

63223-0

63223-0

NO. 63223-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED.

1. A trial court does not abuse its discretion in rejecting an ineffective assistance of counsel claim if the court reasonably concludes that the defendant failed to establish either deficient performance or prejudice. Here, the trial court reasonably concluded that counsel was not deficient in failing to contact witnesses that were not helpful to the defense, and that defendant Leroy Jones was not prejudiced. Did the trial court properly exercise its discretion in finding that defendant failed to establish ineffective assistance of counsel?

2. As a general matter, defense counsel's decision whether to object to testimony is a tactical decision and cannot constitute deficient performance unless the testimony is central to the State's case. The testimony of the victim's mother was not central to the State's case, and was not improper. Has Jones failed to establish that counsel's performance was deficient?

3. A trial court does not abuse its discretion in rejecting an ineffective assistance of counsel claim if the court reasonably concludes that the defendant failed to establish either deficient performance or prejudice. Here, the trial court reasonably concluded that counsel adequately advised Jones that his two

Florida convictions could be strikes. The trial court also reasonably concluded that Jones was not prejudiced because he refused an offer to plead guilty to a lesser charge even after he was advised that the Florida convictions could be strikes. Did the trial court properly exercise its discretion in finding that defendant failed to establish ineffective assistance of counsel?

4. The trial court does not abuse its discretion in refusing to grant a mistrial based on a discovery violation unless the defendant has been irreparably prejudiced. Here, Jones was not prejudiced by the State's belated disclosure of witnesses' taped statements because the statements were not helpful to the defense and did not alter the defense theory of the case. Did the trial court properly exercise its discretion in refusing to grant a mistrial?

5. The trial court does not abuse its discretion in excluding a witness' prior juvenile adjudications if they are offered only for general impeachment. The defense offered T'Shaun Bennett's juvenile adjudications for general impeachment. Did the trial court properly exercise its discretion in excluding them?

6. The trial court does not abuse its discretion in giving an aggressor instruction when the defendant claims self-defense and there is evidence that the defendant was the aggressor. In the

present case, Jones was the aggressor and claimed that after attacking the victim he drew a knife in self-defense. Did the trial court properly exercise its discretion in giving the aggressor instruction?

7. An offender is a persistent offender, and must be sentenced to life in prison, if he was previously convicted of two out-of-state convictions whose elements are comparable to a most serious offense. Jones has two prior Florida convictions whose elements are identical to the crime of assault in the second degree, a most serious offense. Was he properly sentenced to life in prison?

8. The trial court does not abuse its discretion in denying a motion for new trial based on governmental mismanagement where there is no arbitrary action or mismanagement that materially affected the defendant's right to a fair trial. The State accurately advised the defense prior to trial that Jones had prior Florida convictions, and that those convictions might constitute strikes. Did the trial court properly exercise its discretion in finding no governmental mismanagement and denying the motion for a new trial?

9. There is no constitutional right to a jury determination of prior convictions. Should Jones' claim to the contrary, which has been repeatedly rejected by Washington courts, be rejected?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Leroy Jones was convicted by jury trial of the crime of assault in the second degree. CP 893. Before sentencing, trial counsel withdrew, and newly appointed counsel filed a motion for new trial based on ineffective assistance of counsel and governmental mismanagement. CP 82. The trial court denied the motion for new trial, finding that Jones had failed to establish either ineffective assistance of counsel or governmental mismanagement. CP 887-91. At sentencing, the trial court found that Jones had previously been convicted in Florida of two crimes that were comparable to most serious offenses. 13RP 24; CP 894. The court imposed a sentence of life imprisonment without possibility of parole. CP 896.

2. FACTS OF THE CRIME.

At 2:30 p.m. on September 10, 2007, four co-workers were returning from their daily afternoon coffee break and walking along Fourth Avenue in downtown Seattle when 17-year-old Taurian Alford ran up to the group and stated something to the effect of "he's trying to stab me." 4RP 83-87, 117-19, 135-37; 5RP 7-9. Alford seemed "very agitated," "alarmed," and "frantic." 4RP 89, 137; 5RP 11; 7RP 37. The men were skeptical at first, but within seconds an older male, later identified as Leroy Jones, appeared and attacked Alford. 4RP 90-92, 120, 139; 5RP 13. Jones knocked Alford to the ground, and tried to stab Alford with a knife. 4RP 97-98, 123, 141; 5RP 15. All four men agreed that Alford appeared to be primarily defending himself. 4RP 93, 122, 140; 5RP 16. As Jones and Alford struggled on the ground, two other young men, T'Shaun Bennett and Devin Wilturner, ran up and attempted to help Alford. 4RP 22-23, 35-36, 94, 123, 140; 5RP 17. During the fight, Jones stabbed Alford in the forehead. 4RP 37, 127; 6RP 54. The young men eventually got the better of Jones and pinned him to the ground, hitting him and kicking him at least once. 4RP 37-39; 96-100, 123-26, 142-43; 5RP 19-20. Jones continued to struggle and hold on to the knife until police officers

arrived. 6RP 45-48. Even then, Jones refused to drop the knife until he was tasered by a police officer. 6RP 50.

Medics treated Alford. 6RP 55. Alford did not testify at trial. The State obtained a material witness warrant for him but was unable to secure his presence for trial. 5RP 56-57. His mother testified that she sent him to Missouri to live with his father after this incident. 5RP 42.

