

64103-4

64103-4

No. 64103-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BARRY MICHAEL CAUDLE,

Appellant.

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

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL
ASSIGNMENT OF ERROR

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2010 APR 29 PM 4:50
COURT OF APPEALS
DIVISION ONE
CLERK

TABLE OF CONTENTS

A. <u>SUPPLEMENTAL ASSIGNMENT OF ERROR</u>	1
B. <u>ISSUE PERTAINING TO ASSIGNMENT OF ERROR</u>	1
C. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT COULD CONSIDER THE EVIDENCE OF OTHER ACTS OF SEXUAL ABUSE FOR ONLY A LIMITED PURPOSE.....	3
2. THE TRIAL COURT COMMENTED ON THE EVIDENCE BY INSTRUCTING THE JURY THAT AN INCIDENT OCCURRED IN THE DOWNSTAIRS FAMILY/TV ROOM SOMETIME DURING THE CHARGING PERIOD	10
a. The instruction was an improper comment on the evidence.....	10
b. The improper comment on the evidence was prejudicial.....	16
D. <u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. IV, § 16	12, 14
----------------------------	--------

Washington Supreme Court

<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	15
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997)	12
<u>State v. Brown</u> , 113 Wn.2d 520, 782 P.2d 1013 (1989).....	8
<u>State v. Ferguson</u> , 100 Wn.2d 131, 667 P.2d 68 (1983)	5
<u>State v. Foxhoven</u> , 161 Wn.2d 168, 163 P.3d 786 (2007) ..	4, 5, 7, 9
<u>State v. Goebel</u> , 36 Wn.2d 367, 218 P.2d 300 (1950).....	8
<u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	17
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	12, 13
<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995)	6, 7
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	11
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	5
<u>State v. Recuenco</u> , 163 Wn.2d 428, 180 P.3d 1276 (2008)	11
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982)	4, 6, 8
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	15
<u>State v. Thorne</u> , 43 Wn.2d 47, 260 P.2d 331 (1953).....	5

Washington Court of Appeals

State v. Eaker, 113 Wn. App. 111, 53 P.3d 37 (2002) 13, 17

State v. Guzman, 119 Wn. App. 176, 79 P.3d 990 (2003) 5

State v. Russell, ___ Wn. App. ___, 225 P.3d 478
(2010) 5, 6, 7, 8, 9, 10

State v. Smith, 122 Wn. App. 294, 93 P.3d 206 (2004)..... 15

State v. Stephens, 7 Wn. App. 569, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974) 12

State v. Whalon, 1 Wn. App. 785, 464 P.2d 730 (1970)..... 8

Court Rules

ER 404(b)..... 1, 4, 5, 6, 7, 8

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in failing to instruct the jury that it could consider the ER 404(b) evidence for only a limited purpose.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

In a prosecution for sexual abuse, when the trial court admits evidence of other alleged acts of sexual abuse over defense objection, the court must provide the jury with a limiting instruction, even if not requested by the parties. Did the trial court err in failing to instruct the jury that it could consider the evidence of other acts of sexual abuse for only a limited purpose?

C. SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Mr. Caudle with one count of rape of a child in the first degree-domestic violence. CP 21. But the State offered, and the trial court admitted, evidence of *three* separate acts of sexual abuse.

Prior to trial, the prosecutor announced that the State intended to present evidence that Mr. Caudle sexually abused K.A.G. on two occasions in addition to the occasion on which the charge was based. The State offered the evidence under the "lustful disposition" exception to ER 404(b). 3/16/09RP 17-18, 22-23. Defense counsel objected, arguing the evidence was unfairly

prejudicial. 3/16/09RP 18-19. The court overruled the objection, finding the evidence was relevant to show Mr. Caudle's lustful disposition toward K.A.G. 3/16/09RP 23.

