

NO. 89976-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT EUGENE BARRY,

Appellant.

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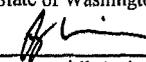
ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 43438-5-II
Superior Court No. 11-1-00241-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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SERVICE	<p>Mitch Harrison 101 Warren Avenue N. Seattle, WA 98109-4928 Email: mitch@mitchharrisonlaw.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 29, 2014, Port Orchard, WA  Original e-filed at the Supreme Court; Copy to counsel listed at left.</p>
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant has failed to show that a reversal is warranted when he has failed to show that any prejudice resulted from the trial court's erroneous instruction, which allowed the jury to consider the demeanor of the Defendant?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Robert Eugene Barry, was charged by an amended information filed in Kitsap County Superior Court with two counts of child molestation in the first degree, both with special allegations of domestic violence. CP 9. A jury found the Defendant guilty on one count, but was unable to reach a verdict on the second count. CP 137. The trial court then imposed a standard range sentence. CP 149. The Court of Appeals affirmed, and this Court subsequently granted the Defendant's Petition for Review.

B. FACTS

In the present case the Defendant was charged with two counts of child molestation in the first degree stemming from the allegations that he molested C.C. and B.C, both of whom were the Defendant's grandsons. CP 9. The case proceeded to trial and the Defendant did not testify.

During jury deliberations the jury submitted a question asking,

“Can we use as ‘evidence,’ for deliberations our observations of the defendant’s actions - demeanor during the court case?” RP 823; CP 115. The parties and the court discussed this jury question and the trial court noted that “none of us knows what they observed or why they are even talking about it.” RP 825. The record also shows that neither party had referenced the Defendant’s demeanor at trial. Furthermore, neither party offered any suggestion of what events or actions could have led to this question. Rather, the trial court noted that there simply was no record of the defendant’s demeanor in the courtroom. RP 832.

The trial court asked to hear from counsel regarding the jury question, and defense counsel suggested telling the jurors to reread their instructions and instruct them that the Defendant’s choice not to testify could not be used against him. RP 824. The trial court, however, immediately explained that it thought that the case law indicated that the jury could consider what they witnessed in the courtroom, and the court further noted that “I can’t misadvise them of what the law is.” RP 824-25. The court also went through what it thought the case law specifically held, and then defense counsel suggested,

Well, perhaps the best answer is to just simply quote that language: The evidence includes what they witness in the courtroom.

RP 826. The trial court then paraphrased this slightly, and suggested an

answer to the jury's question that would read, "Evidence includes what you witness in the courtroom." RP 827. The trial court ultimately decided that it would answer the jury's question with this language, although defense counsel objected. RP 829; CP 115.

The jury ultimately found the Defendant guilty of one count of child molestation in the first degree. CP 137-39.¹

On appeal, the Defendant argued that the court erred. The Court of Appeals agreed and held that the trial court had misstated the law, but that the error was not a constitutional error. *State v. Barry*, 179 Wn. App. 175, 181, 317 P.3d 528 (2014). Rather, the Court of Appeals held that the trial court's instruction amounted to an evidentiary decision as it allowed the jury to consider the Defendant's demeanor as evidence. *Id.* The Court further explained that errors regarding the admission of evidence are not considered constitutional errors, and thus they are not reviewed under the more stringent constitutional standard for prejudice. *Barry*, 179 Wn. App. at 182. In addition, the court concluded that because the record was silent as to what the demeanor evidence actually was, the Defendant could not show prejudice – a requirement under the nonconstitutional test. *Id.*

¹ The jury was unable to reach a verdict on the second count, which alleged that the Defendant had molested C.C.'s brother, B.C. CP 137-39.

III. ARGUMENT

A. THE DEFENDANT HAS FAILED TO SHOW THAT A REVERSAL IS WARRANTED BECAUSE HE HAS FAILED TO SHOW THAT ANY PREJUDICE RESULTED FROM THE TRIAL COURT'S ERRONEOUS INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER THE DEMEANOR OF THE DEFENDANT DURING TRIAL.