Alford's cousin, T'Shaun Bennett, testified at trial that he was with Alford on the day in question. 4RP 22-24. He noticed Alford arguing with Jones on the street. 4RP 26-27. He did not hear the substance of the argument, but shortly thereafter he saw Alford running from Jones, screaming that Jones had a knife. 4RP 29. Bennett saw the knife in Jones' hand as Jones chased Alford down the street. 4RP 30. Bennett and Devin Wiltturner joined the chase and caught up with Alford and Jones on Fourth Avenue, where Jones was on top of Alford and trying to stab him. 4RP 35. Bennett and Wiltturner jumped onto Jones' back and struggled with him until the police arrived. 4RP 36-40. Bennett was granted use immunity in regard to his testimony. 4RP 43.¹

¹ The immunity agreement pertained to any potential assault charges against Bennett for hitting Jones. 4RP 43, 69.

Jones did not testify at trial. The defense presented the testimony of Mark Forbes, a transportation supervisor who was working at the bus stop next to where the assault occurred. 7RP 64. He testified that he saw two men walking together, who started arguing and then fighting on the ground. 7RP 67-68. Three other men joined the fight and then he heard someone say "he has a knife." 7RP 69. At that point, he noticed a knife cupped in the hand of one of the men and noticed that another man's forehead was bleeding. 7RP 69. According to Forbes, the man with the knife seemed to be protecting himself, although he admitted on cross-examination that it was the other, taller man who appeared to be trying to flee when the fight started. 7RP 73. In closing argument, defense counsel argued that Jones did not assault Alford with a knife at the beginning of the altercation, and only drew the knife in self-defense after he was being attacked by Alford's friends. 7RP 117-19.

3. THE MOTION FOR MISTRIAL.

After the State presented the testimony of five witnesses, Detective Tim DeVore testified that he took taped statements from three witnesses to the fight, Peter Schwab, Erik Fierce and Lori

Brown on September 13, 2007. 5RP 58. Neither the prosecutor nor defense counsel had copies of these taped statements, although both parties had copies of written statements of Schwab and Fierce taken on the day of the assault. 5RP 61-69. Lori Brown's name and number had been provided to the defense previously. 6RP 10. Defense counsel moved for a mistrial. 5RP 72. The court denied the motion for mistrial, but granted a continuance² for defense counsel to locate Lori Brown and to allow Schwab and Fierce, who had already testified, to be recalled for further cross-examination. 6RP 29.

Lori Brown, a government employee who observed part of the fight while waiting at the bus stop, was located and testified as a witness for the State. 7RP 10-11. She testified that she saw a man chasing another man. 7RP 12. The one being chased stopped and "stood his ground" and a fight ensued. 7RP 13. She testified that she was not watching closely, and did not see any weapons, but did hear someone say something about a knife after more men joined the fight. 7RP 13, 19.

² The court recessed on April 10, 2008, after denying the motion for mistrial and trial resumed on April 14, 2008, after Lori Brown had been located and interviewed by both parties. 6RP 79-83, 95; 7RP 6-10.

On further cross-examination, Peter Schwab, who was one of the four co-workers, testified that although he did not see a knife when the fight started, he did see that Jones was holding something "pointy" in his fist. 7RP 40-42. Erik Fierce, also one of the four co-workers, testified upon further cross-examination that he noticed the knife halfway through the fight after the other young men joined the fight, which was consistent with his previous testimony. 7RP 51; 4RP 123.

4. THE MOTION FOR NEW TRIAL.

Prior to sentencing, Jones moved for a new trial, claiming ineffective assistance of trial counsel, discovery violations and governmental mismanagement. The parties presented evidence that prior to trial, the lawyers expressed some uncertainty about the legal ramifications of Jones' criminal history. 2RP 16. At that time, defense counsel expressed concern that two prior Florida convictions, aggravated battery and aggravated assault, might both be strikes under the Persistent Offender Accountability Act. 2RP 17. The prosecutor stated that he had a copy of the judgment from Florida, that he was not conceding that the aggravated assault conviction was not a strike, but that "I don't believe that it's a strike

at this time, but again, I can't say with absolute certainty." 2RP 18.

Defense counsel later provided a declaration stating that prior to trial he believed the current conviction would be Jones' third strike, and that he conveyed that concern to Jones. CP 1027-29. He advised Jones that even though the prosecutor had indicated that the Florida aggravated assault conviction was "probably not a strike," he remained concerned that it was a strike offense.

CP 1029. According to defense counsel, Jones adamantly refused the State's offer to plead guilty to assault in the third degree, stating that he would not accept the offer even if this was his third strike.

CP 1028. Jones stated that "he didn't care." CP 1028. The trial court found that defense counsel's performance was adequate, and that Jones was not prejudiced because he refused to accept the State's offer even after being advised that he might be facing his third strike. CP 888. The court also found no governmental mismanagement. CP 891.

In support of his claim of ineffective assistance of counsel, Jones also claimed his attorney was deficient in not locating and calling Michael Hamilton as a witness. Jones submitted a taped interview with Michael Hamilton in support of the motion for a new trial. CP 218. Hamilton stated in his interview that he was standing

at the bus stop when the assault occurred, and saw two men come around the corner. CP 222. One appeared to be chasing the other, and the older man was being chased. CP 222. The older man was tackled by the younger man. CP 222. The older man had a knife in his hand right after he was tackled by the younger man. CP 223, 226. He saw another man run up and join the fight and then Hamilton boarded a bus. CP 224-25. He was never contacted by the defense attorney or the prosecutor. CP 234. The trial court found that Jones had failed to establish ineffective assistance of counsel because Hamilton's proposed testimony was not exculpatory and, in fact, contradicted the defense claim at trial that Jones wielded the knife only in self-defense after he was attacked by Alford's friends. CP 889. The court denied the motion for a new trial. CP 891.

