

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARCUS LANGFORD,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

J.J. Stimson shot and killed David Watson. He pled guilty to second-degree felony murder and was sentenced to 20 years in prison. He is not the appellant in this case.

Sixteen-year-old Marcus Langford was with Stimson that night. He did not shoot anyone; indeed, there was no evidence he was armed. Other than one unreliable hearsay statement, there was no evidence he knew his friend planned to commit any crime at all. Yet he was charged with first-degree felony murder as an accomplice, based on an alleged underlying felony of attempted robbery.

The jurors struggled for days, at one point indicating they were hopelessly deadlocked and at another asking for clarification regarding the difference between “mere presence” and “ready to assist through presence.” After being ordered to keep deliberating, the jury ultimately found Marcus guilty. He was sentenced to over 28 years in prison for J.J. Stimson’s killing of David Watson.

This Court should reverse. The trial court erred in denying Marcus’s motion to strike the hearsay statement. Additionally, Marcus was deprived of the effective assistance of counsel, and the court improperly coerced a verdict by ordering the jury to continue deliberating after it was deadlocked.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Marcus's motion to strike Tajanae Williams's statement that J.J. Stimson "said that him and Marcus were going to rob this guy and take his truck, but they didn't," because the admission of the statement violated ER 802, ER 403, and the Confrontation Clause of the Sixth Amendment to the United States Constitution.¹

2. Marcus was deprived of his right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution.

3. Marcus was deprived of his right to a fair and impartial jury guaranteed by the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution.

4. The State presented insufficient evidence to support the firearm enhancement.

5. The instruction and special verdict form for the firearm enhancement are contrary to the Washington Pattern Instructions, caselaw, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and article IV, section 16 of the Washington Constitution.

¹ Because Marcus was only 16 years old at the time of the incident in this case, and is still a child as of this writing, this brief will refer to him by his first name.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. ER 802 requires the exclusion of hearsay, which is an out-of-court statement offered for the truth of the matter asserted. Although another person's statement is not hearsay if a party "adopted" it, and a person may adopt another's statement even through silence, silence does not constitute an adoptive admission unless the statement and circumstances were such that it is reasonable to conclude the listener would have responded had there been no intention to acquiesce. Here, Tajanae Williams testified that her boyfriend, J.J. Stimson, "said that him and Marcus were going to rob this guy and take his truck, but they didn't," that she responded by saying she wouldn't have allowed him to park the truck at her house, and that during their conversation Marcus Langford was sitting on the other side of her with a "blank stare." Did the trial court err and violate the rule against hearsay by denying Marcus's motion to strike the testimony? (Assignment of Error 1)

2. Once the foundational requirements are satisfied, whether an accused has made an adoptive admission is a matter of conditional relevance to be determined by the jury. Thus, the jury must be instructed that it can consider the statement at issue only if it finds that the defendant adopted it as his own. Here the court instead explicitly instructed the jury that it could consider J.J. Stimson's statement if it found it was true – in

other words, it instructed the jury that it could consider J.J. Stimson's statement for a hearsay purpose. Did the trial court err and violate the rule against hearsay in so instructing the jury? (Assignment of Error 1)

3. ER 104(a) assigns to the trial judge the responsibility for making preliminary determinations regarding the "admissibility of evidence." Although the Washington Supreme Court has never addressed the issue, the Oregon Supreme Court has held that the question of whether a party adopted another's statement is one for the judge under ER 104(a). This Court has held that the similar question of whether the declarant had the authority to speak for the party is an issue for the judge under ER 104(a). In a 25-year-old case, however, Division One held that the question of whether a party adopted another's statement is one for the jury under ER 104(b), and a panel of this Court subsequently followed that case. Should this Court part company with these cases, because the question at issue is one of admissibility and not weight? (Assignment of Error 1)

4. Should this Court follow Pennsylvania's lead and abolish the "tacit admission" exemption altogether because the evidence thereby admitted is unreliable? (Assignment of Error 1)

5. ER 403 provides for the exclusion of evidence that is substantially more prejudicial than probative. Where there was no

evidence that Marcus affirmatively adopted J.J. Stimson's statement, but the State used it to argue he was an accomplice to Stimson's felony murder of David Watson, and where there was otherwise no evidence that Marcus knowingly facilitated attempted robbery, did the trial court violate ER 403 by denying the motion to strike the statement? (Assignment of Error 1)

6. The Sixth Amendment and article I, section 22 guarantee a defendant the right to confront his accusers. Did the trial court violate Marcus's constitutional right to confront his accusers by denying the motion to strike J.J. Stimson's alleged statement, when J.J. Stimson never testified? (Assignment of Error 1)

7. A defendant is entitled to a new trial if his attorney's performance was deficient and if there is a reasonable probability that the result would have been different absent the deficiency. Marcus's attorney failed to lodge a timely objection to the hearsay statement described above, helped craft an instruction telling the jury it could use the statement for a hearsay purpose, and failed to propose an affirmative defense instruction that was supported by the evidence. The trial judge indicated he would have sustained a timely objection, and the jury deliberated for days because they were agonizing over the difference between "mere presence" and "ready to assist through presence." Under these

circumstances, is Marcus entitled to a new trial because he was deprived of his constitutional right to the effective assistance of counsel?

(Assignment of Error 2)

8. The constitutional right to a jury trial includes the right of a jury to fail to agree. Accordingly, after jury deliberations have begun, a court may not instruct the jury in such a way as to suggest the need for agreement. After the jury had been deliberating for 11 hours, it told the court it was hopelessly deadlocked, and the foreperson said “no” when asked whether there was a reasonable possibility of reaching agreement within a reasonable time. The court ordered the jury to return to its room and continue deliberating. Did the court coerce a verdict, in violation of the constitutional right to a fair and impartial jury trial? (Assignment of Error 3)

9. Before a firearm enhancement may be imposed, the State must prove beyond a reasonable doubt that the accused was armed or that he knew an accomplice was armed. In this case, no evidence was presented that Marcus was armed, and the evidence showed his companion did not reveal he had a gun until just before he shot the victim. Must the firearm enhancement be vacated and the case remanded for resentencing?

(Assignment of Error 4)

10. Under caselaw, the WPICs, and the Fourteenth Amendment, a jury must be told it can answer “no” to the question of whether the State proved an enhancement, not that the only verdict it can return is “yes.” Here, the concluding instruction and special verdict form told the jury it could either return a “yes” verdict or not return any verdict; there was no option to find Marcus not guilty of the firearm enhancement. Did the instruction and verdict form violate Marcus’s right to due process? (Assignment of Error 5)

11. Article IV, section 16 of the Washington Constitution prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. Did the concluding instruction and special verdict form, which allowed for a “yes” answer but not a “no” answer, violate article IV, section 16? (Assignment of Error 5)

D. STATEMENT OF THE CASE

Marcus Langford was despondent after his mother died in November, 2011. He pressed on with his studies at Stadium High School and continued to do well academically, but his home life was chaotic. He started spending a lot more time outside the house, and he made new friends. 9/20/13 RP 23; CP 105-12.

One of those friends was J.J. Stimson. J.J.'s mother had been convicted of a crime and was sent to the women's prison in Purdy. Thus, J.J. moved in with his great aunt in spring of 2012. 7/24/13 RP 280.

J.J.'s aunt had 12 guns in a safe. She eventually realized two of them, both .38 special revolvers, were missing. J.J. later admitted having taken at least one of them. 7/24/13 RP 281-82, 289.

1. J.J. Stimson shoots and kills David Watson

In the early morning of November 18, 2012, David Watson was found bleeding to death in his truck, a couple of blocks from a Chevron station in Tacoma. 7/23/13 RP 115. He had been shot, and a .380 caliber bullet was found in his body. 7/24/13 RP 145, 264. The bullet was shot from an automatic handgun; it could not have been fired from a .38 special revolver. 7/24/13 RP 146.

