

AUG 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28985-1-III
(consolidated with No. 28986-9-III)

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR LANDRUM,

Appellant.

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

The Honorable Cameron Mitchell

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

1. THE TRIAL COURT ERRED IN ORDERING A SINGLE TRIAL ON THE 2006 AND 2008 COMPLAINTS. 1

2. SEALING THE JUROR QUESTIONNAIRES VIOLATED ARTICLE 1, SECTION 22, AND REQUIRES REVERSAL. 5

3. THE DEFENDANT’S MULTIPLE CONVICTIONS FOR SOLICITATION OF PERJURY MUST BE REVERSED, DISMISSED, AND/OR VACATED. 5

4. THE DEFENDANT’S SECOND DEGREE RAPE CONVICTION MUST BE REVERSED FOR INDIVIDUAL OR CUMULATIVE ERROR. 6

1. The Respondent cites no case requiring expert testimony about the routine fact that prescription drugs can affect a persons’s perceptive abilities if under use at the time of the incident. 6

2. Respondent did not “open the door” to Officer Lee’s opinion of the believability of the rape complainant, which also constituted an opinion as to Mr. Landrum’s guilt. 8

5. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE “ATTEMPTED SEXUAL CONTACT” AND “NON-MARRIAGE” ELEMENTS OF THE ATTEMPTED INDECENT LIBERTIES CHARGE. 10

6. THE DEFENDANT’S INDECENT LIBERTIES CONVICTION MUST BE REVERSED WHERE THE PROSECUTOR IMPROPERLY ELICITED POLICE TESTIMONY THAT MR. LANDRUM REFUSED TO COME TO THE POLICE STATION TO DISCUSS THE ALLEGED INCIDENT. 10

7. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CONSECUTIVE TERMS OF INCARCERATION ON MR. LANDRUM'S INDECENT LIBERTIES AND RAPE CONVICTIONS.	12
8. THE TRIAL COURT ERRONEOUSLY IMPOSED 160 MONTHS INCARCERATION FOR AN <i>ATTEMPTED</i> INDECENT LIBERTIES CONVICTION	12
9. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING COURT COSTS WITHOUT FINDING MR. LANDRUM HAD AN ABILITY TO PAY.	12
10. THE TRIAL COURT FAILED TO PROPERLY INQUIRE INTO DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTING FROM REPRESENTATION OF PROSECUTION WITNESS ROBERT PYKE.	13
E. CONCLUSION	15

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Avendano-Lopez, 79 Wn. App. 706,
904 P.2d 324 (1995) 8

State v. Burke, 163 Wn.2d 204, 206, 181 P.3d 1 (2008) 1

State v. Bythrow, 114 Wn.2d 713, 790 P.2d 154 (1990). 8,11

State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000) 4

State v. Farr-Lenzini, 94 Wn. App. 453, 970 P.2d 313 (1999). 9

State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990) 4

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998) 6

State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003). 9

State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). 3

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) 11

State v. Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009) 3,4

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007) 9

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 6

State v. Lewis, 130 Wn.2d 700, 927 P.2d 253 (1996). 10,11

State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996) 13

State v. Myers, 82 Wn. App. 435, 918 P.2d 183 (1996) 3

<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	6
<u>State v. Regan</u> , 143 Wn. App. 419, 177 P.3d 783 (2008)	14
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).	2,7
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).	2
<u>State v. Smith</u> , 74 Wn.2d 744, 446 P.2d 571 (1968).	1
<u>State v. Watkins</u> , 53 Wn. App. 264, 766 P.2d 484 (1989)	2,4

UNITED STATES SUPREME COURT CASES

<u>Holloway v. Arkansas</u> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)	14
<u>Mickens v. Taylor</u> , 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)	14

STATUTES AND COURT RULES

ER 608(a)	9
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A. REPLY ARGUMENT

1. THE COURT ERRED IN ORDERING A SINGLE TRIAL ON THE 2006 AND 2008 COMPLAINTS.

Respondent State of Washington does not contest and apparently concedes that the issue of separate trials was properly raised. See Appellant's Opening Brief, at pp. 6-7.