C. ARGUMENT.

1. JONES FAILED TO ESTABLISH THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

On appeal, Jones contends that trial counsel was ineffective in three respects. First, he contends that he was ineffective in failing to contact two witnesses prior to trial. Second, he contends

that he was ineffective in failing to object to the testimony given by the mother of Taurian Alford. Third, he contends that he was ineffective in failing to adequately investigate Jones' criminal history. The trial court considered and rejected two of these claims. All three are without merit. Jones has failed to establish either deficient performance or prejudice in regard to each of these claims.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable

probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. The United States Supreme Court has warned that, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and judge counsel's performance from counsel's perspective at the time. Id.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90.

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; McFarland, 127 Wn.2d at 335.

- a. The Trial Court Did Not Abuse Its Discretion In Finding That Counsel's Failure To Contact Witnesses Hamilton And Brown Was Not Deficient Or Prejudicial.

Jones contends that trial counsel was ineffective in failing to contact Michael Hamilton and Lori Brown prior to trial. The trial court rejected this claim in denying Jones' motion for new trial. The trial court did not abuse its discretion in finding that Jones failed to establish ineffective assistance of counsel given that these witnesses were not helpful to the defense.

The decision to deny a motion for new trial based on a claim of ineffective assistance of counsel is reviewed for abuse of discretion. State v. West, 139 Wn.2d 37, 983 P.2d 617 (1999). The trial judge plays an important role in evaluating the credibility of evidence at a hearing to determine whether the defendant has met the Strickland standard. Id. at 44. The trial judge's credibility determinations will not be disturbed absent a manifest abuse of discretion. Id. at 46.

It is undisputed that counsel did not contact Michael Hamilton or Lori Brown prior to trial. However, counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998).

Michael Hamilton's name and number was on the 911 dispatch report. CP 216-17. The report reflects that at 2:33 Michael

Hamilton called and reported "male with knife is fighting with other people here." CP 216. Lori Brown's name and number was listed as a witness on Officer Tovar's incident report. CP 215. There is nothing in the police reports that suggest that either Hamilton or Brown's testimony would be helpful to the defense. Unless this Court adopts a rule that defense counsel must contact every witness listed in discovery in preparation for trial, there is no basis for concluding that trial court was deficient in contacting these two witnesses.

Moreover, the trial court correctly concluded that Jones was not prejudiced by counsel's failure to call Hamilton as a witness. To the extent that Hamilton's account placed Jones as the person being tackled, it differed from the other five eyewitnesses to the assault and was not credible. However, Hamilton's testimony would have been detrimental to the defense claim that Jones displayed the knife in self-defense only after he was attacked by Alford's friends. Hamilton recalled seeing the older man display the knife as soon as the fight started and before the other men joined in. CP 224, 226. The trial court reasonably concluded that there is no reasonable probability that Hamilton's testimony would have changed the outcome of the trial.

Similarly, the trial court correctly concluded that Jones was not prejudiced by counsel's failure to contact Lori Brown prior to trial, because Brown's testimony was presented to the jury anyway. CP 888, 890. Moreover, her testimony was not exculpatory and largely comported with the other witnesses that one man had first chased another and a fight started. 7RP 11-13. Brown never saw a knife and only heard a statement about a knife one to four minutes into the fight. 7RP 19, 22, 26. She was not watching the fight closely and looked away when she used her cell phone to call for help. 7RP 13, 18. There is no possibility that contacting Brown prior to trial would have changed the outcome of the trial. The trial court correctly concluded that Jones failed to establish ineffective assistance of counsel in regard to these two witnesses. The trial court did not abuse its discretion in denying the motion for new trial based on this claim.

b. Jones Has Failed To Establish That Counsel Was Ineffective In Failing To Object To The Testimony Of Alford's Mother.

For the first time on appeal, Jones contends that trial counsel's performance was deficient in failing to object to the testimony of Alford's mother and that her testimony improperly

bolstered Alford's credibility. However, this testimony was not objectionable because it did not bolster Alford's credibility, particularly since Alford did not testify at trial. Moreover, counsel was not deficient in failing to object to testimony that was not central to the State's case.

"The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The testimony of Julia Buchanon, Taurian Alford's mother, consists of four pages in the report of proceedings. 5RP 39-43. She testified that Taurian was her son and that he was 17 years old. 5RP 40. She testified that Taurian had a cut on his forehead in September of 2007. 5RP 41. She testified that she was afraid to let Taurian testify and sent him to Missouri to live with his father, partly because of the court case and partly because of "other things," which remained unspecified. 5RP 42-43. There was no testimony that Buchanon knew Jones or had received any threats from anyone.

Jones' reliance on State v. Bourgeois, 133 Wn.2d 389, 945 P.3d 1120 (1997), is misplaced. In that case, which involved a retaliatory shooting at a market, witnesses testified that they were reluctant to testify because of fear that they or their families might be hurt as a result of their testimony. Id. at 394. In closing, the prosecution argued that their reasonable fear of retaliation made their testimony credible. Id. at 396-97. The supreme court held that the State may not bolster a witness's testimony by bringing out testimony that he is fearful, unless and until the witness's credibility is attacked. Id. at 400. Nonetheless, the court found the error in that case harmless. Id. at 405.

