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King County Prosecutor
Appellate Unit

COURT OF APPEALS
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NO. 64879-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER W. RHYMES,

Appellant.

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

The Honorable Cheryl B. Carey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel deprived the appellant of his constitutional right to effective assistance by failing to propose an instruction for the inferior degree offense of fourth degree assault.

Issue Pertaining to Assignment of Error

Viewed in the light most favorable to the appellant, the evidence supported a conclusion the appellant committed fourth degree assault and not third degree assault. Despite not receiving a fourth degree assault instruction, the jury asked whether it could consider the inferior degree offense. The trial court said it could not, and the jury convicted the appellant of the charged crime of third degree assault. Did trial counsel render ineffective assistance by failing to propose a fourth degree assault instruction?

B. STATEMENT OF THE CASE

Christopher W. Rhymes and Stacy Giosso began dating in February 2009. 2RP 131.¹ Before long Rhymes was spending many nights at Giosso's residence. 3RP 26-27, 30, 76-77; 4RP 33-34. Rhymes testified they got along well until about the end of April, when he told

¹ The five-volume verbatim report of proceedings is cited as follows: 1RP – 11/30-12/1/09; 2RP – 12/2/09; 3RP – 12/3/09; 4RP – 12/7/09; 5RP – 12/9/09, 1/8/10.

Giosso he would be spending less time with her because of his new school schedule. 4RP 34. Giosso became upset and suspected Rhymes intended to end their relationship. 4RP 34.

Giosso became suspicious of his interactions with a group of friends he got together with each week at a local pub. 4RP 34-36, 44. Rhymes said Giosso looked at his MySpace and Facebook social networking pages and questioned him about women who left messages for him. 4RP 36-40. The topic of other women became constant and Rhymes and Giosso began to argue frequently. 4RP 40-41. Rhymes grew tired of this and in May began seeing less of Giosso. 4RP 41-42.

Giosso testified she looked at some pictures Rhymes posted on his MySpace and Facebook pages, but not at messages people sent him. 2RP 166-67; 3RP 26. She did not consider herself a jealous woman, was never concerned about other women being around Rhymes, did not question him about other women, and was not upset by his weekly visits to the local pub. 2RP 167-69; 3RP 75. She and Rhymes had discussed not dating other people, and she "was content with his response." 3RP 75. Giosso testified Rhymes had a light school schedule and his schooling did not interfere with their time together. 3RP 75-76.

On May 17, 2009, Rhymes and Giosso went to a Mariners' Sunday afternoon game. 2RP 133-34; 4RP 45-47. Rhymes drank five beers during the game. 2RP 135-36; 4RP 45. Giosso testified she believed she had two or three, but she knew it was "what I consider to be a lot[.]" 2RP 135; 3RP 32-33. Rhymes testified Giosso had six beers. 4RP 49-50. According to him, she was "pretty drunk." 4RP 52. Giosso testified she did not feel drunk. She was "[a] little bit" under the influence of the beer. 2RP 136-37. She said Rhymes was "as drunk as I had seen him before." 2RP 136.

Rhymes testified he and Giosso did not argue during the ride home in his truck. 4RP 52. Giosso described the ride differently. Out of nowhere, Rhymes repeatedly called her stupid and retarded, and she continually asked him why his mood suddenly changed. 2RP 139-40. Rhymes did not explain. 2RP 139.

Both of them needed to use the bathroom by the time they arrived at Rhymes' residence. 2RP 140-41; 4RP 52. Rhymes testified he ran up the stairs and got there first. 4RP 52-53. While he was in the bathroom, he heard Giosso trip as she headed up the stairs. 4RP 54-55. Giosso testified she went straight into the bathroom as soon as she entered the

apartment. 2RP 141. What occurred after that is the basis for the charges of third degree assault and felony harassment. CP 1-2.²

Rhymes said Giosso suddenly flew into a rage. Referring to a text message she just saw on Rhymes' cell phone, Giosso began yelling and accused him of lying and cheating on her. 4RP 55-56. She broke his phone and hit him in the face with one of the pieces. 4RP 56-57. She started punching him in the face and head, which sparked a lengthy stop-and-go verbal and physical argument during which Rhymes was repeatedly forced to defend himself against Giosso's aggression. 4RP 58-74.

Both Rhymes and Giosso fell to the floor several times. 4RP 59-70. Giosso once fell head first into a wall and baseboard heater. 4RP 60-61. After another fall, Giosso grabbed a fireplace poker but Rhymes made her drop it before anything happened. 4RP 64-66. At some point during the scuffle, he intentionally broke Giosso's cell phone. 4RP 73-74, 106-07.