The Defendant argues that a reversal is warranted in the present case either because prejudice should be presumed or because the error below was a constitutional error. Pet. for Rev. at 3-20. This claim is without merit because the Court of Appeals properly found that the error below was one regarding the admission of evidence and that such errors are reviewed under the nonconstitutional error standard. *Barry*, 179 Wn. App. at 180-81. Furthermore, as the record contained no information about what possible demeanor evidence the jury may have considered, the Court of Appeals properly held that the Defendant was unable to establish any prejudice and that “the absence of prejudice precludes reversal on this basis.” *Barry*, 179 Wn. App. at 182. The State respectfully submits that the Court of Appeals decision was consistent with Washington law and asks this Court to affirm the Defendant’s conviction and sentence.

Generally speaking, it has long been the law that an error at trial is not grounds for reversal unless the error was prejudicial to the defendant. *State v. Grenning*, 169 Wn.2d 47, 57, 234 P.3d 169 (2010) (citing *State v.*

Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980) (citing *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974))). In some instances, however, prejudice is presumed.

The Defendant in the present case argues that he should not be required to show prejudice and he presents several arguments for why prejudice should be presumed. Each of the Defendant's arguments, however, are without merit.

1. Contrary to the Defendant's assertion, Washington law does not presume that all instructional errors are prejudicial.

The Defendant argues that all instructional errors are presumed to be prejudicial. Pet. for Rev. at 11. In support of this claim the Defendant cites three cases: *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984), and *State v. Belmarez*, 101 Wn.2d 212, 215, 676 P.2d (1984). Pet. for Rev at 11, n.25. All three of these cases cite the same single case, *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977), for its holding regarding prejudice.²

The actual language found in *Wanrow* is as follows:

When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless.

² See *Smith*, 131 Wn.2d at 263 (citing *Wanrow*, 88 Wn.2d at 237); *Hicks*, 102 Wn.2d at 186-87 (citing *Wanrow*, 88 Wn.2d at 237); and *Belmarez*, 101 Wn.2d at 215 (citing *Wanrow*, 88 Wn.2d at 237).

Wanrow, 88 Wn.2d at 237. *Wanrow*, in turns cites several previous cases that had included this exact same language, which dates back at least to 1947 and appears to have originated from 3 Am. Jur. 511, § 949. *See, e.g., Wanrow*, 88 Wn.2d at 237 (*citing, inter alia, State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) (“When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless”) (*citing* 3 Am. Jur. 511, s 949)).³

This Court, however, has recently examined this language from *Wanrow* and explained that the actual language of *Wanrow* itself explains that the presumption of prejudice does not apply in the context of an erroneous jury instruction that was not proposed by a party but was proposed by the trial court sua sponte. *State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2010). In *O’Hara*, the trial court had “sua sponte instructed the jury as to the meaning of ‘malice.’” *O’Hara*, 167 Wn.2d at 96. This Court explained that in *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), it had previously cited *Wanrow* for the proposition that

³ *See also, State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191, 202 (1970) (“When the record discloses an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless”), *State v. Odom*, 8 Wn. App. 180, 188, 504 P.2d 1186 (1973) (same); *State v. Johnson*, 1 Wn. App. 553, 463 P.2d 205 (1969) (same).

erroneous jury instructions were presumed to be prejudicial. *O'Hara*, 167 Wn.2d at 101. This Court in *O'Hara*, however, disavowed *LeFaber's* characterization of *Wanrow*, finding that it was "inaccurate." *O'Hara*, 167 Wn.2d at 101-02. Specifically, this Court explained that,

In *Wanrow*, this court held when there is error in a self-defense jury instruction *requested by the prosecution*, the error is presumed to have been prejudicial.

O'Hara, 167 Wn.2d at 102 (emphasis added) (citing *Wanrow*, 88 Wn.2d at 235-37). This Court then went on to explain that,

[U]nder *Wanrow*, situations could exist where a defendant or the trial court propose an erroneous jury instruction and the instruction is not presumptively prejudicial. Again, the statement in *LeFaber* oversimplifies a more nuanced area of the law.

O'Hara, 167 Wn.2d at 103. Thus, pursuant to *O'Hara*, a presumption of prejudice is appropriate only where the prevailing party proposed the erroneous instruction. The presumption does not apply when the erroneous instruction was proposed by the trial court or by a non-prevailing defendant. This appears to be this Court's last word on this subject.

