case, for example, self-defense does not negate the actual infliction of bodily injury or unwanted touching.

Due process requires the state to prove *each element* of an offense beyond a reasonable doubt. If defense of others is validly raised in order

to negate the intent element, it is irrelevant whether it also negates other elements. The burden shifts to the state to prove that the use of force was unlawful.

Lawful use of force is legally available as a defense to attempted robbery because it negates the *mens rea* element of that offense. *Acosta*, 101 Wn.2d at 615. The court erred by ruling otherwise.

C. The facts of Mr. Hernandez's case supported a defense of others instruction.

The court must take the evidence in the light most favorable to the defense when determining whether the facts support a self-defense instruction. *State v. George*, 161 Wn. App. 86, 95, 249 P.3d 202 (2011). Mr. Hernandez presented evidence that he hit Wade in response to Wade groping Torres without her consent. RP 182, 239. Still, the state argues that the facts of the case did not support a defense of others instruction. Brief of Respondent, pp. 12-13. Respondent notes that Mr. Hernandez said that he "felt disrespected" when Wade grabbed Torres's breast. Brief of Respondent, p. 13.

But any additional motivation Mr. Hernandez may have had does not affect whether he reasonably believed that Torres was about to be injured. The strength of the evidence supporting the instruction is corroborated by the prosecutor's arguments: the state did not argue lack of

evidentiary support but instead only averred that the defense was not legally applicable. RP 269-271, 288-294. The facts of Mr. Hernandez's case supported a jury instruction on defense of others.

The state cannot demonstrate that this constitutional error was harmless beyond a reasonable doubt. *State v. Stark*, 158 Wn. App. 952, 961, 244 P.3d 433 (2010). Respondent erroneously seeks to apply the standard for ineffective assistance of counsel claims, arguing that Mr. Hernandez cannot show prejudice from the court's refusal to give the defense of others instruction. Brief of Respondent, pp. 14-15.

Respondent's argument regarding prejudice is incorrect for three reasons. First, Mr. Hernandez does not raise ineffective assistance of counsel. Because this due process violation was preserved below, the state bears the burden of proving that the constitutional error was harmless beyond a reasonable doubt. *Stark*, 158 Wn. App. at 961.

Second, Respondent points out irrelevant credibility issues with Torres's and Mr. Hernandez's testimony.<sup>2</sup> Taking the evidence in the light most favorable to Mr. Hernandez, the facts of the case supported an instruction on lawful use of force. *George*, 161 Wn. App. at 95.

---

<sup>2</sup> Furthermore, Respondent ignores reasons to doubt Wade's credibility. Brief of Respondent, pp. 14-15. For example, when Wade called 911, he reported that four Mexican men had stolen money from him. RP 82-85, 112. Later, he recanted, claiming instead that there were only two men and that they walked away without taking anything. RP 72, 75, 111.

Third, the state claims that defense of others would have been inconsistent with Mr. Hernandez's general denial of the crime. Brief of Respondent, p. 14. But Mr. Hernandez admitted to punching Wade. RP 239. He also explained that he did so in direct response to Wade grabbing Torres's breast. RP 239. The state cannot prove beyond a reasonable doubt that the jury would have believed Wade's version of events over Mr. Hernandez's.

The court erred by refusing to instruct the jury regarding Mr. Hernandez's defense of others claim. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). This error violated Mr. Hernandez's right to due process. *Id.* His conviction must be reversed. *Id.*

**II. THE ACCOMPLICE LIABILITY STATUTE CRIMINALIZES PROTECTED SPEECH; COLEMAN, FERGUSON, AND HOLCOMB WERE WRONGLY DECIDED.**

Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). This standard requires proof of intent; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). The state cannot criminalize mere

advocacy. *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

The First Amendment protects the speech advocating the commission of a crime unless the state also proves that it is (1) made with intent to incite or produce “imminent lawless action” and (2) “likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447. The Washington accomplice liability statute is unconstitutionally overbroad because it requires neither. RCW 9A.08.020.