Giosso also threw things at him and knocked chairs over. 4RP 67-71. While evading a flying milk crate, Rhymes spun around and Giosso broke a beer bottle over his head. He eventually managed to get the bottleneck away from Giosso, at which point she finally heeded one of

² The jury found Rhymes not guilty of harassment. CP 16.

Rhymes' many requests that she leave his residence. 4RP 70-74. Rhymes sustained a bloody nose, a knot on his head, bruises on his face, arm and back, and chipped teeth. 4RP 73, 78-80.

Giosso described the donnybrook a bit differently. She admitted she did not remember much of what happened. 3RP 60. Rhymes began punching her in the head when she came out of the bathroom. 2RP 141-42, 158. During the ensuing attack, Rhymes punched her in the face, knocked her to the floor, hit or kicked her in the chest and ribs, pressed a pillow over her face, placed a knee or foot on her neck, and threatened to kill her. 2RP 142-49, 158.

At some point after she had been punched, Giosso broke Rhymes' cell phone because she was angry. 2RP 144-45, 3RP 44, 50. Rhymes retaliated in kind. 2RP 145. Giosso recalled screaming for help during the episode. 2RP 145. She acknowledged she used a beer bottle, but said she threw it toward Rhymes and did not know whether it hit him or shattered. 2RP 150-51; 3RP 45-46. She did not remember looking at Rhymes' text messages and seeing one from a woman. 2RP 152.

Unbeknownst to either Rhymes or Giosso, both of Giosso's daughters heard a portion of the combat. The daughters had stayed at home, with the 16-year-old daughter watching her 10-year-old sister. 2RP

103-05. At some point, the younger daughter dialed her mother's cell phone number, made a connection, and heard Giosso calling for help and Rhymes yelling something in an angry tone of voice. 2RP 118-20. She gave the phone to her older sister, who heard Giosso yelling but could not tell what she was saying. Giosso's phone then "hung up." 2RP 105-06.

Back at Rhymes apartment, the tussle terminated when Rhymes went into the bathroom, looked in the mirror, and announced he was hurt. 2RP 147-49. Giosso did not leave at this point, although she "probably could have." 3RP 57. Instead, she went into the same bathroom and was horrified to see her face was "very misshapen." 2RP 148, 3RP 57-58. She left shortly thereafter and drove to her brother's house for aid. 2RP 148, 154.

From there Giosso went to a hospital with her sister-in-law and was examined. 2RP 155-56. She had no internal head injuries or broken bones. 4RP 13-17. She had a large, puffy bruise on her forehead, smaller puffy bruises on her ear, head, and neck, and bruises on the side of her chest, rib, arm and hand. 4RP 11-16. Giosso missed three days of work. 2RP 156. She testified she had pain in her head, neck and ribs. The rib pain persisted for a month. 2RP 160.

She went to the police station the following morning, gave a statement, and showed an officer where Rhymes lived. 3RP 125-35. After the officer returned Giosso to a friend, he went to Rhymes' residence and arrested him without incident. 3RP 136-37.

After the jury heard the above and while deliberating, the presiding juror sent out a note asking, "May we consider assault 4?" CP 17. After consulting the parties, the judge answered as follows: "No. Please reread the instructions and continue with your deliberations." CP 18. Nearly six hours later, the jury informed the court it had reached a verdict on the felony harassment count, but were deadlocked as to third degree assault. The court called the jurors into court and directed them to return for further deliberations. After deliberating for nearly three more hours, the jury found Rhymes guilty of third degree assault and not guilty of felony harassment. CP Supp. __ (sub. no. 65A, Clerk's Minutes, pages 14-16).

The trial court imposed a 3-month sentence, the top of the standard range, and 12 months of community custody. CP 49-55; 5RP 82.³

³ The court did not indicate it was imposing community custody by checking the appropriate space on the judgment and sentence. CP 52. But the court pronounced the 12-month community custody term at the sentencing hearing. 5RP at 82. It also included the proper community custody form, "Appendix H," in the judgment and sentence. CP 54. The failure to check the proper space thus appears to be a scrivener's error.

C. ARGUMENT

RHYME'S TRIAL LAWYER WAS INEFFECTIVE FOR FAILING TO PROPOSE A FOURTH DEGREE ASSAULT INSTRUCTION.