When one applies *O'Hara* and *Wanrow* to the present case it is clear that no presumption of prejudice is appropriate, as the State did not propose the erroneous instruction. Rather, the record clearly shows that the trial court initially informed the parties, *sua sponte*, that it believed the law

allowed the jury to consider a defendant's demeanor and that the court could not "misadvise" the jury about the law. RP 824-25. Defense counsel then proposed some language for the answer (although defense counsel later objected to the giving of the answer), and the trial court ultimately came up with the language of the instruction. RP 827.

The record thus clearly shows that the trial court's ultimate answer to the jury's question was clearly proposed by the trial court sua sponte, or by the trial court working in conjunction with suggested language from the Defendant. Either way, the language was clearly not proposed by the State. Thus, pursuant to *O'Hara* and *Warrow*, there is no presumption of prejudice. The Defendant's claim that there is a presumption of prejudice merely because the error came in the form of a jury instruction, therefore, is without merit.

2. Constitutional vs nonconstitutional error.

As there is no presumption of prejudice warranted merely because the error came in the form of an instruction, this Court should next turn to the standard harmless error analysis. As stated above, an error in a trial is not grounds for reversal unless the error was prejudicial to the defendant. *Grenning*, 169 Wn.2d at 57. Some errors, however, are presumed to be prejudicial. For instance, "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was

harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Stated another way, if the error is of constitutional magnitude, the harmless beyond a reasonable doubt standard is applied. *Grenning*, 169 Wn.2d at 57-58.

With respect to nonconstitutional errors, this Court has repeatedly set forth the relevant analysis as follows:

An accused cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). . . Where the error is not of constitutional magnitude, we apply the rule that “error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.”

State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986), quoting *Cunningham*, 93 Wn.2d at 831; See also *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982) (same); *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012) (same).

Under this analysis the first question is whether the trial court’s answer to the jury’s question was a constitutional or nonconstitutional error. The Court of Appeals took a common sense approach and held that “[e]ven though the trial court gave an instruction to the jury, it essentially

made an evidentiary decision – allowing the jury to consider Barry’s demeanor as evidence.” *Barry*, 179 Wn. App. at 180. This common sense approach was entirely appropriate as it focused on the actual nature of the error below.

Furthermore, as the Court of Appeals explained, an error in the admission of evidence is generally reviewed under the nonconstitutional error standard. *Barry*, 179 Wn. App. at 181 (citing *State v. Gresham*, 173 Wn.2d at 432-33 (admission of evidence violating ER 404(b)), *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997) (admission of evidence violating ER 609(a)(1)), and *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Accord, *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (“Evidentiary errors under ER 404 are not of constitutional magnitude.”); *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002) (“An evidentiary error which is not of constitutional magnitude, such as erroneous admission of ER 404(b) evidence, requires reversal only if the error, within reasonable probability, materially affected the outcome.”); *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997) (same). *State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (the same non-constitutional analysis applies to both ER 404 and ER 609(a) rulings). This Court has similarly explained that a trial court’s evidentiary error that does not result in prejudice to the defendant is not

grounds for reversal. *Bourgeois*, 133 Wn.2d at 403. “[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The mere fact that the trial court admitted the evidence via a jury instruction is immaterial and should not change the analysis. As an example, trial courts that admit ER 404(b) or 609 evidence often also instruct the jury regarding the admission of this evidence and its limited purpose. The State is aware of no Washington case that has ever held that the well-settled holding that evidentiary errors are reviewed under the nonconstitutional standard is somehow altered or trumped if a trial court also happens to include an ER 404(b) or 609 instruction.

In the present case the Court of Appeals properly applied the nonconstitutional standard. Furthermore, as the record contained no information about what possible demeanor evidence the jury may have considered, the Defendant was unable to establish any prejudice. Thus, although the trial court’s demeanor instruction was improper, “the absence of prejudice precludes reversal on this basis.” *Barry*, 179 Wn. App. at 182.

The Defendant, however, claims that the more stringent standard for constitutional errors should apply, and that the State is therefore

required to prove that the error was harmless beyond a reasonable doubt. Pet. for Rev. at 9. The Defendant claims that the error here was “constitutional” because it impacted his privilege against self incrimination and his right to a verdict based solely on the evidence. Pet. for Rev 3, 9. The Defendant’s claims, however, are without merit for the reasons outlined below.