Based on the arguments in his Appellant's Opening Brief, Mr. Landrum argues that the trial court's orders directing a single trial were error under the "manifest abuse of discretion" standard in the circumstances of this case. State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). Respondent places great emphasis on the admissibility of the ER 404(b) evidence. Brief of Respondent, at pp. 10-11. However, this is not dispositive. The issue where multiple counts are joined for trial is whether a single trial of multiple counts "unduly embarrasses or prejudices" the defendant. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968). Here, the trial court's initial assessment of the case was correct: the Court stated that

trying to try these cases together I think would result in the very real possibility that the jury might look at these two matters together and say if they're charging him with two of these things then he must have committed these crimes.

8/28/09RP at 82-83. Here, the trial court was correctly placing emphasis on the prejudice resulting from a joined trial on the two substantive counts, and

as argued in the Opening Brief, the court never retreated from its stance that the concern expressed above was not affected by admissibility of any ER 404(b) evidence.

Why did the trial court express its concerns regarding a joined trial in such a strongly worded manner? The significant fact of this prosecution of Mr. Landrum was that he was being pursued on a charge of indecent liberties (significantly increasing his offender score) which nonetheless was supported by extraordinarily thin evidence – a movement toward the victim. That charge was joined with a very serious allegation of actual rape, supported by significantly stronger evidence. This is the gravest concern where cases are sought to be joined – a great imbalance between the evidence on the two counts. Mr. Landrum was prejudiced by a single trial because evidence of the crimes was likely to cumulate and harm his right to fair resolution of each count. State v. Russell, 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995); State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). And as the trial court recognized, when the crimes charged are both sexual in nature, the joinder of like charges can be particularly prejudicial. See State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982).

The Washington Courts have held that the primary concern in determining severance must be whether the jury could be reasonably

expected to keep the testimony and evidence of each offense separate. State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). The unique aspects of the present case show that the jury would never be able to keep these charges “separate.”

Furthermore, the charged counts were not cross-admissible. Respondent argues that State v. Myers, 82 Wn. App. 435, 918 P.2d 183 (1996), supports cross-admissibility. However, that case was a prosecution for sexual exploitation of a minor by videotaping his daughter’s vaginal area. The issue was the admissibility of evidence that the defendant had videotaped other persons’ vaginal areas on the same day using the same tape, admitted to show that he had a non-innocent mens rea in making the tape, rather than it being made, as he claimed, to anger his girlfriend by his act of filming the child in question. Myers, at 438-40. The Myers case does not support the ruling in this case that allowed the State to use the defendant’s rape of a woman as proof that he attempted indecent liberties against a second woman. This is pure propensity evidence.

Similarly, State v. Kennealy, 151 Wn. App. 861, 214 P.3d 200 (2009), does not support the trial court’s ruling of a common scheme or plan. There, the similarities between the two incidents were dramatic – in both instances, the defendant committed the acts on children who were related to him or lived and played closed to him, committed the acts only

after the children knew him and trusted him, and touched the children in the same locations. Kennealy, at 888-89. Mr. Landrum's case is far different – claims of actual rape – non-consensual sexual intercourse – were admitted and used by the State to convince the jury of the defendant's intent to rape or sexually violate another woman, whom the defendant at most innocently tried to kiss (never doing so). For counts to be cross-admissible in a joined trial, they must both pass muster, each as to the other, under ER 404(b). See State v. Watkins, 53 Wn. App. at 270 (ER 404(b) is the appropriate evidentiary standard when addressing cross-admissibility of counts in the context of the issue of joined or separate trials).

This is nothing close to common scheme and the trial court abused its discretion. But once again, the trial court's initial gut reaction to the prosecution's plan to secure guilt makes sense and shows why this error requires reversal. The evidence of the more serious crime was "more likely to arouse an emotional response [by the jury rather] than a rational decision." State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). This is never more true than in sex cases and is true here. The joined trial was reversible error.