Here, the State did not use the testimony to bolster Taurian Alford's credibility. Alford's credibility was not at issue. He did not testify. Other witnesses testified that Alford said "he's going to stab me," but the credibility of this statement was not seriously in question since Jones did have a knife and did subsequently stab Alford. Buchanon's testimony was not objectionable. Moreover, Buchanon's testimony was in no way central to the State's case, and thus a tactical decision not to object could not constitute ineffective assistance of counsel.

c. The Trial Court Did Not Abuse Its Discretion In Finding That Counsel Was Not Ineffective In Advising Jones As To His Criminal History.

Jones contends that the trial court abused its discretion in concluding that he failed to establish ineffective assistance of counsel in regard to trial counsel's advice regarding Jones' criminal history. This claim should also be rejected. The record amply supports the trial court's conclusion that Jones failed to establish either deficient performance or prejudice.

A reasonable attorney who knows of his client's extensive criminal history should attempt to investigate out-of-state prior convictions prior to advising the defendant whether to accept or reject a State's offer to plead guilty to a non-strike offense. State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). However, in order to establish prejudice, a defendant must establish that he had the option to plead to a non-strike offense, and a reasonable probability that he would have pled to the non-strike offense if he had known that he had two strikes. Id. at 100. In Crawford, the defendant, who was convicted of his third strike at trial, claimed that trial counsel rendered ineffective assistance of counsel by not properly advising him regarding his criminal history prior to trial. Id. at 89. The state supreme court held that counsel's performance in

that case was deficient by not advising Crawford that his Kentucky prior conviction was potentially a strike, but that Crawford had failed to establish prejudice because the State had never offered to allow Crawford to plead to a non-strike offense. Id. at 100-01.

In the present case, unlike Crawford, the record is clear that trial counsel repeatedly advised Jones that the present conviction was potentially his third strike. The declaration of trial counsel states the following:

"I believed that this case could be the defendant's third strike and I relayed this concern to him."
CP 1027.

"I relayed my concern that this case could be a third strike to the defendant. I told him that I researched the matter and that based on the research, it appeared that the current case could be his third strike." CP 1028.

"I told the defendant that Mr. Richey told me that the Aggravated Assault/Robbery was probably not a strike. I told the defendant that I was still concerned that the Aggravated Assault/Robbery could be a strike." CP 1029.

"Immediately prior to trial, I spoke with the defendant about the fact that if the Aggravated Assault/Robbery was indeed a strike, he would be sentenced to life in prison." CP 1029.

"The defendant never expressed disagreement about whether the prior convictions for Aggravated Battery and Robbery were strike offenses." CP 1030.

Trial counsel's assertions are supported by Jones' own declaration, in which he admits that "my attorney, Al Kitching, told me that it was

possible that I had two prior convictions that would count as strike crimes." CP 129. Thus, the facts of the present case are starkly different from Crawford, where the defendant was never advised by anyone that he was potentially facing his third strike if convicted. Crawford, 159 Wn.2d at 91. Here, Jones was repeatedly advised that his two Florida convictions could be strikes.³ The trial court's conclusion that counsel made adequate efforts to correctly determine Jones' criminal history and advise him is not manifestly unreasonable. CP 888. The trial court's conclusion that Jones failed to establish deficient performance should be affirmed.

Likewise, the trial court properly found that Jones failed to establish prejudice. After being advised repeatedly that he could be facing conviction for a third strike, Jones told his attorney that he did not care and refused to accept the State's offer of a plea to assault in the third degree. CP 1028. Jones' declaration confirms that he rejected the State's offer to plead guilty to assault in the third degree, after being advised that this conviction could be his

³ Moreover, Jones had been advised in 2000 that he was facing his third strike. In that case, Jones was charged with robbery in the second degree. CP 1095. Jones agreed to plead guilty to assault in the third degree with an agreed exceptional sentence of 5 years in order to avoid a third strike conviction. CP 1101-11.

third strike. CP 129-30. Because the record reflects that Jones had no intention of pleading guilty to assault in the third degree⁴

⁴ The State never offered a plea to anything less than assault in the third degree. CP 1026-30.

regardless of his criminal history, the trial court did not abuse its discretion in concluding that Jones failed to establish prejudice.

Moreover, even if Jones had established ineffective assistance of counsel, he was not denied his right to a fair trial. As the Utah Supreme Court has concluded, the constitutional right to effective assistance of counsel is grounded in the right to a fair trial. State v. Greuber, 165 P.3d 1185, 1188 (Utah, 2007). While plea bargaining is an essential component of the justice system, if a defendant receives deficient representation and rejects a plea offer but ultimately receives a fair trial, then he has not been deprived of his constitutional rights. Id. at 1190. As the Utah court noted, the judicial remedy requested by Jones--forcing the State to extend the previously rejected plea offer--violates the doctrine of separation of powers. Id. at 1190. Thus, even if Jones had established that counsel was prejudicially deficient in plea negotiations, he received a fair trial and is not entitled to any further remedy.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL AND DISMISSAL BASED ON THE DISCOVERY VIOLATION.

Jones contends that the trial court abused its discretion in denying his motion for a mistrial and dismissal⁵ after he learned that Detective DeVore had taken taped statements from three witnesses and those statements had not been provided to the defense. This claim should be rejected because the continuance granted by the court was sufficient to remedy the discovery violation.