Nevertheless, the state argues that the statute does not criminalize protected speech. According to Respondent, the accomplice liability statute only encompasses speech “directed at and likely to incite or produce imminent lawless action.” Brief of Respondent, pp. 16-17 (*citing State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011); *State v. Coleman*, 155 Wn. App. 951, 961, 231 P.3d 212 (2010)). The state quotes at length from a portion of *Coleman* stating that the Washington accomplice statute requires “the criminal *mens rea* to aid or agree to aid the commission of a specific crime with knowledge that it will further the crime.” Brief of Respondent, p. 16 (*citing Coleman*, 155 Wn. App. at 960-61).

But the portion of the *Coleman* decision respondent highlights is indicative of the problem with that case. “A specific crime” is not the

same as *imminent* lawless action. Likewise, knowledge that a statement will further a crime does not rise to the level of intent to produce imminent lawless action.

The *Ferguson* court adopted the reasoning of *Coleman* whole cloth, but took the error a step further by quoting the *Brandenburg* standard and baldly stating that RCW 9A.08.020 meets the standard. *Ferguson*, 164 Wn. App. at 376. By its plain language, the accomplice liability standard does *not* require proof of intent to produce “imminent lawless action” or that it is likely to produce such action. RCW 9A.08.020. The bare claim that the standard is met does not change the language of the statute.

Division III recently released a published decision, relying on *Ferguson* and *Coleman* to reject a First Amendment challenge to the accomplice liability statute. *State v. Holcomb*, No. 32155-0-III, --- Wn. App. ---, --- P.3d --- (April 10, 2014). The *Holcomb* court makes the same mistake as *Ferguson* and *Coleman* by holding that the statute does not reach protected speech – despite the omission of an intent element -- because it requires knowledge of the crime and that the speech be “directed to inciting or producing imminent lawless action.” (Slip Op. at 6). As noted, this is incorrect – mere knowledge is insufficient, and neither the statute nor the instruction includes an imminence requirement.

Like *Ferguson* and *Coleman*, the *Holcomb* court ignores the plain language of the statute and associated instruction, which do not require that speech be directed at and likely to produce imminent lawless action for conviction. RCW 9A.08.020.

*Ferguson*, *Coleman*, and *Holcomb* are wrongly decided.

The jury in Mr. Hernandez's case was instructed that it could find him guilty as an accomplice if he, "with the *knowledge* that it would promote or facilitate the commission of the crime," aided or agreed to aid another person. CP 36 (emphasis added). The word "aid" was defined for the jury as "words, acts, encouragement, support, or presence." CP 36. Parroting the language of the statute, the instruction did not inform the jury that it had to find that Mr. Hernandez spoke with the intent to facilitate a crime and that his words were likely to produce imminent lawless action. CP 36. The accomplice liability statute and the instructions permitted the jury to convict Mr. Hernandez for protected speech alone. His conviction must be reversed.

**III. MR. HERNANDEZ'S CONVICTION FOR ATTEMPTED FIRST-DEGREE ROBBERY VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.**

Mr. Hernandez relies on the argument in his Opening Brief.

**IV. MR. HERNANDEZ MAY CHALLENGE THE SCHEME FOR IMPOSING ATTORNEY’S FEES, WHICH IMPERMISSIBLY CHILLS THE EXERCISE OF THE RIGHT TO COUNSEL, FOR THE FIRST TIME ON APPEAL.**

A court impermissibly chills the exercise of the right to counsel by imposing attorney’s fees upon accused persons without first determining that they have the present or future ability to pay them. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). The court must assess the person’s current or future ability to pay prior to imposing the cost of a public defender. *Id.* The court ordered Mr. Hernandez to pay \$1,500 in attorney’s fees without assessing whether he could afford to do so. CP 8; RP 355-68.

Respondent does not argue that the order was permissible under the Sixth Amendment. Brief of Respondent, pp. 18-21. Instead, the state claims that the issue cannot be raised for the first time on appeal. Brief of Respondent, pp. 18-21. Although the general rule under RAP 2.5 is that issues not objected to in the trial court are waived on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). The imposition of a criminal penalty may be challenged for the first time on appeal on the grounds that the sentencing

court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).<sup>3</sup>

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 29916-3-III, 2014 WL 1225910 (Wash. Ct. App. Mar. 25, 2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to LFOs. *Id.* Those cases do not govern Mr. Hernandez’s claim that the court lacked constitutional authority to order him to pay attorney’s fees without first finding that he was able to do so.