2. SEALING THE JUROR QUESTIONNAIRES VIOLATED ARTICLE 1, SECTION 22, AND REQUIRES REVERSAL.

Mr. Landrum relies on the arguments in his Appellant's Opening Brief. Confidential juror questionnaires, when used in a criminal trial, are indeed a part of the *voir dire* process. However, unlike *voir dire* in open court, since they are court documents, juror questionnaires are subject to state law, General Rule 31 and the Benton County Superior Court's local rules for public access to court records. Those rules manifestly do not allow any member of the public to inspect the juror questionnaires by obtaining them from the court or counsel while they are in use in court during jury selection, prior to their filing. Respondent ignores this contention and instead simply argues to the contrary, asserting that the questionnaires were publicly available during jury selection. Brief of Respondent, at pp. 15-16.

3. THE DEFENDANT'S MULTIPLE CONVICTIONS FOR SOLICITATION OF PERJURY MUST BE REVERSED, DISMISSED, AND/OR VACATED.

Mr. Landrum acknowledges the Respondent's concession that only one count of perjury can survive the Appellant's Double Jeopardy challenge. Brief of Respondent, at p. 18-19.

However, the Respondent has not offered argument in response to Mr. Landrum's further arguments regarding insufficiency of the evidence on the solicitation counts, which results in a remedy of reversal "with prejudice" and thereby the inability of any insufficient counts to be charged

again. Appellant's Opening Brief, at pp. 32-36; State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In addition, Respondent has not responded to Appellant's arguments regarding the unanimity error as to the solicitation counts, which requires reversal of all of the counts that were charged. Appellant's Opening Brief, at pp. 40-44; State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 411-12, 756 P.2d 105 (1988) (same). Mr. Landrum strongly contends that the Petrich argument is well-taken. Not just all but one, but all of the solicitation convictions must be reversed.

**4. THE DEFENDANT'S SECOND DEGREE RAPE
CONVICTION MUST BE REVERSED FOR INDIVIDUAL
OR CUMULATIVE ERROR.**

**1. The Respondent cites no case requiring expert testimony about
the routine fact that prescription drugs can affect a person's perceptive
abilities if under use at the time of the incident.**

Mr. Landrum attempted to inquire about whether Strand was using medications at the time of the alleged incident. 9/30/09RP at 691. Counsel informed the court that the basis for his question was the complainant's statements in her defense interview that she was indeed taking drugs, including drugs that are also commonly known to interact with alcohol, such as Diazepam and Lithium. 9/30/09RP at 693.

Mr. Landrum relies on the arguments in his Appellant's Opening Brief that this evidence was improperly excluded. It is widely understood that evidence of a complainant's drug use, where there is a "reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial," is relevant and admissible to impeach the alleged victim's credibility. State v. Tigano, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991); see also State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994) (witness's use of drugs and alcohol on the night of the charged crime was admissible).

In response, the State of Washington merely cites Tigano, which of course also outlines that use of drugs is not relevant where they were not under use by the witness at the time of the incident. Brief of Respondent, at p. 20 (citing Tigano). Here, prescription drug use by Ms. Strand would be relevant in the circumstances of the alleged incident, and the question was based not on speculation but on an offer of proof. The Respondent cites no authority that the defendant must provide expert testimony in order to admit simple evidence of this sort of drug usage, if time-relevant.

2. Respondent did not “open the door” to Officer Lee’s opinion of the believability of the rape complainant, which also constituted an opinion as to Mr. Landrum’s guilt.