At trial, pursuant to the trial court's ruling, K.A.G. testified about three discrete incidents of alleged sexual abuse. First, K.A.G. testified that one night while she was in her bedroom asleep, she woke up to find the bottom half of her sheets pulled up. 3/23/09RP 45. She looked up to see Mr. Caudle shining a flashlight on the lower half of her body and looking at her. 3/23/09RP 45. She did not know what to do so she fell back to sleep. 3/23/09RP 45. She could not remember when the incident occurred. 3/23/09RP 46.

Next, K.A.G. testified that about two weeks later she was sitting on the couch one day in the family room watching TV with Mr. Caudle. 3/23/09RP 53-54. Somehow, she ended up sitting on his lap. He began stroking her leg, then opened her pants and put his hands inside her underwear and touched her private parts, penetrating her vagina with his finger. 3/23/09RP 53-54, 58.

Finally, K.A.G. testified that about two months later, while the family was staying at Ocean Shores, Mr. Caudle took her and her brothers swimming in the pool. 3/23/09RP 60. As she was sitting

on a step in the pool, under water, Mr. Caudle sat next to her and somehow she ended up on his lap. 3/23/09RP 60. He penetrated her vagina with his finger. 3/23/09RP 60.

The prosecutor chose the TV room incident as the basis for the charged crime of rape of a child. CP 32. Although the court admitted the evidence of the other two incidents only for a limited purpose, to show Mr. Caudle's "lustful disposition" toward K.A.G., the court did not instruct the jury that it could consider the evidence for only that purpose. See CP 22-36. To the contrary, the court instructed the jury it could consider that evidence in deciding whether *any* proposition had been proved. CP 24 (Instruction number 1, stating: "In order to decide whether any proposition has been proved, you must consider *all* of the evidence that I have admitted that relates to the proposition.") (emphasis added).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT COULD CONSIDER THE EVIDENCE OF OTHER ACTS OF SEXUAL ABUSE FOR ONLY A LIMITED PURPOSE

The trial court admitted evidence of three separate acts of alleged sexual abuse, yet the State charged Mr. Caudle with committing only a single act. Defense counsel objected to admission of the evidence of other acts of sexual abuse, arguing it

was unfairly prejudicial, but the court overruled the objection. The court found the evidence was relevant and admissible to show Mr. Caudle's "lustful disposition" toward K.A.G.. 3/16/09RP 7-19, 23. Yet the court did not instruct the jury that it could consider the evidence for only that limited purpose. To the contrary, the court instructed the jury it could consider the evidence for *any* purpose. CP 24. The court's ruling permitted the jury to draw an impermissible inference from the evidence—that Mr. Caudle was "a person of abnormal bent, driven by biological inclination" and therefore more likely to have committed the crime. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). In light of the facts of the case and given that admission of evidence of other acts of sexual abuse is particularly prejudicial in sex abuse prosecutions, the court's failure to provide a limiting instruction was not harmless.

Interpretation of an evidentiary rule is a question of law reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court has correctly interpreted the rule, admission of evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 174. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Id.

Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. Id.

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person to show action in conformity therewith." This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to show the character of a person to prove the person acted in conformity with that character at the time of the crime. Foxhoven, 161 Wn.2d at 175.

ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. Foxhoven, 161 Wn.2d at 175. Relevant here, such evidence may be admitted also to show the defendant's "lustful disposition," that is, sexual desire for a particular victim. State v. Russell, ___ Wn. App. ___, 225 P.3d 478, 481-82 (2010) (citing State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Guzman, 119 Wn. App. 176, 182, 79 P.3d 990 (2003) (citing State v. Ferguson, 100 Wn.2d 131, 134, 667 P.2d 68 (1983) (quoting State v. Thorne, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))). ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the

State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. Russell, 225 P.3d at 482 (citing Foxhoven, 161 Wn.2d at 175 (citing State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995))).

"[S]ubstantial prejudicial effect is inherent in ER 404(b) evidence." Lough, 125 Wn.2d at 863. This is particularly true in sex abuse prosecutions, "where the prejudice potential of prior acts is at its highest." Saltarelli, 98 Wn.2d at 363. "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." Id. (citation omitted).