3. The Defendant has failed to show that the erroneous instruction negatively impacted his Fifth Amendment rights.

Two Washington cases have addressed a prosecutor’s comment on a defendant’s demeanor at trial. See, *State v. Klok*, 99 Wn. App. 81, 82, 992 P.2d 1039 (2000) and *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 2994 (2001). In *Klok*, the Court of Appeals stated that “it is improper to comment on a defendant’s demeanor and to invite the jury to draw from it a negative inference about the defendant’s character.” *Klok*, 99 Wn. App. at 85. In *Smith*, this Court similarly noted that “it may be improper to comment on a defendant’s demeanor so as to invite a jury to draw a negative inference about the defendant’s character.” *Smith*, 144 Wn.2d at 679. The courts in *Klok* and *Smith*, however, did not address whether the error was constitutional or nonconstitutional.

Nevertheless, cases from around the country have held that comments about a defendant’s demeanor at trial did not violate a defendant’s Fifth Amendment right not to testify. See, e.g, *Bates v. Lee*,

308 F.3d 411, 421 (4th Cir. 2002) (“This court has found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify.”), *cert. denied*, 538 U.S. 1061, 123 S. Ct. 2223, 155 L. Ed. 2d 1113 (2003); *People v. Houston*, 281 P.3d 799, 827 (Cal. 2012); *Hall v. Wainwright*, 733 F.2d 766, 773 (11th Cir. 1984) (comment on defendant's demeanor during the trial would not naturally and necessarily be taken by the jury to be a comment on the defendant's failure to testify); *Cunningham v. Perini*, 655 F.2d 98, 100 (6th Cir. 1981) (comment that defendant just sat and stared during trial did not run afoul of the Fifth Amendment); *Resnover v. Pearson*, 965 F.2d 1453 (7th Cir. 1992) (Prosecutor's comments regarding defendant's refusal to come to courtroom were not comments on exercise of privilege against self-incrimination and thus there was no constitutional violation); *U.S. v. Mellen*, 393 F.3d 175, 182 (D.C. Cir. 2004) (prosecution's comments alluding to defendant's passive demeanor at trial and indicating that defendant had been “sitting there, very, very quietly all throughout the trial” did not highlight defendant's election not to testify).⁴

⁴ In addition to holding that comments on a defendant's demeanor did not violate the Fifth Amendment, other courts have also held that such comments were not improper at all. For instance, in *State v. Brown*, 358 S.E.2d 1 (N.C. 1987), the Supreme Court of North Carolina found no error when the prosecutor had made arguments regarding the defendant's stoic demeanor to the jury. The court found nothing wrong with such argument, noting that “Urging the jurors to observe defendant's demeanor for themselves

These cases demonstrate that courts around the country have rejected claims that a comment on a defendant's demeanor violates the Fifth Amendment. In the present case, of course, the State did not comment on the Defendant's demeanor in any way. The Court of Appeals was thus in accord with other jurisdiction in finding no Fifth-Amendment violation. *Barry*, 179 Wn. App. at 177-78. This Court should find that no Fifth Amendment violation occurred in the present case and that the erroneous instruction should therefore be reviewed under the non-constitutional harmless error standard. Furthermore, as the record is completely silent as to any potential prejudice, the Defendant is unable to show that a reversal is required under the nonconstitutional error analysis.

It is also worth noting that had the prosecutor actually commented on the defendant's demeanor and asked the jury to draw a negative inference, then the issue would have been a claim of prosecutorial misconduct. *See, e.g., Klok*, 99 Wn. App. at 84; *Smith*, 144 Wn.2d at 678-

does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." *Brown*, 358 S.E.2d at 15, *citing State v. Myers*, 263 S.E.2d 768, 773-74 (N.C. 1980). The court also explained that such remarks were in fact "rooted in the evidence" and related "to the demeanor of the defendant, which was before the jury at all times." *Brown*, 358 S.E.3d at 15, *citing Myers*, 263 S.E.2d at 774. The court also rejected the Defendant's claim that such comments constituted a comment on his failure to testify. *Brown*, 358 S.E.2d at 15-16. *See also, State v. McNatt*, 463 S.E.2d 76, 77-78 (N.C. 1995) (prosecutor's argument about the non-testifying defendant's courtroom demeanor proper and did not violate Fifth Amendment); *Bishop v. Wainwright*, 511 F.2d 664 (5th Cir.1975) (holding it was permissible to refer to non-testifying defendant's courtroom demeanor, and rejecting claim that comments violated Fifth Amendment).