Pursuant to CrR 4.7(h)(7)(i), if a party fails to comply with the discovery rules, the court may order discovery, grant a continuance, dismiss the action or enter any other order it deems just under the circumstances. Pursuant to CrR 4.7(a)(1)(i), the prosecutor is obligated to provide any written or recorded statements of its witnesses. In the present case, the State did not comply with this rule by failing to provide the taped statements of Erik Fierce and Peter Schwab, although the State had provided the defense with the written statements of Fierce and Schwab taken at the scene. 5RP 67. Since the State did not intend to call Lori

⁵ In his briefing at trial, defense counsel requested either a mistrial or dismissal of the charges. CP 47. This claim was also raised in the motion for new trial. CP 93.

Brown as a witness, there is no provision of CrR 4.7 that required the production of her taped statement, unless the statement was exculpatory. CrR 4.7(a)(3).

In the present case, the trial court reasonably granted a continuance to allow the defense to locate and interview Lori Brown and to recall Schwab and Fierce for further cross-examination based on their taped statements. None of the information obtained from the taped statements was helpful to the defense. For example, Schwab maintained his testimony that he saw a pointy object in Jones' hand as Jones first approached Alford, and that he clearly saw that it was a knife before Alford's friends joined the fight. Compare 4RP 141; 7RP 44. Fierce maintained his testimony that he noticed the knife halfway through after the others joined the fight. Compare 4RP 133; 7RP 51. Lori Brown's testimony was not exculpatory. She testified that she was not watching the fight closely, never saw a knife, but did see someone making jabbing motions as if he had a knife. 7RP 13, 19, 22, 27, 31. None of these statements changed the defense theory of the case, or bolstered it. Jones has failed to show that the trial court abused its discretion in granting a continuance rather than a mistrial to remedy the discovery violation.

Pursuant to CrR 8.3(b), a court may dismiss a case "due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." A trial court's decision on a CrR 8.3(b) motion to dismiss is reviewed for manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Governmental misconduct need not be evil or dishonest; simple mismanagement is sufficient. State v. Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980). Dismissal of a prosecution pursuant to CrR 8.3(b) is discretionary and reviewable only for a manifest abuse of discretion. Id. Similarly, dismissal of a case for discovery abuse pursuant to CrR 4.7(h)(7)(i) is not only discretionary, but an extraordinary remedy that is only available when the defendant has been prejudiced by the prosecution's actions. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). The burden is on the defendant to show by a preponderance of the evidence that there is prejudice requiring dismissal. State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Here, the trial court reasonably found that Jones had not been inalterably prejudiced by the late disclosure of the taped

statements of Lori Brown, Erik Fierce and Peter Schwab such that dismissal was warranted. The trial court did not abuse its discretion.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING PRIOR JUVENILE ADJUDICATIONS PURSUANT TO 609(d) THAT WERE NOT NECESSARY FOR A FAIR DETERMINATION OF GUILT.

Jones claims that the trial court abused its discretion in excluding the prior juvenile convictions of seventeen-year-old T'Shaun Bennett. This claim should be rejected. The trial court reasonably concluded that the convictions, which were offered for general impeachment, were not necessary for a fair determination of guilt.

T'Shaun Bennett testified at trial that he was with Alford on the day of the assault. 4RP 21-23. Bennett had prior juvenile adjudications for possession of stolen property in the third degree, theft in the third degree, malicious mischief in the third degree, hit and run unattended, and taking a motor vehicle in the second

degree. CP 908.⁶ The trial court ruled that these convictions were not admissible to impeach Bennett's credibility. 4RP 52. In so ruling, the trial court did not abuse its discretion.

ER 609(d) governs the admissibility of juvenile adjudications for impeachment purposes. The rule states:

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

ER 609(d). When a juvenile adjudication is offered for impeachment, the trial court has broad discretion on admissibility. State v. Gerard, 36 Wn. App. 7, 11, 671 P.2d 286 (1984). As the rule states, juvenile adjudications are generally inadmissible. Absent any indication of special reasons for admissibility beyond general impeachment, such as motive or bias, the adjudications are inadmissible. Id. at 12. In the present case, Jones presented no

⁶ Possession of stolen property, taking a motor vehicle without permission and theft are crimes of dishonesty pursuant to ER 609(a)(2). State v. McKinley, 116 Wn.2d 911, 913, 810 P.2d 907 (1991); State v. Trepanier, 71 Wn. App. 372, 381, 858 P.2d 511 (1993).

reason that Bennett's juvenile adjudications would be necessary for a fair determination of Jones' guilt other than to attack Bennett's general credibility. None of those adjudications had any particular relevance to the events at issue in the present case, such as an allegation that Bennett had stolen something from Jones prior to the assault. The trial court did not abuse its discretion in ruling that Bennett's juvenile adjudications were not necessary for a fair determination of the issues at hand.

Any error in the admission of prior convictions of a non-party witness is not constitutional error. State v. Harris, 44 Wn. App. 401, 407, 722 P.2d 867 (1986). Such an error is harmless unless, within reasonable probabilities, the error materially affected the outcome of the trial. Id. Any error in excluding Bennett's juvenile adjudications was harmless. His testimony was not the only evidence supporting the State's assertion that Jones wielded the knife against Alford in the initial attack. That fact was also established by Alford's statement, "he's going to stab me," and the testimony of Peter Schwab and Gus Iverson. There is no reasonable probability that admission of Bennett's prior adjudications would have affected the outcome of the trial.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GIVING AN AGGRESSOR INSTRUCTION.

Jones contends that the trial court abused its discretion in giving an aggressor instruction over his objection. This claim should be rejected. Ample evidence supports the inference that Jones provoked the entire altercation by tackling Alford. The aggressor instruction was properly given in light of the defense theory that Jones drew his knife in self-defense only after Alford's friends joined the fight.