*Fuller* prohibits a court from *imposing* attorney’s fees upon indigent persons without first determining whether they have the ability to pay them. *Fuller*, 417 U.S. at 45. Nonetheless, Respondent argues that Mr. Hernandez’s claim is not ripe because the state has not yet tried to

---

<sup>3</sup> See also, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has

*collect*. Brief of Respondent, p. 19. As argued in Mr. Hernandez’s Opening Brief, the scheme turns *Fuller* on its head by permitting the court to impose attorney’s fees in every case and leaving the question of whether the accused can afford to pay to a later date. The Sixth Amendment does not permit such a system. *Fuller*, 417 U.S. at 45.

The state also argues that Mr. Hernandez’s claim is foreclosed by *State v. Blank*<sup>4</sup> and *State v. Curry*.<sup>5</sup> But *Blank* addressed the constitutionality of the statute permitting recoupment for the cost of an appeal. *Blank*, 131 Wn.2d at 233-34. Likewise, *Curry* dealt with the system for imposing costs and fees, in general. *Curry*, 118 Wn.2d at 914. Those cases did not address the Sixth Amendment claim Mr. Hernandez raises.

Finally, manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Respondent argues that this issue is not manifest. Brief of Respondent, pp. 20-21.<sup>6</sup> This is incorrect: all of the facts necessary to decide Mr. Hernandez’s Sixth

---

“established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

<sup>4</sup> 131 Wn.2d 230, 239, 930 P.2d 1213 (1997).

<sup>5</sup> 118 Wn.2d 911, 916, 829 P.2d 166 (1992).

<sup>6</sup> The state cites to cases indicating the undesirability of new trials based on issues not raised below. Brief of Respondent, p. 21. But Mr. Hernandez does not ask for a new trial based on the violation of his right to counsel. He merely asks the court to vacate the order that he pay \$1,500 in attorney’s fees absent any evidence that he was able to do so.

Amendment claim appear on the record, as does the prejudice he suffered. The court found Mr. Hernandez indigent at the end of the proceedings and sentenced him to 96 months in prison. CP 8, 21. No fact finder could determine that he has the present or future ability to pay \$1,500 in attorney's fees.

The court violated Mr. Hernandez's right to counsel by ordering him to pay the cost of court-appointed attorney without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Hernandez to pay \$1,500 in attorney fees must be vacated. *Id.*

### **CONCLUSION**

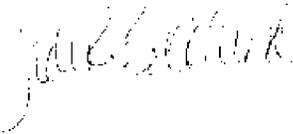
The court violated Mr. Hernandez's right to due process rights by refusing to instruct the jury on defense of others. The court instructed the jury on accomplice liability in a manner that is overbroad in violation of the First Amendment. The court's definition of "substantial step" erroneously relieved the state of its burden of proving each element of attempted robbery beyond a reasonable doubt. Mr. Hernandez's conviction must be reversed.

In the alternative, the court ordered Mr. Hernandez to pay the cost of his court-appointed attorney in a manner that impermissibly chills the

exercise of the right to counsel. The court's order that Mr. Hernandez pay the cost of his public defender must be vacated.

Respectfully submitted on April 15, 2014,

**BACKLUND AND MISTRY**



---

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



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant



---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Kirk Hernandez, DOC #303638  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

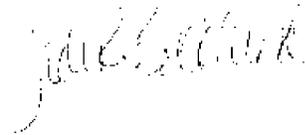
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney  
prosecutor@clark.wa.gov

I filed the Appellant's Reply 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 April 15, 2014.



---

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

## BACKLUND & MISTRY

April 15, 2014 - 11:42 AM

### Transmittal Letter

Document Uploaded: 447711-Reply Brief.pdf

Case Name: State v. Kirk Hernandez

Court of Appeals Case Number: 44771-1

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:

[prosecutor@clark.wa.gov](mailto:prosecutor@clark.wa.gov)