Nevertheless, J.J. Stimson was soon implicated in the crime. Surveillance video placed him at the scene. Ex. 69;² 7/25/13 RP 360; 7/29/14 RP 514-16. The video showed that Watson parked at the Chevron in the early morning hours, stumbled out of his truck and fell to the ground

² There are two discs in exhibit 69, one of which shows the truck (along with several other views) and one of which shows the door. To play the DVD that includes the truck video, open the VideoPlay folder and click on the "videoplay.exe" file. From inside the video player, open the other folder, labeled "20121118173604." Then press play. The primary camera view at issue is Camera 8.

(subsequent laboratory analysis revealed he had a blood-alcohol level of .36). Ex. 69 at ~3:55:05; 7/24/13 RP 267; 7/25/13 RP 402. Watson stood up, only to fall down again. Ex. 69 at ~3:55:11-3:55:15.

Shortly thereafter, J.J. and Marcus walked into the parking lot. Ex. 69 at ~3:57:40. They found Watson on the ground by his truck, and helped him back in. 7/25/13 RP 403; 7/29/13 RP 539; Ex. 69 at ~3:58:12-4:00:14; Ex. 72; Ex. 75 at 9. According to Marcus and J.J., Watson asked them to buy him beer, and gave them five dollars. 7/25/13 RP 419; 7/29/13 RP 539-40; Ex. 72; Ex. 75 at 9. The video shows Marcus trying to open the door of the store, then heading back toward the truck after realizing the door was locked. 7/25/13 RP 419; 7/29/13 RP 541; Ex. 69, CAM08_20121118025126.avi at ~00:08-00:16.³ Marcus stood behind and to the left of J.J., who pulled something from his waist area and shot Watson. 7/25/13 RP 419; 7/29/13 RP 543. No gun ever appeared on the video. 7/25/13 RP 453-55; Ex. 69.

J.J. “took off running.” Ex. 75 at 19. Marcus “was scared,” and “didn’t know what to do,” so he started running also. Ex. 75 at 19. Both boys were eventually arrested. 7/29/13 RP 466, 565; Ex. 72.

³ This file is on the other disk in the envelope marked Exhibit 69. It can be played using standard video players like Windows Media Player.

Both J.J. and Marcus were charged with first-degree felony murder, predicated on attempted robbery, with a firearm enhancement. CP 8-9. Marcus was charged as an accomplice to J.J. Stimson. CP 8-9. J.J. eventually pled guilty to second-degree felony murder, and received a 20-year sentence. 7/18/13 RP 13-14.

2. Marcus insists he had no idea his friend planned to commit a crime, but he is tried for first-degree murder as an accomplice

Marcus insisted he had no idea that J.J. planned to rob anyone or commit any crime whatsoever.⁴ 7/25/13 RP 436; 7/29/13 RP 535; Ex. 72; Ex. 75 at 16, 17. The two were simply walking through the parking lot on their way to J.J.'s girlfriend's house after a birthday party, when they ran into Watson. Ex. 75 at 10. Although Marcus knew that J.J. had his aunt's .38 specials earlier in the day, he thought (correctly) that J.J. did not have them anymore, and he certainly did not know that J.J. had exchanged those guns for a .380. 7/25/13 RP 422-24; 7/29/13 RP 544; Ex. 72; Ex. 75 at 18-19. Marcus, therefore, refused to enter a guilty plea and exercised his constitutional right to trial. 7/18/13 RP 14-15.

⁴ At first he said he was not with J.J. that night at all, but he later admitted he was with him. He insisted all along that he had no knowledge of any criminal plan and did not aid J.J. in attempting to rob Watson. Ex. 72.

At trial, the State presented the surveillance video, the evidence that J.J. had stolen guns not used in the crime, and Marcus's statements to detectives. 7/24/13 RP 281-82, 289; 7/25/13 RP 402-403, 408-58; Exs. 69, 72, 75. Numerous law enforcement officers testified about the way that Watson was found bleeding to death in his truck, their unsuccessful search for a shell casing, and their discussions with J.J. Stimson's aunt about the missing .38 specials. 7/23/13 RP 98-112; 7/24/13 RP 147-205; 7/25/13 RP 312-64, 399-401; 7/29/13 RP 505-11. A forensic scientist for the State testified that the bullet found in Watson's body was a .380 and could not have come from a .38 special. 7/24/13 RP 145-46.

The State also called J.J.'s girlfriend, Tajanae Williams, as a witness. 7/29/13 RP 475-77. Tajanae testified that the boys went to her house in the early morning of November 18. 7/29/13 RP 479. She escorted them to her room, and all three sat on her bed – J.J. on one side of her and Marcus on the other. 7/29/13 RP 481. She testified that J.J. "said that him and Marcus were going to rob this guy and take his truck, but they didn't." 7/29/13 RP 481. The judge asked her to repeat the statement, and she said, "J.J. said they were going to rob this guy for his truck, but they didn't." 7/29/13 RP 481.

She said that in response, she argued with J.J., telling him that she would not have let him park a stolen truck at her house. 7/29/13 RP 482.

Marcus was not a part of this conversation; he was sitting silently on the other side of her, with a blank look. 7/29/13 RP 482. Marcus then changed the subject, and asked if he could download some music. 7/29/13 RP 482.

Outside the presence of the jury, Marcus's attorney moved to strike Tajanae's testimony about J.J.'s out-of-court statement. 7/29/13 RP 552. Counsel said he was caught off-guard by it because it was not in the discovery, and that it was improperly elicited and should not be considered by the jury. 7/29/13 RP 552. The State countered that it was in the discovery, in a detective's police report. 7/29/13 RP 552. The court deferred ruling on the motion to strike. 7/29/13 RP 555.

When the court and the parties took up the issue again, the State claimed that by failing to take part in the conversation between J.J. and Tajanae, Marcus "adopted" J.J.'s statement as his own, and therefore there was no hearsay or confrontation problem. 7/29/13 RP 600-08. Marcus's attorney vehemently disagreed, and argued that "I don't believe the threshold has been met regarding acquiescence by silence." 7/29/13 RP 609-10.

The court indicated it would have sustained a timely objection because "the law is clearly that incriminating statements by co-defendants are inadmissible," but said the "problem is you didn't object." 7/29/13 RP

610. The court also sympathized with the principle that Marcus's silence did not necessarily indicate acquiescence. 7/29/13 RP 613. But the court ultimately sided with the State, ruling that under a 25-year-old Division One opinion, State v. Neslund, 50 Wn. App. 531, 551, 749 P.2d 725 (1988), "the jury is primarily responsible for determining whether in light of all the surrounding circumstances the defendant acquiesced in the statements." 7/29/13 RP 614-15. The court denied the motion to strike, stating that the question of whether Marcus adopted J.J.'s statement was one of conditional relevance to be determined by the jury.⁵ 7/29/13 RP 615.

The court and parties then attempted to craft an instruction to this effect, but were unsuccessful. Nobody explained to the jury that J.J.'s statement should be disregarded if it was not adopted by Marcus. The court instead instructed the jury:

Alleged statements of an accomplice should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such alleged statements alone unless after carefully considering the statements, you are satisfied beyond a reasonable doubt of its truth.

It is for the jury to determine if such statements were made and whether those statements, in light of all the

⁵ The court also denied Marcus's subsequent motion to reconsider the ruling. 7/30/13 RP 621.

circumstances, were heard, understood and acquiesced by the defendant.

CP 60 (Instruction 9).

During closing arguments, Marcus's attorney told the jury that Marcus was with J.J. that night but that mere presence is not sufficient to find someone guilty as an accomplice to someone else's crime. 7/30/13 RP 693-702. The State argued that Marcus was not merely present but knowingly facilitated J.J.'s attempted robbery of Watson's truck, and was therefore guilty of first-degree murder. 7/30/13 RP 663. The State relied primarily on Tajanae Williams's testimony about J.J. Stimson's out-of-court statement to prove Marcus's supposed knowledge. 7/30/13 RP 667-68, 708.