Jones presented a claim of self-defense. CP 55. Under Washington law, a person who provokes an altercation cannot claim the right of self-defense unless he in good faith first withdraws from the combat at a time and in a manner to let the other person know that he is withdrawing. State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The defense objected to the trial court giving WPIC Instruction 16.04, commonly referred to as the aggressor instruction. 7RP 84. That instruction, as given in the present case, reads:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a

reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 72.

The aggressor instruction is appropriate when there is credible evidence that the defendant provoked the need to act in self-defense, even if the evidence before the jury is conflicting. Id. at 909-10. The provoking act must be intentional. State v. Wasson, 54 Wn. App. 156, 772 P.2d 1039 (1989). A trial court's decision to give a jury instruction based on a factual dispute is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

In State v. Riley, 137 Wn.2d at 906-07, the court held that the aggressor instruction was properly given where Riley pulled a gun on the victim and demanded the victim's gun. Riley testified that as the victim was reaching for his own gun, Riley shot him in self-defense. Id. The supreme court held that the aggressor instruction was appropriate because it was based on evidence that Riley was the first to engage in aggressive conduct by pulling his gun. Id. at 909.

Likewise, in the present case, there was ample evidence that Jones first engaged in aggressive conduct by tackling Alford after Alford tried to flee from him. The defense theory was that there were two different assaults. 7RP 117. The first, according to the defense, was the fight between Jones and Alford alone, and did not involve a knife, and thus could not constitute assault in the second degree. The second assault, according to the defense, was when Jones pulled his knife in self-defense after he was attacked by Alford's friends. 7RP 117-19. The State's theory was that Jones pulled his knife before he tackled Alford or shortly thereafter. 7RP 97-98, 123.

The aggressor instruction was made necessary by the defense theory of the case that there were two fights, and that Jones was entitled to pull a knife in self-defense during the second fight because he was outnumbered. Under that theory, there was clearly evidence, practically undisputed, that Jones had started the entire altercation by tackling Alford. Thus, it was proper to instruct the jury that Jones could not provoke the altercation by tackling Alford, and then stab Alford in self-defense after Alford's friends tried to assist him. This is precisely the type of the fact pattern for which the aggressor instruction was drafted.

Jones' argument on appeal that the aggressor instruction was not warranted because the provocation was the assault itself ignores the defense theory of the case, which was that there were two separate assaults: the initial tackling of Alford and the subsequent drawing of a knife in self-defense. The State was entitled to have the aggressor instruction given to the jury in light of the defense theory of the case and the testimony from some of the witnesses that the knife was not seen until Alford's friends joined the fight. The trial court did not abuse its discretion in giving WPIC Instruction 16.04.

5. THE TRIAL COURT PROPERLY SENTENCED JONES TO LIFE IN PRISON WITHOUT PAROLE AS A PERSISTENT OFFENDER.

Jones contends that his Florida prior convictions for aggravated battery and aggravated assault are not comparable to the most serious offense of assault in the second degree even though the elements are identical. This claim must be rejected. The Washington Supreme Court has repeatedly held that if the elements of an out-of-state conviction are identical to a most serious offense, the out-of-state conviction constitutes a strike. Jones' claim that the trial court must also examine the criminal

jurisprudence of the other jurisdiction and determine what defenses were available to the defendant is based on dicta, runs counter to repeated holdings of the supreme court, runs counter to the plain language of the SRA and would make sentencing hearings so cumbersome that it would render comparability analysis completely unworkable.

Pursuant to RCW 9.94A.030(33), a persistent offender is an offender who has been convicted of a most serious offense and has been previously convicted on two separate occasions of "most serious offenses." A persistent offender must be sentenced to life without the possibility of release. RCW 9.94A.570. Assault in the second degree is a most serious offense. RCW 9.94A.030(29)(b).

Throughout the Sentencing Reform Act, the legislature has manifested its intent that out-of-state convictions be included in a defendant's criminal history and in the persistent offender determination. RCW 9.94A.030(12) explicitly defines "criminal history" as being the defendant's prior convictions, "whether in this state, federal court, or elsewhere." RCW 9.94A.030(33) defines a "persistent offender" as one who was previously convicted of two

most serious offenses, "whether in this state or elsewhere."⁷

RCW 9.94A.030(29)(u) defines "most serious offenses" as including "any federal or out-of-state conviction for an offense that under the laws of this state would be felony classified as a most serious offense." The state supreme court held that the Legislature obviously intended sentencing courts to include out-of-state convictions when making sentencing calculations, including persistent offender findings. State v. Morley, 134 Wn.2d 588, 597, 952 P.2d 167 (1998).

RCW 9.94A.525(3) provides that "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." To determine whether an out-of-state conviction is comparable, the court must look to the elements of the crime and compare them to the elements of the Washington crime. Morley, 134 Wn.2d at 605. The elements of the crime are the "cornerstone" of the comparison. Id. at 606. If the elements of the out-of-state conviction are comparable to the elements of a Washington offense "on their face," the out-of-state conviction is included in the offender score

⁷ "Elsewhere" includes all foreign convictions, whether from other states, federal courts, military courts or foreign countries. State v. Morley, 134 Wn.2d 588, 599, 952 P.2d 167(1998).

and no further analysis is required. State v. Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are comparable to a most serious offense, then the out-of-state conviction constitutes a strike. Morley, 134 Wn.2d at 613-14.