In Russell, the Court of Appeals recently reversed a conviction for rape of a child, where the trial court admitted evidence of other acts of sexual abuse under the "lustful disposition" exception to ER 404(b) but did not instruct the jury it could consider the evidence for only that purpose. State v. Russell, 225 P.3d 478. In Russell, the child testified her step-father began committing acts of sexual abuse against her while the family lived in Hawaii, which continued after the family moved to Washington, and

also thereafter, when the family moved to Florida and then to Indiana. Id. at 480. The State charged Russell with one count of first degree rape of a child, regarding the alleged abuse in Washington. Id. The State sought to admit evidence of the alleged acts that occurred out-of-state, arguing they were relevant to show Russell's "lustful disposition" toward the child. Id. at 481-82. Defense counsel objected, but the trial court overruled the objection and admitted the evidence. Id. at 481.

The Court of Appeals reversed. The court emphatically held that where ER 404(b) evidence is admitted at trial, "a limiting instruction 'must be given to the jury.'" Russell, 225 P.3d at 482 (quoting Foxhoven, 161 Wn.2d at 175 (citing Lough, 125 Wn.2d at 864)). The court ruled that the trial court's admission of the ER 404(b) evidence, standing alone, was not itself an abuse of discretion. Russell, 225 P.3d at 483. But the court recognized that in Foxhoven, the Washington Supreme Court had affirmed that "where such evidence is admitted, a limiting instruction 'must be given to the jury.'" Id. (quoting Foxhoven, 161 Wn.2d at 175). The court noted, "the cases from which this rule is derived place the burden of giving such instruction on the trial court." Russell, 225 P.3d at 483 (citing Foxhoven, 161 Wn.2d at 175; Lough, 125 Wn.2d

at 864 (noting that because the trial court repeatedly gave a limiting instruction to the jury at the conclusion of trial and before each witness in question testified, the record failed to support a contention that the jury used the ER 404(b) evidence for an improper purpose); Lough, 125 Wn.2d at 860 n.18 (citing State v. Brown, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989), for the proposition that the trial court should explain the purpose of the evidence and give a cautionary instruction to consider it for no other purpose); Brown, 113 Wn.2d at 529 (citing Saltarelli, 98 Wn.2d at 362 (citing State v. Goebel, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950))); Goebel, 36 Wn.2d at 379 ("the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes"); State v. Whalon, 1 Wn. App. 785, 794, 464 P.2d 730 (1970) (citing Goebel).

Russell acknowledged that generally a trial court need not give a cautionary instruction if no instruction is requested, but held the general rule does not apply to evidence admitted under ER 404(b) where defense objected to admission of the evidence. Russell, 225 P.3d at 483 & 483 n.4. Under those circumstances,

due to the significant possibility that the evidence will unfairly prejudice the jury, Foxhoven is controlling. Id.

Russell is indistinguishable from Mr. Caudle's case and therefore requires that his conviction be reversed. As in Russell, Mr. Caudle was charged with one count of rape of a child but the trial court admitted evidence of other acts of sexual abuse, over defense counsel's objection. Also as in Russell, the trial court ruled the evidence was admissible to show Mr. Caudle's "lustful disposition" toward the alleged victim, but the court did not instruct the jury that it could consider the evidence for only that purpose. Finally, as in Russell, the court instructed the jury that "[i]n order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." Russell, 225 P.3d at 483-84; CP 24. "Accordingly, the jury was *required* to consider the other acts evidence when determining [Mr. Caudle's] guilt of the charged offense." Russell, 225 P.3d at 484 (emphasis in Russell).

As stated, in a prosecution for a sexual offense, the jury is particularly likely to be swayed by evidence that the defendant committed other acts of sexual abuse. Without an instruction telling the jury that they may consider the evidence only for a proper

purpose, the jury is likely to conclude the defendant *must* have committed the crime charged due to his criminal character. As in Russell, this Court cannot say that the trial court's failure to give the jury a limiting instruction did not affect the outcome of the trial.

Reversal is therefore required.