3. The jury deliberates for days, states it is hopelessly deadlocked, and requests clarification on whether mere presence is enough to create accomplice liability

The jury deliberated for days. After discussing the case for an hour and a half the afternoon of Tuesday, July 30th, all day Wednesday, July 31st, and all morning Thursday, August 1st, the jury sent a note to the judge. It said, "We have been working very hard to come to a consensus and at this time it does not appear possible." CP 45; 8/1/13 RP 730. The court discussed the issue with counsel for both sides. The State wanted the jury to continue to deliberate. The defense attorney said, "Your

Honor, I know it's traditional to inquire if there is any possibility of them reaching a verdict, giving them reasonable time. However, when I saw that statement, I was impressed by the certainty of it – that there is, I believe she said, no possibility.” Defense counsel said, “Our position, Your Honor, is that they are hung at this time.” 8/1/13 RP 731.

The judge said he usually asks whether there is a reasonable probability of the jury reaching an agreement within a reasonable time. 8/1/13 RP 731-32. He said, if the answer is yes, he would tell the jury to continue to deliberate. The judge asked counsel what they wanted if the answer was no. Defense counsel said, “Our position then, Your Honor, to have them deliberate further would be coercing a verdict....” 8/1/13 RP 732.

The court did not seem to acknowledge this response. The judge said:

Okay. All right. Because it is a very serious case and a lengthy trial, I am going to ask the standard question. If the answer is no, I am still at this point in time going to instruct the jury to continue deliberating, okay? We will bring the jury in.

8/1/13 RP 732.

When the jurors came in, the court warned them not to disclose any information about their deliberations. 8/1/13 RP 732-33. He said to the foreperson, “I do want to ask you at this point in time if you believe

there is a reasonable probability of the jury reaching an agreement within a reasonable time.” The foreperson said, “No.” 8/1/13 RP 733.

The court nevertheless responded: “Okay. At this point in time, I am going to ask the jury to continue deliberating at this point in time, and so I am going to excuse you back to the jury room and ask you to continue your discussions and deliberations.” 8/1/13 RP 733.

The next day, the jury sent out another note, this one asking for clarification on the instructions. It asked:

In the last sentence of Instruction No. 8, what is meant by “mere presence?” Does mere presence apply to both acquaintances and innocent bystanders? How does “mere presence” differ from “ready to assist by his or her presence”?

CP 47; 8/2/13 RP 735. The parties agreed that the court should refer the jury to the existing instructions. 8/2/13 RP 736; CP 47.

4. Marcus is convicted and sentenced to over 28 years in prison

The following Monday, the jury returned a verdict of guilty. 8/5/13 RP 740-45; CP 73.

At sentencing, Marcus offered condolences to the victim’s family for their loss. But he emphasized, “I don’t think it’s right for me to be getting convicted for a crime that I didn’t even commit. I was there, but I didn’t have knowledge that the crime was going to be committed. ... I am

just a kid. ... I couldn't control my codefendant's actions nor what he was thinking. I was just there at the wrong time and hanging around with the wrong person." 9/20/13 RP 25.

The court imposed a sentence of 28 years. 9/20/13 RP 31; CP 91.

E. ARGUMENT

1. **A new trial should be granted because the court erred in denying Marcus's motion to strike Tajanae Williams's statement that J.J. Stimson "said that him and Marcus were going to rob this guy and take his truck, but they didn't."**

Although the jury struggled for days because it could not agree on whether Marcus was "merely present" or "present and ready to assist," it ultimately found Marcus guilty as an accomplice to J.J. Stimson. The only evidence that Marcus was "ready to assist" was Tajanae Williams's testimony that "J.J. said they were going to rob this guy for his truck, but they didn't." 7/29/13 RP 481.

The statement was hearsay and should have been stricken. The court erred in ruling it was admissible as an "adoptive admission," because Marcus was not a participant in the conversation in question and was merely sitting silently with a "blank stare." Furthermore, even if the statement was properly admitted as an adoptive admission, the court improperly instructed the jury that it could use the statement **regardless** of whether Marcus adopted it, so long as it believed J.J.'s statement was true.

In other words, the jury was explicitly instructed it could use the statement for a forbidden hearsay purpose.

This Court should hold that the admission of the statement requires reversal for any of several independent reasons: (1) the statement was inadmissible hearsay, not an adoptive admission, and therefore its admission violated ER 802; (2) the jury was improperly instructed that it could consider the statement for a hearsay purpose; (3) the admission of the statement violated ER 403; (4) the admission of the statement violated the Confrontation Clause; and (5) Marcus was deprived of the effective assistance of counsel because his attorney failed to object to the statement at the moment it was elicited and helped craft the erroneous jury instruction.⁶ Finally, this Court should take the opportunity to revisit whether ER 104(a) or ER 104(b) applies to alleged adoptive admissions, and whether the tacit admission exemption should exist at all in Washington.

⁶ Ineffective assistance of counsel is addressed in Argument Section E(2).

- a. The admission of Tajanae Williams's testimony about J.J. Stimson's statement violated the rule against hearsay.
 - i. *J.J.'s statement was inadmissible hearsay, not an adoptive admission, because Marcus did not affirmatively adopt the statement in any manner; he sat silently with a "blank stare."*

The Rules of Evidence prohibit the admission of hearsay. ER 802. Hearsay is inadmissible because the witness repeating it has no personal knowledge of the truth of the matter asserted. See State v. Babich, 68 Wn. App. 438, 447, 842 P.2d 1053 (1993). "The theory of the hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." State v. Ryan, 103 Wn.2d 165, 175, 691 P.2d 197 (1984) (quoting 5 J. Wigmore, Evidence § 1420, at 251 (Chadbourn rev. 1974)).

The Rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Another person's out-of-court statement is not hearsay if it is one in which "the party has manifested an adoption or belief in its truth." ER 801(d)(2)(ii). The theory is that the other person's statement thereby becomes the party's own statement, and may accordingly be used against him. State v. Cotten,

75 Wn. App. 669, 689, 879 P.2d 971 (1994). However, “[e]vidence of ‘tacit’ or ‘adoptive’ admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony.” Holmes v. United States, 580 A.2d 1259, 1263 (D.C. 1990) (internal citation omitted).

A person “may manifest adoption of a statement in words or gestures.” State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988). For example, if a person nods his head “yes” to a statement another makes, he has manifested a belief in its truth. Therefore, the other’s statement essentially becomes his own statement, and is an adoptive admission rather than inadmissible hearsay. See id. (citing State v. Anderson, 44 Wn. App. 644, 723 P.2d 464 (1986, review dismissed, 109 Wn.2d 1015 (1987))).

Although it is also theoretically possible for a party to manifest adoption of a statement by silence, silence is “inherently equivocal,” and therefore evidence of a statement and its silent response “must be received with caution.” Neslund, 50 Wn. App. at 551. Silence constitutes an admission only if:

- (1) the party-opponent heard the accusatory or incriminating statement and was mentally and physically able to respond; and

(2) the statement and circumstances were such that it is reasonable to conclude the party-opponent would have responded had there been no intention to acquiesce.

Neslund, 50 Wn. App. at 551.

In Neslund, the court held that a trial judge determines whether the foundational requirements for admissibility have been satisfied by deciding whether a reasonable jury could answer both of the above questions in the affirmative. In order for the statement to be admitted as an adoptive admission, “[t]he circumstances must also be such that an innocent defendant would normally be induced to respond.” Id. Only if these foundational questions are satisfied may the jury hear the statement. Id.

The foundational requirements were not satisfied in this case. J.J. Stimson’s statement was inadmissible hearsay, not an adoptive admission, and the statement should have been stricken. As to the first requirement, it is true that a reasonable jury could conclude that Marcus heard J.J.’s statement and was not physically or mentally disabled. But as to the second requirement, the statement and circumstances were **not** such that a person would normally respond if he did not intend to acquiesce. To the contrary, Marcus was not part of the conversation at all. It was an argument between a boyfriend and girlfriend, during which the boyfriend said “we were going to rob this guy for his truck, but we didn’t,” and the

girlfriend responded by saying she wouldn't have let him park a stolen truck at her house. 7/29/13 RP 48-82. While J.J. Stimson and Tajanae Williams were having this conversation, Marcus was sitting on the other side of Tajanae. 7/29/13 RP 481. He was silent, and had a "blank stare." 7/29/13 RP 482. **After** Tajanae and J.J. finished that "discussion," Marcus changed the subject and asked if he could use Tajanae's computer. 7/29/13 RP 482. A reasonable person in Marcus's position would not have interrupted the conversation between J.J. and his girlfriend simply to clarify that J.J. should have said "I" instead of "we" when describing the attempted robbery. Most people in Marcus's position would not think that this distinction would matter to the girlfriend, and would not want to get in the middle of a boyfriend/girlfriend discussion to correct a pronoun.