The State argues that the defendant opened the door to any improper opinion by asking the officer about the witness’s demeanor. Brief of Respondent, at p. 21. However, the State cites no case law and ignores the Appellant’s detailed discussion showing why defense counsel’s careful questioning precisely did not open the door to improper testimony, under the case law standard. It is only where the defense introduces evidence that would be inadmissible if offered by the opposing party that the defense opens the door to the opposing party to explain or contradict that evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). Here, defense counsel carefully and specifically made clear that he was inquiring simply whether Strand’s account of the incident would “change from time to time.” 9/30/09RP at 723-24. This is a routine question designed to inquire into consistency and therefore credibility. The questions posed by defense counsel did not seek to elicit improper matters to benefit from their introduction to the jury. Counsel’s other routine cross-examination merely inquired about her alcohol intoxication level – a matter that was proper to explore.

The prosecutor's subsequent inquiry of the police witness, however, produced improper evidence, and was misconduct. One witness cannot be asked, directly or indirectly, to express an opinion on another witness's credibility. ER 608(a); State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Certainly, *police officers* must not comment on the alleged victim's credibility. State v. Farr Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference") (Emphasis added.).

As argued in the Opening Brief, Officer Lee's testimony was comparable to cases where similar comments were deemed improper. Appellant's Opening Brief, at pp. 54-55. The Respondent cites State v. Kirkman, where certain improper comments were deemed to not be so patently a comment on credibility as to be manifest constitutional error and thus addressable initially on appeal. State v. Kirkman, 159 Wn.2d 918, 930, 155 P.3d 125 (2007). Here, defense counsel objected when the officer testified that the victim's demeanor was consistent with a traumatic event. 9/30/09RP at 725-26.

Furthermore, the officer's testimony in this case was not akin to the question in Kirkman as to whether the victim's story was clear and consistent. Just as it was proper for defense counsel to ask about the

witness's consistency (and did not open any door by doing so), it was proper for the State's medical and expert witnesses in Kirkman to describe the victim's accounts in that manner. Here, however, the officer was permitted to opine that the victim appeared to him to be behaving like someone who was traumatized. The prosecutor was clearly asking for, and the jury heard, an authoritative police officer's improper opinion that the victim *was acting like someone who had been raped*. This was error and requires reversal.

5. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE "ATTEMPTED SEXUAL CONTACT" AND "NON-MARRIAGE" ELEMENTS OF THE ATTEMPTED INDECENT LIBERTIES CHARGE.

Mr. Landrum relies on the arguments in his Appellant's Opening Brief. Appellant's Opening Brief, at pp. 55-63.

6. THE DEFENDANT'S INDECENT LIBERTIES CONVICTION MUST BE REVERSED WHERE THE PROSECUTOR IMPROPERLY ELICITED POLICE TESTIMONY THAT MR. LANDRUM REFUSED TO COME TO THE POLICE STATION TO DISCUSS THE ALLEGED INCIDENT.

The Respondent ignores the significant difference between the present case and the cited case of State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996). Brief of Respondent, at pp. 30-33. In Lewis, the officer testified that he told the defendant he could come to the police station if he had anything more to say to show his innocence. But the officer in that case did not thereafter testify that no further explanation was ever forthcoming,

or that the defendant did not come to the police station as he was invited to do. Therefore, there was no use of the defendant's silence to imply he was guilty. State v. Lewis, 130 Wn.2d at 704.

There was no mention at all by the prosecutor in closing argument about the defendant's refusal to speak with the police about the charges or about his failure to keep appointments with the officer.

State v. Lewis, 130 Wn.2d at 704. Here, in direct contrast to Lewis, the deputy prosecutor pointedly elicited from Officer Buchan the fact that, after discussing the incident briefly with the defendant on the telephone, Mr. Landrum outright said "no" to her request that he come down to the police station and discuss the matter further with the officer in person. 9/29/09RP at 555-57. The testimony emphasized both the request, the refusal, and the fact that the defendant never contacted the officer thereafter – i.e., his silence.

Making matters worse, subsequently, in closing argument, the prosecutor stated: "And the defendant gives a little, but when you look at the whole story you know what the truth of the matter is." 9/29/09RP at 66. This comment called further attention to the fact that Mr. Landrum had refused to discuss the incident with Officer Buchan *any further* as the officer had desired. See 9/29/09RP at 555-57. Contrary to the Respondent's efforts to distinguish the case in its Brief of Respondent, the case of State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), is directly

comparable. Pursuant to that case and the others cited by Appellant, the improper matter was used to show guilt, in the testimony phase, and in closing argument. Reversal is required, as argued in the Appellant's Opening Brief.

7. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CONSECUTIVE TERMS OF INCARCERATION ON MR. LANDRUM'S INDECENT LIBERTIES AND RAPE CONVICTIONS.

Mr. Landrum acknowledges the Respondent State of Washington's concession of error. See Brief of Respondent, at p. 34. Mr. Landrum's sentence must be reversed in favor of concurrent terms, and subject to the other errors argued herein that should further reduce his convictions and offender score.

8. THE TRIAL COURT ERRONEOUSLY IMPOSED 160 MONTHS INCARCERATION FOR AN *ATTEMPTED* INDECENT LIBERTIES CONVICTION

Mr. Landrum acknowledges the Respondent State of Washington's concession of error. See Brief of Respondent, at pp. 34-35.

9. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING COURT COSTS WITHOUT FINDING MR. LANDRUM HAD AN ABILITY TO PAY.

Mr. Landrum relies on the arguments in his Appellant's Opening Brief. Appellant's Opening Brief, at pp. 70-72. Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay court costs as

part of the judgment and sentence. However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.”

Mr. Landrum may appeal the imposition of costs, because absent such finding, the trial court was without statutory authority in imposing costs. When a trial court acts beyond its statutory sentencing authority, the issue can be heard for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996).

10. THE TRIAL COURT FAILED TO PROPERLY INQUIRE INTO DEFENSE COUNSEL’S CONFLICT OF INTEREST RESULTING FROM REPRESENTATION OF PROSECUTION WITNESS ROBERT PYKE.

Mr. Landrum relies on the arguments in his Appellant’s Opening Brief. Appellant’s Opening Brief, at pp. 72-74. The Respondent contends that the appellant Mr. Landrum has failed to show that any actual conflict of interest existed below. Brief of Respondent, at p. 36. However, the issue raised is that the trial court failed to properly inquire into a potential conflict. Mr. Landrum’s defense counsel, Mr. Metro, had apparently “[done] something on [Pyke’s] behalf,” including presenting Pyke with a document to sign, apparently regarding that representation. 8/28/09RP at 38-39. The prosecutor acknowledged that this was a legal matter potentially affecting the case when he expressed his frustration that any such document had not been provided to the State. 8/28/09RP at 39, 46.

Clearly, this was an issue that raised a potential conflict. Defense counsel's own claim that any activity by him for Mr. Pyke did not involve legal "representation" of Mr. Pyke is erroneous and could not have been permissibly relied on by the trial court. Mr. Metro in fact elsewhere conceded that he had represented Mr. Pyke and that a document had been executed in connection with that representation, but simply asserted it involved a small matter. 8/28/09RP at 53.

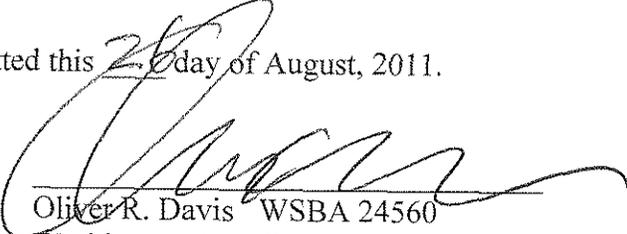
Yet the trial court did not conduct any inquiry into the conflict, requiring remand to determine if an actual conflict existed. The trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a *potential* conflict exists. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008) (citing Mickens v. Taylor, 535 U.S. 162, 167-72, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)).

Plainly, the trial court must make an adequate inquiry. Holloway, 435 U.S. at 488; Regan, 143 Wn. App. at 425-26. The court here failed to do so. This error requires reversal.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Landrum respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 28 day of August, 2011.



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 28985-1-III
)	
TAYLOR LANDRUM,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF AUGUST, 2011.

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