2. THE TRIAL COURT COMMENTED ON THE EVIDENCE BY INSTRUCTING THE JURY THAT AN INCIDENT OCCURRED IN THE DOWNSTAIRS FAMILY/TV ROOM SOMETIME DURING THE CHARGING PERIOD

a. The instruction was an improper comment on the evidence. The State contends that because the jury instruction "did not resolve a disputed issue of fact, there was no comment on the evidence." SRB at 6, 11-12. The State conflates the question of whether the instruction was an improper comment on the evidence with the question of whether the comment was prejudicial. Moreover, an improper comment on the evidence can be prejudicial even when the evidence is undisputed. Finally, the facts at issue *were* disputed.

As an initial matter, the State contends the to-convict instruction did not comment on the evidence because it did not comment on an element of the crime. SRB at 9. That is not correct. "Elements" are the facts that the State must prove beyond

a reasonable doubt to establish that the defendant committed the charged crime." State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).

As stated in the opening brief, in a multiple acts case, where the State alleges multiple acts but files only one criminal charge, the State must prove beyond a reasonable doubt the particular act upon which it is relying for conviction. State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984). All 12 jurors must agree that the same underlying act has been proved. Id. Thus, the alleged act upon which the State is relying is an element of the crime.

In this case, the State filed one charge for rape of a child but K.A.G. testified to three distinct acts of alleged sexual abuse. The State elected to rely upon K.A.G.'s testimony that Mr. Caudle raped her one day while the two were sitting together on the couch in the family room watching TV. This means the State was required to prove beyond a reasonable doubt that the TV room incident actually occurred, and that it happened sometime during the charging period. Thus, the court's instruction, that the jury must find beyond a reasonable doubt that "the defendant had sexual intercourse with K.A.G. (downstairs family-TV room incident)," CP 32, commented on an element of the crime.

Moreover, the instruction would amount to an improper comment on the evidence even if the evidence were undisputed. A judge is prohibited by article IV, section 16 from "instructing the jury that 'matters of fact have been established as matters of law.'" State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." Levy, 156 Wn.2d 721.

In Levy, the court concluded that the trial court commented on the evidence by stating in the to-convict instruction that to convict Levy of the crime of burglary, the jury must find that he "entered or remained unlawfully in a building, *to-wit: the building of Kenya White*." Id. at 716. The court did not address the question of whether the evidence was undisputed until after it concluded the instruction was a comment on the evidence. Id. at 723. Moreover, the court explained that "the State has the burden of showing the jury's decision was not influenced, *even when the evidence is undisputed or overwhelming*." Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). The court concluded Levy could

not have been prejudiced only because the jury could not have concluded that White's apartment "was anything *other than* a building." Levy, 156 Wn.2d at 726.

In sum, a jury instruction is an improper comment on the evidence if it suggests to the jury that they need not consider an element of the crime, or that an issue of fact has been resolved as an matter of law. If the court concludes the instruction is a comment on the evidence, the court then asks whether "the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 723. The comment may require reversal even if the evidence is undisputed or overwhelming. Id.

Here, the court commented on the evidence by suggesting to the jury it need not separately find whether (1) an incident occurred in the TV room; (2) the incident amounted to a rape; and (3) the incident occurred sometime during the charging period. See State v. Eaker, 113 Wn. App. 111, 118-19, 53 P.3d 37 (2002). The instruction was an improper comment on the evidence regardless of whether any of those facts were disputed.

Moreover, the facts at issue *were* disputed. First, the State suggests the instruction was not improper because defense counsel agreed to it. SRB at 8-9. But there is no indication in the

record, other than the judge's offhand comment during the post-trial hearing, that defense counsel agreed to the instruction. More important, article IV, section 16 prohibits *the judge* from implying that matters of fact have been settled as matters of law. The constitutional prohibition against judicial comments recognizes that *a judge's* opinion of the case carries special weight with the jury; it is not concerned with the actions of defense counsel. Consistent with the constitutional doctrine, the jury was instructed in this case that they must rely on *the judge*, not the attorneys, to provide them with the law that they must apply to the facts of the case. CP 23, 25.¹