Marcus's case stands in stark contrast to Neslund. There, the defendant, Ruth Neslund, had admitted to one of her brothers, Paul Meyers, that she killed her husband. Neslund, 50 Wn. App. at 534. Paul Meyers was also present when Ruth Neslund was conversing with her other brother, Robert Meyers. "[T]he two talked about how Robert had cut up Rolf's body in the bathtub using a broadax and a butcher knife and then carried the body parts in a wheelbarrow out behind barn, where he built a wood fire in the burn barrel and burned the body parts and later dumped the ashes in a pile of animal waste behind the barn." Id. At trial,

Neslund objected to Paul Meyers's testifying about Robert Meyers's half of this conversation. Id. at 549.

This Court affirmed the admission of the testimony, holding it satisfied the above test. Importantly, “**both** Neslund and Robert participated” in the conversation – a “detailed conversation describing the killing of Rolf Neslund and the dismemberment and disposal of his body.” Id. at 553 (emphasis in original). Thus, if Robert Meyers's statements were incorrect, it would have been natural for Neslund to refute them. Id.

Here, though, Marcus was **not** a participant in the conversation. He was sitting quietly with a blank stare while Tajanae and J.J. Stimson conversed. It would not have been natural for him to jump into that conversation, particularly because it appeared the two were arguing a bit. Instead, he did what is more natural and appropriate for a third party to do when a couple is fighting: he stayed out of it, then changed the subject. Neslund is not on point.

The same is true of Cotten, 75 Wn. App. 669. There, as in Neslund, the defendant and another person participated in a conversation, and a silent third-party listener later testified about the conversation at the defendant's trial. Cotten, 75 Wn. App. at 673-74. The witness testified that “Cotten and Baldassari ... began talking about an incident where they went to the Hilltop and killed someone.” Id. at 673. According to the

witness, Baldassari “said that he saw someone on the Hilltop, shot him and that he blew his head clean off.” According to the witness, Cotten then said, “Oh, I didn’t get one.” Id. Among other things, both Cotten and Baldassari told him “that Cotton was driving the car and Baldassari had shot the person through the passenger side.” Id. at 674.

Cotten argued that Baldassari’s half of the conversation should have been excluded as hearsay, but this Court held it was admissible as an adoptive admission. Id. at 689. The circumstances were such that if Cotten disagreed with any of Baldassari’s statements, he would have said so, because both of them together were telling the third party about the incident. As the third-party witness explained:

[T]he first person would say something and then the other person would add to this. Louis [Baldassari] would say something and then [Cotten] would add to it, or if something was left out, Bryan would add something to what Louis said or vice versa.

Cotten, 75 Wn. App. at 689. This was not the case here, as Marcus was sitting silently while Tajanae and J.J. conversed.

In sum, the witnesses in Neslund and Cotten were silent third parties who observed and heard conversations in which defendants participated. But here, **Marcus** was the silent third party, yet Tajanae was permitted to testify about her own conversation with J.J. Stimson, in which Marcus did not participate. This was improper and violated the rule

against hearsay. Marcus did not “adopt” J.J.’s statement by failing to interject himself into J.J.’s conversation with his girlfriend. The trial court erred in denying the motion to strike, and this Court should reverse.

- ii. *The trial court erroneously instructed the jury that it could consider J.J.’s out-of-court statement for its truth regardless of whether Marcus adopted it.*

In Neslund, the court held that once the foundational requirements are satisfied, “whether an accused has made an adoptive admission is ... a matter of conditional relevance to be determined ultimately by the jury.” Neslund, 50 Wn. App. at 551-52. Thus, the jury must be instructed that it can consider the statement at issue **only if** it finds that the defendant adopted it as his own. See id. For example, California follows the same rule as Neslund, and has adopted the following pattern instruction for these circumstances:

If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

1. The statement was made to the defendant or made in (his/ her) presence;
2. The defendant heard and understood the statement;
3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true; and

4. The defendant could have denied it but did not.

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

CALCRIM 357 (2013) (emphasis added).

But in Marcus's case, the trial court instructed the jury:

Alleged statements of an accomplice should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such alleged statements alone unless after carefully considering the statements, you are satisfied beyond a reasonable doubt of its truth.

It is for the jury to determine if such statements were made and whether those statements, in light of all the circumstances, were heard, understood and acquiesced by the defendant.

CP 60 (Instruction 9). The instruction does not tell the jury to disregard the statement if it determines the statement was not "heard, understood and acquiesced by the defendant." The instruction does not tell the jury the significance of this determination at all. The only clear instruction is that the jury can consider J.J.'s out-of-court statement if it is satisfied of its truth – but that is exactly the type of statement that is **inadmissible** under the rule against hearsay. ER 801, 802. Thus, even if the trial court did not

err in denying the motion to strike, it erred in affirmatively instructing the jury it could consider another person's out-of-court statement for a hearsay purpose.⁷

- iii. *This Court should hold that the question of whether a party adopted a statement is an issue for the judge under ER 104(a).*

Although the above arguments resolve the issue, this Court should consider going further and revisiting the proper framework for the adoptive admission exemption. As explained, in Neslund, Division One held that the question of whether a party adopted another's statement is one of conditional relevance to be determined ultimately by the jury under ER 104(b). Neslund, 50 Wn. App. at 551-52. This Court followed Neslund in Cotten, but this Court should take the opportunity to reconsider the issue. This Court should hold that because the "adoptive admission" question is one of competence rather than relevance, it should be determined by a judge under ER 104(a).⁸

⁷ The instruction the trial court gave is the standard instruction given when an alleged accomplice testifies and thereby makes statements **in court**. In such circumstances there is no hearsay problem. It was improper for the court to give the instruction with respect to an **out-of-court** statement, because an out-of-court statement may not be offered for its truth. ER 801, 802.

⁸ It does not appear that our supreme court has addressed the issue since the Rules of Evidence were adopted.

The Oregon Supreme Court so held in State v. Carlson, 311 Or. 201, 808 P.2d 1002 (1991). Looking first to the wording of Oregon Evidence Code 104(1), which is the same as Washington’s ER 104(a), the Court noted that the rule “assigns to the trial judge the responsibility for making preliminary determinations regarding, inter alia, the ‘admissibility of evidence.’” Carlson, 311 Or. at 211. The question of whether a person intended to adopt another’s statement falls within the scope of that rule, because its proof concerns the admissibility of evidence, not the weight to be accorded it. Id.

Tegland agrees that:

[T]he judge determines all ... preliminary questions concerning ‘the admissibility of evidence’ – factual determinations necessary to decide whether a particular exception to the hearsay rule applies, whether an exception to the best evidence rule would be made, whether the State should be allowed to offer evidence of a criminal defendant’s criminal history, and so forth.

5 K. Tegland, Washington Practice, Evidence § 104.3 at 121 (5th ed. 2007). For example, ten years after Neslund, this Court held that “[w]hether a declarant is a speaking agent for purposes of ER 801(d)(2)(iii) and (iv) is a question of preliminary fact governed by ER 104(a).” Condon Bros., Inc. v. Simpson Timber Company, 92 Wn. App. 275, 285, 966 P.2d 355 (1998). Notwithstanding Cotten, this Court implied that the same should be true of adoptive admissions. See id. at

285-86 (stating “Like other such hearsay related questions of preliminary fact, it is decided by the trial judge”); *id.* at n. 23 (“As used here, the phrase, ‘hearsay-related questions of preliminary fact’ includes questions of fact that relate to a hearsay exemption (ER 801(d)) or a hearsay exception (ER 803-04)”).

Indeed, it would make no sense to say that ER 104(a) governs admissibility questions under ER 801(d)(2)(iii) and (iv) but that ER 104(b) governs the similar question under ER 801(d)(2)(ii). The issue in either case is whether the declarant’s statement can be imputed to the party. The same screening rule should therefore apply in either instance. That rule should be ER 104(a), not ER 104(b), because the question is one of admissibility and not of weight.