Jones does not dispute that the State proved with certified documents that he had a 1988 Florida conviction for aggravated assault pursuant to Fla. Stat. 784.021(1)(b), and a 1991 Florida conviction for aggravated battery pursuant to Fla. Stat. 784.045(1)(a)(2). CP 951, 956. Jones pled guilty in both cases. CP 956, 998. Fla. Stat. 784.021(1)(b), in effect in 1988, defines aggravated assault as "an assault with an intent to commit a felony." See Appendix A. Fla. Stat. 784.045(1)(a)(2), in effect in 1991, defines aggravated battery as "a person commits aggravated battery who, in committing battery uses a deadly weapon." See Appendix B. Both crimes are comparable to the Washington crime of assault in the second degree. In Washington, RCW 9A.36.021(1)(c) and (e) define assault in the second degree as follows: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree, . . . (c) assaults another with a deadly weapon; or . . . (e) with intent to commit a felony, assaults another." The elements

of aggravated battery pursuant to Fla. Stat. 784.021(1)(b) are comparable to assault in the second degree as defined by RCW 9A.36.021(1)(e). The elements of aggravated assault pursuant to Fla. Stat. 784.045(1)(a)(2) are comparable to assault in the second degree as defined by RCW 9A.36.021(1)(c). Both the 1988 and 1991 prior convictions are comparable to the most serious offense of assault in the second degree.

Nonetheless, Jones argues that the Florida offenses cannot be comparable to assault in the second degree, despite the identical elements, because diminished capacity is not an available defense in Florida. Jones relies on dicta from State v. Lavery, *supra*, and State v. Stockwell, 159 Wn.2d 394, 150 P.3d 82 (2007), for this proposition. Jones is mistaken. The holdings of those cases do not support Jones' argument.

In Lavery, the state supreme court held that federal bank robbery is not comparable to Washington's robbery in the second degree because federal bank robbery is a general intent crime and robbery in the second degree in Washington requires an intent to steal. Lavery, 154 Wn.2d at 255-56. The court concluded that "because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, we

conclude that federal bank robbery and second degree robbery in Washington are not legally comparable." Id. at 256 (emphasis added). In discussing the difference between general intent and specific intent crimes, the court noted the availability of certain defenses for the latter. Id. at 256. However, the court reaffirmed its prior holding that "if the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense." Id. at 255 (citing Morley, 134 Wn.2d at 606).

Two years later, in State v. Stockwell, the supreme court addressed the question of whether a prior Washington statutory rape conviction is comparable to the current crime of rape of a child. Stockwell, 159 Wn.2d at 397. The court concluded that the elements of the two crimes are comparable. Id. at 399. In so holding, the court reiterated its long-standing rule that "if the elements of the strike offense and the elements of the foreign (or prior) crime are comparable, the former (or prior) crime is a strike offense." Id. at 397. The court then contradicted its own holding in dicta, stating, "where there would be a defense to the Washington strike offense that was not meaningfully available to the defendant

in the other jurisdiction or at the time, the elements may not be legally comparable." Id. This statement is erroneous dicta. Statements in an opinion that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed. Ass'n of Wash. Bus. v. Dep't of Revenue, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005). The sentence relied on by Jones was not necessary to decide Stockwell, is dicta, and need not be followed.

Jones' contention that the trial court must take into consideration all possible defenses available in the foreign jurisdiction in conducting a comparability analysis is contrary to the supreme court's prior holdings that the legislature did not intend that comparability analysis be an overly cumbersome and complicated process. In State v. Morley, 134 Wn.2d at 598, the supreme court held that the Sentencing Reform Act cannot be read in a way that would exclude every out-of-state conviction from a defendant's criminal history. In that case, the defense argued that in order to constitute a conviction, an adjudication of guilt must be "pursuant to Titles 10 and 13 RCW." The court rejected the claim, holding that "the application of Title 10 to out-of-state convictions would effectively result in all out-of-state convictions being excluded

from consideration under the SRA." Morley, 134 Wn.2d at 598.

Similarly, Jones' claim that the State must prove not only that an out-of-state conviction's elements are the same, but that the other state's substantive criminal law provides all the same defenses would likely result in very few out-of-state convictions being included in a defendant's criminal history.

Similarly, in State v. Berry, 141 Wn.2d 121, 132, 5 P.3d 658 (2000), the supreme court stated "that expanding the comparability analysis beyond an elemental analysis would unnecessarily complicate an already difficult process." Jones' claim would create the type of complicated process that the court rejected in Berry, by requiring inquiry into mental defenses such as insanity, and diminished capacity, as well as the laws of defense of self and others, necessity, duress, entrapment and consent. Sentencing hearings would become all-day hearings exploring the criminal jurisprudence of other states to insure that there were no defenses available in Washington that were unavailable in the other state. Under Jones' reasoning, if there was any variation between the jurisprudence of the other state and Washington, then the out-of-state conviction could not be included in the defendant's criminal history.

Most importantly, Jones' claim is contrary to the plain language of the Sentencing Reform Act. As stated above, RCW 9.94A.525(3) provides that "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." (Emphasis added). On its plain terms, comparability analysis is limited to the definition of the crime. There is no support in the language of the statute for Jones' claim that there must also be identical defenses in order for an out-of-state conviction to be comparable pursuant to RCW 9.94A.525(3).

It should also be noted that Jones is incorrect in his assertion that there was no diminished capacity defense in Florida at the time of his prior convictions. Prior to 1999, voluntary intoxication was a valid defense in Florida.⁸ The Florida Supreme Court held in State v. Bias, 653 So.2d 380 (Fla. 1995), that expert opinion was admissible to show that a mental disease or defect in combination with intoxication prevented the defendant from forming the specific intent to commit the crime. Thus, as in Washington, the defense of diminished capacity based on intoxication or intoxication

⁸ In 1999, the Legislature enacted Fla. Stat. 775.051, which proscribes the use of voluntary intoxication as a defense to any crime, unless the intoxication was the result of a lawful prescription.

plus a mental defect was available at the time of Jones' prior convictions.