79. In such a case the law is clear that the defendant would bear the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *See, e.g., State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If he objected at trial, the Defendant would be required to establish prejudice and demonstrate that there was a substantial likelihood the misconduct affected the jury's verdict. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011). If no objection had been made, an even greater showing would be required: that the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *Sakellis*, 164 Wn. App. at 184.

The present case did not involve an actual comment on the Defendant's demeanor or an invitation to draw any negative inferences. It therefore makes no sense to apply a higher harmless error standard, especially when the record does not even demonstrate that the demeanor at issue weighed against the defendant.

4. The Defendant has failed to show that the erroneous instruction in the present case negatively impacted his Sixth Amendment rights.

The Defendant's claim that the error impacted his right to a verdict based solely on the evidence is similarly without merit. Washington law includes numerous examples where courts have applied the non-

constitutional harmless error standard where the trial court erroneously admitted certain evidence, including highly prejudicial evidence.

For instance, as mentioned previously, it is well settled that evidence admitted in violation of ER 404(b) is reviewed under the lesser standard of non-constitutional harmless error. Similarly, nonconstitutional harmless error analysis is used in analyzing challenges to prior conviction evidence admitted under ER 609(a)(1). If both ER 404(b) and ER 609 errors do not trigger the constitutional harmless error standard, despite a similar right to a “verdict based solely on the evidence” claim, then certainly the error in the present case, where the record is entirely silent as to the what the Defendant’s demeanor was, should be reviewed under the nonconstitutional harmless error standard.

Stated another way, in each of the previously cited ER 404(b) and 609 cases the defendant was able to point to a specific item of evidence or portion of testimony that was prejudicial to his or her case, yet was erroneously admitted. *Supra*, at pages 10-11. This Court nevertheless has consistently held that such cases are reviewed under the nonconstitutional harmless error test.

In the present case the Defendant cannot point to any testimony or evidence that was harmful to his case. Rather, the record is silent on whether the “demeanor” evidence was helpful or harmful to the

Defendant. There can be no question, therefore, that the present case is far less egregious than a case where actual 404(b) or 609 evidence was admitted. The Defendant's claim, therefore, must fail.⁵

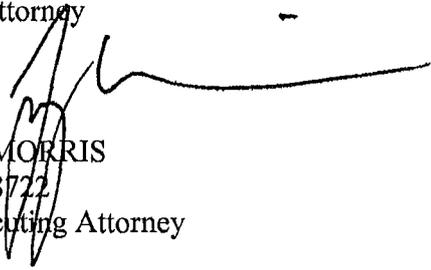
In conclusion, this Court should apply the nonconstitutional harmless error standard and hold that the Defendant has failed to show any prejudice.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED August 29, 2014.

Respectfully submitted,
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⁵ The Defendant further argues that his burden of showing prejudice is somehow unfair because it is difficult or impossible for him to make such a showing in the present case. Pet. For Rev. at 14-15. At least one Washington court, however, has previously rejected such an argument and found that it was "unconvincing" since the defendant in that case (as is true in the present case) had cited "no authority for the notion that the difficulty of establishing prejudice is relevant to whether such a showing is required at all." *State v. Webbe*, 122 Wn.App. 683, 697, 94 P.3d 994 (2004).

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To: Jeremy A. Morris
Subject: RE: Filing for State v Barry 89976-2

Rec'd 8/29/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jeremy A. Morris [mailto:JMorris@co.kitsap.wa.us]
Sent: Friday, August 29, 2014 2:31 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mitch Harrison (mitch@mitchharrisonlaw.com); Kaitlyn Jackson (kaitlyn@mitchharrisonlaw.com)
Subject: Filing for State v Barry 89976-2

Attached, please find the State's Supplemental Brief of Respondent in the case of *State v. Robert Barry*, No. 89976-2. I apologize for the previous email that failed to include the attachment.

Sincerely,

Jeremy A. Morris
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