Saddling the jury with the question of admissibility is an inappropriate allocation of authority. As Tegland explains:

Occasional deviations from these general principles can be found in Washington. In a few reported cases, the trial court gave the jury instructions that, in effect, invited the jury to decide whether the requirements for the admissibility of certain evidence had been satisfied. The jury instructions then went on to say that if the jury concluded that the requirements had not been satisfied, the jury should disregard the evidence. These cases depart from the general rule, perhaps inadvertently, and do not seem to represent the current approach under Rule 104.

Tegland, § 104.3 at 122 (emphasis added).

The Oregon Supreme Court noted another “even more persuasive” reason for holding that the question is one for the judge: “If the evidence is inadmissible, i.e., the jury does not find the preliminary fact (intent to adopt, agree or approve) to exist, preventing jury contamination may prove impossible.” Carlson, 311 Or. at 213. Such contamination is inconsistent with Rule 103, which states, “In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means.” Id. at n. 12; see ER 103(c) (Washington rule has same language as Oregon rule).

Professor Norman Garland agrees:

If the decision as to the fact’s existence involves the preservation of an exclusionary rule of law, ... then the judge must be the one to decide whether the fact exists before the jury gets to hear anything about the proffered evidence. Otherwise, the jury would be tainted by consideration of the evidence governed by the exclusionary rule.

Norman M. Garland, An Essay on: Of Judges and Juries Revisited in the Context of Certain Preliminary Fact Questions Determining the Admissibility of Evidence under Federal and California Rules of Evidence, 36 Sw. U. L. Rev. 853, 855 (2008). Professor Garland reasons that the California approach, which is similar to the Neslund approach, “undermines the operation of the exclusionary force of the hearsay rule.” Id. at 856. “The jury should not be allowed to have the chance to consider

the contested hearsay in deciding the existence of these preliminary facts if there is any real danger that the jury would be unable to disregard the contested hearsay.” Id.

The policy of the hearsay rule prohibits statements from being considered for their truth unless certain requirements are met: here, the foundation for an adoptive admission. To allow the jury to hear the statement in order to find the basis for whether the evidence is relevant defeats the operation of the exclusionary rule and the purpose behind it.

Id. at 865.

In Carlson, the Oregon Supreme Court reversed where the trial court had admitted evidence that the defendant “hung his head and shook his head back and forth” after his wife accused him of “shooting up in the bedroom with all [his] stupid friends.” Carlson, 311 Or. at 203. The reviewing court held this evidence was not admissible because, given the ambiguity of the defendant’s nonverbal reaction, there was insufficient evidence to support a finding by a preponderance of the evidence that the defendant intended to adopt or agree with his wife’s accusation. Id. at 214. Here there is even less evidence that Marcus intended to adopt or agree with J.J.’s claim. This Court should hold that ER 104(a) applies to alleged adoptive admissions and that Tajanae Williams’s hearsay testimony should have been stricken in the absence of a finding by the trial judge that Marcus adopted the statement as his own.

iv. *This Court should reject the “tacit admission” rule.*

This Court should also consider rejecting the “tacit admission” exemption altogether. In other words, although a person may adopt another’s statements through words or gestures, passive silence should never constitute an adoptive admission. The Pennsylvania Supreme Court has so held in light of the unreliability of such evidence. Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967). The Dravecz court declared the tacit admission rule “too broad, widesweeping, and elusive for precise interpretation, particularly where a man’s liberty and his good name are at stake.” Id. at 585.

Who determines whether a statement is one which “naturally” calls for a denial? What is natural for one person may not be natural for another. There are persons possessed of such dignity and pride that they would treat with silent contempt a dishonest accusation. Are they to be punished for refusing to dignify with a denial what they regard as wholly false and reprehensible?

Id. A law review article similarly refuted the foundation for the tacit admission exemption:

The common sense psychology behind the adoptive admission rule assumes that, when confronted with an untrue statement, a listener will speak up to refute it. This approach ignores the fact that many people, especially women and people of color, may react in a very different way – with silence or equivocation – because of their race, class, gender, ethnicity, or a combination of these factors.

Maria L. Ontiveros, Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity, 28 Sw. U. L. Rev. 337, 338-39 (1999).

Another law review author condemned the exemption more broadly, stating, “the principle that the innocent deny accusations is another ... fallacious generalization elevated to a binding proposition despite the lack of a valid basis for it in either empirical data or human experience.” Charles W. Gamble, The Tacit Admission Rule: Unreliable and Unconstitutional – A Doctrine Ripe for Abandonment, 14 Ga. L. Rev. 27, 33 (1979-80). Thus, “the Tacit Admission Rule in its entirety, including those applications that are constitutionally permissible, should be abandoned as based upon an unreliable principle: that the guilty remain silent when confronted with an accusation, while the innocent cry out.” Id. at 43.

The Dravec court similarly concluded that the tacit admission exemption “is founded on a wholly false premise.” Dravec, 424 Pa. at 586. “It rests on the spongy maxim, so many times proved unrealistic, that silence gives consent.” Id. The court thus overruled its own earlier case adopting the exemption. Id. at 592. This Court should do the same, and should hold that ER 801(d)(2)(ii) applies only to express admissions.

Indeed, such a holding would be consistent with the plain language of the rule. The rule provides that another person's out-of-court statement is not hearsay if it is one in which "the party has **manifested** an adoption or belief in its truth." ER 801(d)(2)(ii) (emphasis added). "Manifest" means "display or show (a quality or feeling) by one's acts or appearance; demonstrate."⁹ Thus, it is an active verb. Passive silence cannot constitute an adoptive admission under the plain language of the rule.

The District of Columbia Court of Appeals has similarly recognized that another person's out-of-court statement should be considered inadmissible hearsay rather than an adoptive admission unless a reasonable jury could conclude that the defendant "unambiguously assented" to the statement. Holmes, 580 A.2d at 1263. And the Minnesota Supreme Court has held:

Where hearsay accusations are sought to be introduced as evidence against a defendant in a criminal proceeding on grounds that the hearsay was "adopted" by defendant as an admission of his guilt, the trial court must first determine that the asserted adoptive admission be manifested by conduct or statements which are unequivocal, positive, and definite in nature, clearly showing that in fact defendant intended to adopt the hearsay statements as his own.

Village of New Hope v. Duplessie, 231 N.W.2d 548, 553 (Minn. 1975).

⁹ <https://www.google.com/#q=define+manifest>. (viewed 4/1/14).

These cases are consistent with the plain language of the rule, and with the principle of admitting only reliable evidence at trial. Cf. State v. Bartholomew, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (holding article I, section 3 of state constitution requires excluding from capital trials evidence of prior charges that did not result in convictions and stating, “We deem particularly offensive to the concept of fairness a proceeding in which evidence is allowed which lacks reliability.”) In sum, this Court should hold that passive silence during another’s statement does not constitute an adoptive admission.

b. The admission of Tajanae Williams’s testimony about J.J. Stimson’s statement violated ER 403.

ER 403 prohibits the admission of evidence that is substantially more prejudicial than probative. Even if Tajanae Williams’s testimony about J.J. Stimson’s statement were not prohibited by ER 802, it is inadmissible under ER 403. The statement was substantially more prejudicial than probative given the ambiguity of Marcus’s silence.

United States v. Rodriguez-Cabrera, 35 F.Supp.2d 181 (D. Puerto Rico 1999) is instructive. There, an FBI agent went to the defendant’s office and advised him he was under arrest. Id. at 184. The defendant said, “what is this about?” The agent replied that it was “about the money,” and the defendant nodded. Id.

This exchange was excluded from the defendant's subsequent trial for various financial crimes. The court ruled the admission of the head nod in response to the statement that it was "about the money" would violate ER 403 because "its meaning is entirely too ambiguous." *Id.* at 185. Although the agent understood the nod to mean that the defendant knew of the extortion money to which he referred, there were "many equally plausible explanations for [the defendant's] nod." *Id.* "Simply put, the meaning of the nod is ambiguous and is not sufficiently reliable to be admitted into evidence as a statement by Defendant. There is no question that the prejudice that would result from admission of the nod substantially outweighs probative value." *Id.* (citing Fed. R. Evid. 403).