In conclusion, the record demonstrates that the State proved that the two prior Florida crimes that Jones pled guilty to are identical to the elements of assault in the second degree. No further analysis was required. The trial court properly found that Jones is a persistent offender, and sentenced him to life imprisonment without the possibility of parole.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING NO GOVERNMENTAL MISMANAGEMENT IN REGARDS TO JONES' CRIMINAL HISTORY.

Jones claims that the State is guilty of governmental mismanagement because the prosecuting attorney demonstrated some confusion over whether Jones' aggravated assault conviction constituted a strike. The trial court reasonably concluded that the State did not commit misconduct and that dismissal pursuant to CrR 8.3(b) was not warranted. The trial court did not abuse its discretion.

As stated previously, a court may dismiss a case pursuant to CrR 8.3(b) "due to arbitrary action or governmental misconduct

when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." A trial court's decision on a CrR 8.3(b) motion to dismiss is reviewed for manifest abuse of discretion. State v. Blackwell, supra, 120 Wn.2d at 830.

In the present case, there was no arbitrary action or mismanagement. An offender has no constitutional or statutory right to pretrial notice of the possibility of being sentenced as a persistent offender. State v. Crawford, supra, 159 Wn.2d at 96. In so holding, the state supreme court noted that the "fact of prior convictions is often not known to the prosecutor before trial." Id. Nonetheless, in the present case, the State accurately advised the defendant prior to trial that his criminal history included two Florida convictions. The State obtained a copy of the judgment and sentence from Florida and made the copy available to the defense at the start of trial. 2RP 17-19. Although the prosecutor demonstrated some confusion as to whether the Florida aggravated assault met the legal standard for comparability, he made no intentional misrepresentations. He stated, "I'm not conceding that we agree it's not a strike . . . I don't believe that it's a strike at this time, but again, I can't say with absolute certainty." 2RP 17-18. Moreover, as the trial court found, the defense did not rely on the

State's representations. CP 889. Defense counsel advised his client that he remained concerned that the present conviction would be Jones' third strike. CP 1027.

Ironically, Jones' argument that the prosecutor "should have known" that both of his Florida convictions constituted strikes runs counter to his argument that those convictions do not constitute strikes. The law regarding comparability of out-of-state convictions has become muddled with the recent state supreme court decisions discussed in the preceding section. It was not mismanagement for the prosecutor to be confused about the state of the law regarding comparability. The prosecutor did not withhold information from the defense regarding Jones' criminal history. The trial court did not abuse its discretion in concluding that there was no governmental mismanagement.

7. JONES' DUE PROCESS RIGHTS WERE NOT VIOLATED AT SENTENCING.

Jones contends that his right to due process was violated because his criminal history was not found by a jury beyond a reasonable doubt. This claim has been repeatedly rejected by the state supreme court in State v. Smith, 150 Wn.2d 135, 75 P.3d 934

(2003), State v. Jones, 159 Wn.2d 231, 241, 149 P.3d 636 (2006),
State v. Lavery, supra, 154 Wn.2d at 256-57, and State v. Thieffault,
160 Wn.2d 409, 585-86, 158 P.3d 580 (2007). See also, State v.
Rudolph, 141 Wn. App. 59, 168 P.3d 430 (2007). There is no right
to a jury trial to determine the fact of a prior conviction for
sentencing under either the federal or state constitution.

D. CONCLUSION.

Jones' conviction and sentence should be affirmed.

DATED this 7th day of December, 2009.

Respectfully submitted,

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By: 
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APPENDIX A

Westlaw

West's F.S.A. § 784.021

Page 1

Effective:[See Text Amendments]

West's Florida Statutes Annotated Currentness
Title XLVI. Crimes (Chapters 775-899)
Chapter 784. Assault; Battery; Culpable Negligence (Refs & Annos)
→ **784.021. Aggravated assault**

(1) An “aggravated assault” is an assault:

(a) With a deadly weapon without intent to kill; or

(b) With an intent to commit a felony.

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

CREDIT(S)

Laws 1881, c. 3275, § 2; Rev.St.1892, § 2402; Gen.St.1906, § 3228; Rev.Gen.St.1920, § 5061; Comp.Gen.Laws 1927, § 7163; Laws 1955, c. 29709, § 1; Laws 1957, c. 57-345, § 1; Laws 1971, c. 71-136, § 731; Fla.St.1973, § 784.04; Laws 1974, c. 74-383, § 18; Laws 1975, c. 75-298, § 8.

Current through Chapter 2009-270 (End)

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APPENDIX B

Effective:[See Text Amendments]

West's Florida Statutes Annotated Currentness

Title XLVI. Crimes (Chapters 775-899)

Chapter 784. Assault; Battery; Culpable Negligence (Refs & Annos)

→ **784.045. Aggravated battery**

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
2. Uses a deadly weapon.

(b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

CREDIT(S)

Laws 1970, c. 70-63, § 1; Laws 1971, c. 71-136, § 732; Laws 1974, c. 74-383, § 20; Laws 1975, c. 75-298, § 10; Laws 1988, c. 88-344, § 3.

Current through Chapter 2009-270 (End)

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JONES, Cause No. 63223-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

12/7/09
Date

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