In addition, to the extent the State suggests that Mr. Caudle invited the error in the jury instruction, this Court must reject that argument. In the context of an erroneous jury instruction, the Supreme Court has consistently applied the invited error doctrine only where defense counsel *requested* the instruction at issue; it

¹ Instruction number 1 informed the jury, "you must apply the law from my instructions to the facts that you decide have been proved." CP 23. That instruction also stated,

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 25.

does not apply where counsel merely failed to object to the instruction. See, e.g., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they *proposed* erroneous instructions); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel *proposed* instructions identical to instructions given to jury that defendant later challenged on appeal); State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990) (defense counsel *requested* instructions later challenged on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel *participated in drafting* instructions later challenged on appeal)).

Finally, Mr. Caudle *did* dispute the facts at issue. Again, the jury instruction was improper because it told the jury they need not separately find whether (1) an incident occurred in the TV room; (2) the incident amounted to a rape; and (3) the incident occurred sometime during the charging period. All of these facts were disputed. Although Mr. Caudle stipulated that *if* an incident occurred, it occurred during the charging period, he did not stipulate that anything ever occurred in the TV room; that Mr. Caudle raped

K.A.G. in the TV room; or that if anything *did* occur in the TV room, it occurred during the charging period.

b. The improper comment on the evidence was prejudicial. The State argues that even if the jury instruction was an improper comment on the evidence, no prejudice resulted because the instruction did not comment on an element of the crime. SRB at 14, 17. But as stated above, the instruction *did* comment on an element of the crime.

The State also argues the comment was not prejudicial, because Mr. Caudle stipulated to the timeframe element and did not claim that he and K.A.G. were never together in the downstairs family room. SRB at 15-16. But as argued, the instruction amounts to more than a comment on the timeframe of the crime. Mr. Caudle did not stipulate to the other facts at issue: whether anything ever occurred in the TV room; whether Mr. Caudle raped K.A.G. in the TV room; or whether anything that *did* occur in the TV room occurred during the charging period.

Moreover, contrary to the State's argument, Mr. Caudle *did* dispute K.A.G.'s testimony about what occurred in the family room. For instance, on cross-examination, defense counsel challenged K.A.G.'s memory of whether there was a blanket involved, whether

her brother was present in the room, whether she told Mr. Caudle to stop, or how the incident ended. 3/23/09RP 86, 91. In closing argument, counsel pointed out inconsistencies in K.A.G.'s statements about what actually occurred in the TV room.

3/25/09RP 28-30.

Finally, the State argues the comment was not prejudicial because, unlike in Eaker, the jury instruction did not resolve conflicting testimony. SRB at 15. But there is no basis to hold that a jury instruction that comments on the evidence is prejudicial only if it purports to resolve conflicting testimony. The question instead in this case is whether it is conceivable the jury could have determined that an incident did not occur in the TV room; that if an incident did occur, it did not amount to a rape; or that if it was a rape, it did not occur during the charging period. See State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006) (where jury instruction commented on the evidence by stating the victims' birth dates, the question was whether it was conceivable that the jury could have found the boys were *not* minors at the time of the events if the court had not specified the birth dates in the jury instructions). Because it is conceivable the jury could have made one or more of those findings if not for the improper jury instruction,

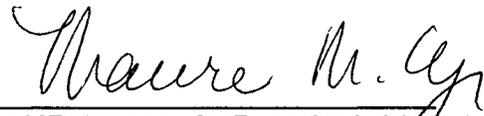
the record does not affirmatively show no prejudice resulted.

Reversal is therefore required.

E. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Caudle's conviction must be reversed.

Respectfully submitted this 29th day of April 2010.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64103-4-I
v.)	
)	
BARRY CAUDLE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] MICHAEL PELLICCIOTTI, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY</p> <hr/>
<p>[X] BARRY CAUDLE 329224 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY</p> <hr/>

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 APR 29 PM 4:50

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF APRIL, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710