The same is true in this case. Although the State presented a theory that Marcus's silence meant he agreed with the statement, there were many equally plausible explanations. The most plausible is that Marcus was not part of the conversation and had no desire to involve himself in an argument between J.J. Stimson and his girlfriend. Regardless of the veracity of the statement, it made sense for Marcus to say nothing during their exchange, then change the topic. Thus, as in Rodriguez-Cabrera, there should be no question that the prejudice of admitting this statement substantially outweighed its probative value.

Accordingly, under ER 403, the evidence should have been excluded.

Rodriguez-Cabrera, 35 F.Supp.2d at 185.

- c. The admission of Tajanae Williams’s testimony about J.J. Stimson’s statement violated the Confrontation Clause .

Even if J.J. Williams himself had testified about his out-of-court statement, the testimony would have violated ER 802 and ER 403.

However, because J.J.’s statement came in through Tajanae Williams, its admission also violated the Confrontation Clause.

The Sixth Amendment provides, “the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend VI. “The right to confront one’s accusers is a concept that dates back to Roman times” Crawford v. Washington, 541 U.S. 36, 43, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The “ultimate goal” of the Confrontation Clause is “to ensure reliability of evidence,” which can best be assessed “by testing in the crucible of cross-examination.” Crawford, 541 U.S. at 61.

Article I, section 22 of the Washington Constitution states, “the accused shall have the right ... to meet the witnesses against him face to face.” Const. art. I, § 22. This provision is even more protective than its federal counterpart. State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (article I, section 22 right to confront witnesses “face to face” broader than Sixth Amendment); see also State v. Martin, 171 Wn.2d 521,

528, 252 P.3d 872 (2011) (article I, section 22 provides greater protection than Sixth Amendment against accusations that defendant tailored testimony to trial evidence).

The admission of J.J. Stimson's statement through Tajanae Williams violated the Sixth Amendment and article I, section 22 because Marcus was unable to cross-examine his absent accuser, J.J. This inability to confront one's accuser is the classic problem the Confrontation Clause seeks to remedy. See Crawford, 541 U.S. at 43.

Given the extremely weak evidence of Marcus's knowledge of J.J.'s plan, J.J.'s accusation was a tremendously damaging piece of evidence – yet it was the one statement for which Marcus was denied the right to confrontation. For this reason, too, this Court should hold the trial court erred in denying the motion to strike the statement.

d. The remedy is reversal and remand for a new trial.

Constitutional errors require reversal unless the State proves beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As to evidentiary errors, reversal is required if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). “[W]here there is a risk of prejudice and no way to

know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010).

Under either standard, reversal is required here for the improper admission of J.J. Stimson’s out-of-court accusation. The statement was the only evidence implying that Marcus knowingly participated in J.J.’s alleged attempted robbery. Other than that statement, the only evidence offered was Marcus’s mere presence with J.J. Stimson.

Given this extremely weak evidence regarding Marcus’s knowledge of his friend’s criminal intent, the erroneous admission of J.J. Stimson’s out-of-court statement cannot be considered harmless. This Court should reverse the conviction and remand for a new trial.

2. Marcus was deprived of his constitutional right to the effective assistance of counsel because his attorney failed to make a timely objection to the hearsay statement and helped craft an erroneous jury instruction which explicitly permitted the jury to use the statement for a hearsay purpose.

As explained in section (1) above, the trial court erred in denying Marcus’s motion to strike J.J. Stimson’s out-of-court statement and in instructing the jury that it could use the statement for a hearsay purpose. Although Marcus believes the issue was adequately preserved by the motion to strike, the State may argue the issue was waived by the failure

to object when the statement was elicited, and by defense participation in the crafting of the instruction. In the event this Court finds that trial counsel waived the error, it should hold that Marcus was deprived of his constitutional right to the effective assistance of counsel.

- a. A defendant is entitled to a new trial if his attorney's performance was deficient and the deficiency prejudiced the defendant.

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI;¹⁰ Const. art. I, § 22;¹¹ United States v. Cronie, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

¹⁰ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

¹¹ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998).

A decision is not permissibly tactical or strategic if it is not reasonable.

Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. Thomas, 109 Wn.2d at 226.

- b. Marcus's attorney's performance was deficient because he failed to lodge a timely, specific objection to the out-of-court statement, and he helped craft a jury instruction which specifically allowed the statement to be used for a hearsay purpose.

Marcus's attorney's performance was deficient. He did not object when the prosecutor asked Tajanae Williams, "Did J.J. say anything to you about a robbery?" 7/29/13 RP 481. Nor did he object when Tajanae twice said, "J.J. said they were going to rob this guy for his truck, but they didn't." 7/29/13 RP 481. It was not until later that counsel moved to strike the statement. 7/29/13 RP 552.

The failure to object was not reasonable and was not tactical. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d

177 (2009). It also includes reasonable investigation. Wiggins, 539 U.S. at 521-22; State v. A.N.J., 168 Wn.2d 91, 110, 225 P.3d 956 (2010).

Marcus's attorney did not perform a reasonable investigation; he did not even read the discovery that was provided to him. He claimed that he did not object to the out-of-court statement because he was caught off guard by it, but the prosecutor pointed out that it was in the police report.

7/29/13 RP 552. The court found that "there is no doubt that all sides had access" to the report and that the statement was in the report. 7/29/13 RP 604. Counsel also did not properly research the law; he helped craft a jury instruction which explicitly permitted the use of the out-of-court statement for a hearsay purpose. 7/30/13 RP 644-56; CP 60.

The record demonstrates that the failure was not tactical. Indeed, counsel ultimately moved to strike the statement, and admitted that the only reason he failed to lodge a timely, specific objection is that he was surprised by the testimony. 7/29/13 RP 552. Counsel's performance was constitutionally deficient.

- c. The deficient performance prejudiced Marcus because the court indicated it would have granted a timely objection, and the out-of-court statement was the only evidence that Marcus had any idea his companion planned to commit a crime.

As to prejudice, it is reasonably probable that the outcome would have been different but for the deficient performance. Accordingly,

Marcus's conviction should be reversed and his case remanded for a new trial.

The trial court twice indicated that it would have sustained a timely objection to the statement. On July 29, the court said:

You know, let me just start by saying that I think the preliminary problem with this is that you didn't move to – you didn't object to the question, and thus, we are in the situation now where the court did not sustain an objection. Because, clearly, I think the rule of law is that incriminating statements by a codefendant are generally not admissible.

7/29/13 RP 610. And again on July 30, when the court was trying to craft an instruction, the judge said:

I wish this problem hadn't come up, and I think it wouldn't have come up if I heard an objection.

7/30/13 RP 652.

Not only is it reasonably probable that the trial court would have sustained a timely objection, it is reasonably probable that the outcome of the trial would have been different. As it is, the jury deliberated for days, indicated at one point that it was hopelessly deadlocked, and asked at another point for the distinction between “mere presence” and “present and ready to assist.” CP 45, 47; 8/1/13 RP 730; 8/2/13 RP 735. If the jury had not heard the hearsay statement and been instructed to use it for a

hearsay purpose, it may well have acquitted Marcus. Accordingly, this Court should reverse and remand for a new trial.

3. Marcus was deprived of his constitutional right to the effective assistance of counsel because his attorney failed to request a jury instruction on the applicable affirmative defense.

- a. Defense counsel's performance was deficient because evidence supported the affirmative defense, but Marcus's attorney failed to request the instruction.

Marcus was further denied his right to the effective assistance of counsel when his attorney failed to request an instruction on the affirmative defense that applies to those like Marcus who are accused of felony murder as an accomplice despite extremely limited involvement.

“Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, counsel's performance is deficient.” In re the Personal Restraint of Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007). It is a defense to felony murder as charged in this case that the defendant:

- (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid in the commission thereof; and
- (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

- (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.030(1)(c). The defendant bears the burden of proving the defense by a preponderance of the evidence. Id.

Marcus's attorney elicited evidence supporting this defense, yet failed to request the appropriate instruction. Indeed, it appears counsel was unaware of the defense. But again, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law."

Kyllo, 166 Wn.2d at 862.

Counsel pointed out to the jury the evidence and lack thereof that would have supported this defense. For instance, he reminded the jury that the video shows that Marcus gestured as if to ask "what is going on?" when J.J. pulled out a gun and shot Watson. 7/30/3 RP 702. The evidence showed that Marcus knew J.J. no longer had the .38 specials he possessed earlier in the day, that Marcus did not know J.J. had subsequently acquired a .380 automatic, and that J.J. drew the weapon "completely out of the blue" at the Chevron. 7/30/13 RP 700. Finally, there was absolutely no evidence that Marcus himself was armed. Thus, in failing to request an

instruction on the affirmative defense, counsel provided deficient representation. See Hubert, 138 Wn. App. at 926.

This Court granted relief in similar circumstances in both Hubert and State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009). These cases were second-degree rape prosecutions in which the State charged the defendants under the “physically helpless victim” prong of the statute. In both cases, evidence was presented that the defendants reasonably believed the victims were not physically helpless, but counsel did not propose the instruction for the affirmative defense available under RCW 9A.44.030(1). Hubert, 138 Wn. App. at 929-30; Powell, 150 Wn. App. at 142, 152. This Court held counsel’s performance was deficient in both cases. Hubert, 138 Wn. App. at 930; Powell, 150 Wn. App. at 154-55.

As in the above cases, Marcus’s attorney’s failure to argue the affirmative defense or propose the relevant instruction constituted deficient performance. The evidence clearly supported the defense, as explained above. There was no reasonable basis for failing to request an instruction on the affirmative defense that applies to accomplices in felony murder prosecutions.

- b. The deficient performance prejudiced Marcus, because it is reasonably probable the jury would have concluded Marcus proved the affirmative defense had it been presented.

Given the evidence that Marcus was not armed and had no idea that his companion planned to kill or seriously injure anyone, if defense counsel had requested an instruction on the affirmative defense, it would have been granted. Cf. State v. Toomey, 38 Wn. App. 831, 841, 690 P.2d 1175 (1984) (instruction properly denied where alleged accomplice knew the principal had a gun, because she carried it for him and gave it to him just before the shooting). Furthermore, it is reasonably probable that the jury would have found the affirmative defense applied. As it is, the jurors deliberated for days, said they were hopelessly deadlocked, and struggled to determine whether Marcus was “merely present” or was “present and ready to assist” in the underlying felony, which was supposedly to steal the truck. Thus, it is reasonably likely they would have found the affirmative defense to the murder applied.

The bottom line is that “[w]here defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” Hubert, 138 Wn. App. at 932. Marcus has been denied a fair trial.

The remedy is reversal and remand for a new trial. Powell, 150 Wn. App. at 158.

4. **The trial court violated Marcus’s constitutional right to a fair and impartial jury by ordering the jury to continue deliberating after it unequivocally stated it was hopelessly deadlocked following 11 hours of deliberations.**

The Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee the right to a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. This right “demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury.” State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978).

Furthermore, the constitutional right to a jury trial “includes the right of a jury to **fail** to agree.” State v. McCullum, 28 Wn. App. 145, 149, 622 P.2d 873 (1981), rev’d on other grounds, 98 Wn.2d 484 (1983) (emphasis added). The criminal rules recognize this constitutional guarantee:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2).

In this case, despite its best efforts, the trial judge coerced a verdict in violation of the Sixth Amendment and article I, sections 21 and 22. The jury deliberated for at least 11 hours over three days before sending a note stating: “We have been working very hard to come to a consensus and at this time it does not appear possible.” CP 45; 8/1/13 RP 730. In front of the whole jury, the court then asked the foreperson whether there was a reasonable probability of their reaching an agreement within a reasonable time. The foreperson said, “No.” 8/1/13 RP 733.

Over defense counsel’s objection, the judge nevertheless ordered the jury to continue deliberating. 8/1/13 RP 732-33. In response to the foreperson’s unequivocal statement that the jury could not reach agreement, the court said: “Okay. At this point in time, I am going to ask the jury to continue deliberating at this point in time, and so I am going to excuse you back to the jury room and ask you to continue your discussions and deliberations.” 8/1/13 RP 733.

This order strongly suggested that failing to reach agreement was not an option, in violation of Marcus’s constitutional rights and CrR 6.15(f)(2). Both in her written missive and in her oral response to the judge’s inquiry, the foreperson unambiguously stated there was no reasonable probability of reaching an agreement. By nevertheless

ordering the jury to go back to the jury room and continue deliberating, the court made it clear that failing to agree simply was not a possibility.

The judge instead should have either dismissed the jury and declared a mistrial, or explained to the jury that it was to continue deliberating but was **not** required to reach a verdict. An example of the former option occurred in State v. Dykstra, where this Court held the trial judge properly declared a mistrial after the jury had been deliberating for over 13 hours and the foreperson answered “no” when asked whether there was a reasonable probability of the jury reaching agreement within a reasonable time. State v. Dykstra, 33 Wn. App. 648, 649-51, 656 P.2d 1137 (1983). An example of the latter option occurred in State v Lee, 77 Wn. App. 119, 889 P.2d 944 (1995), rev’d on other grounds, 128 Wn.2d 151. In that case, some jurors thought it unlikely that further deliberations would be useful while others thought agreement might be possible. Id. at 125. The trial court told the jury to continue deliberating, but also stated during the colloquy that “Judges cannot in any way give any idea to the jurors that the judge is forcing them to reach a verdict.” Id. Thus, it was clear to the jurors in Lee that they were **not** required to reach an agreement.

But here, the court implied the jury **was** required to reach a verdict. The jury had already deliberated for 11 hours over three days, and had

already made clear both in writing and orally that it was hopelessly deadlocked. The court's order indicated that none of that mattered. Any reasonable juror would understand the court's order to require agreement, because the jurors had already twice told the court they could not agree after lengthy deliberations, and yet they were told they were not finished with their job.

This violation constitutes another independent basis for reversal, because there is a reasonably substantial possibility that the verdict was improperly influenced by the trial court's order. See State v. Watkins, 99 Wn.2d 166, 178, 660 P.2d 1117 (1983) (setting forth prejudice standard). As indicated by its subsequent note and further days of deliberations, the jurors had substantial difficulty and disagreement over whether Marcus was an accomplice to his companion's crime. CP 47; 8/2/13 RP 735. But because the court implied they had to keep deliberating until they reached agreement, the jurors who believed Marcus was merely present and was not assisting his friend eventually acquiesced. Under these circumstances, the violation cannot be considered harmless, and this Court should reverse and remand for a new trial.

5. The State presented insufficient evidence to support the firearm enhancement.

The jury found by special verdict that Marcus was armed with a firearm, but the State presented insufficient evidence as a matter of law to support this finding. CP 48. On appellate review, evidence is sufficient to support a jury's finding only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the [necessary facts] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); See State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) (same standard of review applies to aggravating factors supporting exceptional sentence); State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007) (applying same standard of review to determine sufficiency of the evidence for underlying crime and sufficiency of the evidence for firearm enhancement).

The relevant statute provides that five years must be added to a defendant's sentence "if the offender or an accomplice was armed with a firearm." RCW 9.94A.533(3). Before a sentence may be enhanced pursuant to this section, "the evidence must support the conclusion that the accused was armed or that he **knew** an accomplice was armed." State v.

Barnes, 153 Wn.2d 378, 386 n.7, 103 P.3d 1219 (2005) (citing State v. McKim, 98 Wn.2d 111, 653 P.2d 1040 (1982)) (emphasis added).

No evidence whatsoever was presented that Marcus himself was armed. J.J. Stimson was armed, and the State's theory of the case was that Marcus was guilty of the firearm enhancement as an accomplice. But the State did not present evidence that Marcus knew J.J. was armed. Marcus fully admitted that earlier that day he knew J.J. had his great aunt's .38 specials, but he thought (correctly) that J.J. no longer had them once they started walking to Tajanae's house. No evidence was presented that Marcus knew J.J. had somehow acquired a .380 automatic. No gun ever appears on the surveillance video. Ex. 69. The State presented insufficient evidence as a matter of law to prove that Marcus was an accomplice to the firearm enhancement. This Court should vacate the finding and remand for resentencing.

6. The instruction and special verdict form for the firearm enhancement improperly told the jury it could return a "yes" verdict but not a "no" verdict.

- a. The jury was not allowed to return a "not guilty" verdict on the firearm enhancement.

The last three paragraphs of Instruction 19 provided:

You must fill in the blank provided in each verdict form [with] the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given a special verdict form for the crime of Murder in the First Degree. If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form. **In order to answer the special verdict form “yes,” all twelve of you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you do not unanimously agree that the answer is “yes” then the presiding juror should sign the section of the special verdict form indicating that the answer has been intentionally left blank.**

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

CP 70-71 (emphasis added). Although the instruction properly allowed for either a “guilty” or “not guilty” verdict on the underlying crime, it did not allow the jury to return a “no” verdict on firearm enhancement. Id.

Not only did the instruction fail to allow for a “no” verdict, the special verdict form itself was similarly flawed. The special verdict form read as follows:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant Marcus Riley Langford armed with a firearm at the time of the commission of the crime of Murder in the First Degree.

ANSWER: _____ (Write “yes” if unanimous agreement that this is the correct answer)

DATE

PRESIDING JUROR

The answer section above has been intentionally left blank.

DATE

PRESIDING JUROR

CP 48. There was no provision for writing “no” on the special verdict form. See id.

- b. The instruction and special verdict form are contrary to current and prior caselaw and current and prior WPICs.

It is axiomatic that when a jury finds the State failed to prove its case beyond a reasonable doubt, it must find the defendant “not guilty,” rather than doing nothing at all. The only confusion in recent years has been over whether the jury must be unanimous to answer “no” on a special verdict form, or whether a “no” answer is required when the jury cannot unanimously agree on a “yes” answer. In State v. Bashaw, the Supreme Court held that if the jury did not unanimously agree that the State had proved a special finding beyond a reasonable doubt, it must answer “no” on the relevant verdict form. State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010). The Court subsequently overruled Bashaw and held that – as is the case with “guilty” or “not guilty” verdicts – the jury must unanimously agree to return either a “yes” or a “no” verdict. State v.

Nuñez, 174 Wn.2d 707, 285 P.3d 21 (2012). The Court approved the jury instruction given in Nuñez, which was as follows:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer, “no.”

Id. at 710. Under neither Bashaw nor Nuñez was it permissible to tell the jury it could **only** return a “yes” verdict, as occurred here.

Nor were the instruction and verdict form used here correct under any version of the Washington Pattern Instructions. The pattern special verdict form for the firearm enhancement is:

QUESTION: Was the defendant (defendant’s name) armed with a firearm at the time of the commission of the crime [in Count ____]?

ANSWER: _____ (Write “yes” or “no”)

DATE

PRESIDING JUROR

WPIC 190.02 (2011); WPIC 190.02 (2008).

Under both the 2008 and 2011 versions of the WPICs, juries were to be told they could answer “yes” **or** “no” to enhancements. But the verdict form here did not say “write ‘yes’ or ‘no’”; it said only “write ‘yes’”. CP 48.

As for the jury instruction, although the unanimity rule changed with Bashaw and again with Nuñez, the jury was always to be told it could (and must, in certain circumstances) answer “no” on a special verdict form. The pattern instruction following Bashaw was:

In order to answer the special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously agree that the answer to the question is “no,” or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer “no.”

WPIC 160.00 (2011). The pattern instruction before Bashaw, which is again proper after Nuñez, is:

In order to answer the special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

WPIC 160.00 (2008); see Nuñez, 174 Wn.2d at 710. Contrary to both versions of the WPIC, the concluding instruction here told the jury it must answer “yes” if it found the State had proved the special allegation, but did not allow for a “no” answer under any circumstances.

- c. The instruction and special verdict form constitute an unconstitutional comment on the evidence and violate due process.

In addition to violating caselaw and the WPICs, the instruction and special verdict form in Marcus’s case violated his right to due process and

constituted an unconstitutional comment on the evidence. A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). A jury instruction that lowers the State's burden of proof is a manifest error affecting a constitutional right – the right to due process. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); U.S. Const. amend. XIV. Similarly, “[s]ince a comment on the evidence violates a constitutional prohibition, a failure to object or move for a mistrial does not foreclose [a defendant] from raising this issue on appeal.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (quoting State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968)).

By telling the jury the only answer it could return on the special verdict form was “yes,” the court violated Marcus’s Fourteenth Amendment right to due process and commented on the evidence in violation of article IV, section 16 of the Washington Constitution. The state constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Const. art. IV, § 16. This provision “prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case.” Becker, 132 Wn.2d at 64. Moreover, “the court’s personal feelings on an

element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). “[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment” in violation of article IV, section 16. Id.

The concluding instruction and special verdict form here stated that the only answer the jury could return was “yes;” there was no provision whatsoever for a “no” verdict. Thus, the court’s instruction and verdict form did more than “suggest” or “imply” a particular answer – they outright prohibited any other answer. The court stated the jury was allowed to either do nothing or rule for the State. The court did not allow the jury to rule for the defendant. This violated Marcus’s rights under article IV, section 16.

It also violates his rights under the due process clause, which guarantees a presumption of innocence and proof beyond a reasonable doubt. U.S. Const. amend. XIV; Cool v. United States, 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). These rights form the bedrock of our criminal justice system. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and

elementary, and its enforcement lies at the foundation of the administration of our criminal law.” Coffin v. United States, 156 U.S. 432, 453, 15 S.Ct. 394 (1895). To overcome this presumption, the State must prove every element of the charged offense beyond a reasonable doubt, including sentencing enhancements. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Here, the concluding instruction and special verdict form turned the presumption of innocence into a presumption of guilt by not even allowing the jury to make a finding other than guilty. Cf. State v. Pam, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (reversing special verdicts where instructions failed to state that deadly weapon and firearm findings must be proved beyond a reasonable doubt).

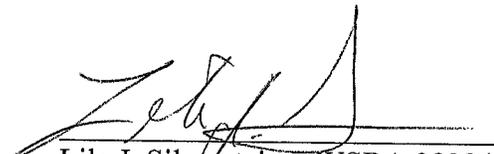
Because the instruction and verdict form violated not only Nuñez, Bashaw, and the WPICs but also the Fourteenth Amendment and article IV, section 16, reversal of the firearm enhancement is required unless the State proves no prejudice resulted. Levy, 156 Wn.2d at 725 (State must show the defendant was not prejudiced by art. IV, § 16 violation); State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (2011) (State must prove beyond a reasonable doubt that due process violation was harmless). As explained in the preceding section, the State presented insufficient evidence that Marcus knew that J.J. was armed. Accordingly, the State

cannot prove beyond a reasonable doubt that the errors were harmless. Marcus asks this Court to vacate the enhancement and remand for resentencing. See State v. Eaker, 113 Wn. App. 111, 121, 53 P.3d 37 (2002) (reversing where jury instruction constituted improper comment on the evidence and State could not prove prejudice); In re Detention of R.W., 98 Wn. App. 140, 145-46, 988 P.2d 1034 (1999) (same).

F. CONCLUSION

For the reasons set forth above, Marcus Langford respectfully requests that this Court reverse his conviction and remand for a new trial. In the alternative, the firearm enhancement should be vacated, and the case remanded for resentencing.

Respectfully submitted this 11th day of April, 2014.


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 45391-6-II
)	
MARCUS LANGFORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA	()	U.S. MAIL
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GREEN HILL SCHOOL	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF APRIL, 2014.

x _____ 

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

April 11, 2014 - 3:51 PM

Transmittal Letter

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Case Name: STATE V. MARCUS LANGFORD

Court of Appeals Case Number: 45391-6

Is this a Personal Restraint Petition? Yes No

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Statement of Arrangements

Motion: _____

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Brief: Appellant's

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