A jury may find the accused not guilty of the degree of the offense charged and guilty of any inferior degree. RCW 10.61.003; State v. Peterson, 133 Wn.2d 885, 892, 948 P.2d 381 (1997). Here, the jury asked whether it could consider fourth degree assault, even though defense counsel did not propose a corresponding instruction for the inferior degree of the charged crime of third degree assault. The court told jurors they could not consider fourth degree assault. Rhymes' trial counsel was ineffective for failing to propose the justifiable inferior degree instruction. See State v. Breitung, 155 Wn. App. 606, 618, 230 P.3d 614 (2010) (defense counsel's failure to propose fourth degree assault instruction as alternative to second degree assault as charged constituted ineffective assistance.

1. *The trial court would have given a fourth degree assault instruction.*

An instruction on an inferior degree offense is warranted where:
(1) the statutes for both the charged offense and the proposed inferior degree offense prohibit but one offense; (2) the information charged an offense that is dividing into descending degrees and the proposed offense

is an inferior degree of the charged offense; and (3) there is evidence the accused committed only the inferior offense. State v. Winings, 126 Wash. App. 75, 86-87, 107 P.3d 141, 147 (2005) (citing State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000)). See State v. Warden, 133 Wn. 2d 559, 563, 947 P.2d 708 (1997) ("If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.").

For the reasons that follow, Rhymes satisfies all three conditions of this test.

Clearly, the statutes for third degree assault and fourth degree assault have at their core the crime of assault. See State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) ("both the first-degree and second-degree assault statutes proscribe but one offense -- that of assault."). And, assault is without question ranked by degrees. RCW 9A.36.011 (first degree assault); RCW 9A.36.021 (second degree assault); RCW 9A.36.031 (third degree assault); RCW 9A.36.041 (fourth degree assault).

In answering the third question – whether there is evidence the accused committed only fourth degree assault -- this court considers all the evidence presented by either party and views it in the light most favorable to Rhymes. Fernandez-Medina, 141 Wn.2d at 455-56.

A person commits third degree assault under RCW 9A.36.031(1)(f) when he, "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." A person is guilty of fourth-degree assault if he commits assault under circumstances not amounting to assault in the first, second, or third degree, or custodial assault. RCW 9A.36.041. "Intent is an implied element of fourth degree assault." State v. Stevens, 127 Wn. App. 269, 277, 110 P.3d 1179 (2005), aff'd., 158 Wn.2d 304, 311 (2006).

The trial court defined negligence as follows:

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly or recklessly as to that fact or result.

CP 36.

The court defined assault as follows:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

CP 31.

Rhymes effectively admitted he intentionally used force, i.e., intentionally touched or struck Giosso, when he testified he acted in self-defense. CP 39 (instruction 17 defining self-defense); RCW 9A.16.020; see 4RP 63 ("I haven't done anything except try to block her, block her punches, grab her arms."); 4RP 72 ("I was scared that she was going to stab me [with the broken bottleneck] and I jumped up and tackled her."). This evidence, when considered in the light most favorable to Rhymes, establishes the fourth degree assault mental state element of intent to the exclusion of the third degree negligence element.

The only remaining distinction between third and fourth degree assault is resulting harm. Third degree assault as charged required a showing of "substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f). Fourth degree assault, in contrast, requires no pain; "intentional unlawful touching of the body of another" is enough. State v. Parker, 81 Wn. App. 731, 737, 915 P.2d 1174 (1996).

By finding Rhymes guilty, the jury necessarily rejected his self-defense claim. This does not mean, however, that the jury believed everything Giosso testified to and rejected Rhymes' testimony as a whole. We know this by looking at the felony harassment (threat to kill) count. Giosso testified Rhymes threatened to kill her and bury her in his yard, 2RP 142-49, 158, while Rhymes denied saying any such thing. 4RP 98-99. The jury's guilty verdict indicates jurors did not believe this aspect of Giosso's testimony.

It is more likely that, viewing the evidence in a light most favorable to Rhymes, a rational juror would have concluded Rhymes properly and intentionally used some force to minimize the harm a berserk Giosso tried to inflict, but that he went too far. In other words, that he employed more "force and means [than] a reasonably prudent person would use under the same or similar conditions as they appeared" to him. RCW 9A.16.020(3); CP 39 (instruction 17).

Other evidence supports this theory as well. Rhymes was considerably larger in stature than Giosso: he was 6 feet tall and weighed 205 pounds, while she stood 5 feet, 2 inches tall. 2RP 170; 4RP 83. Indeed, the prosecutor used this size disparity at several points while cross-examining Rhymes. 4RP 94-95 (e.g., 4RP 94: "Now with her

stature would it be fair to say that you would be able to push her off of you without a ton of effort?") 4RP 108-110 (e.g., 4RP 110: "So why didn't you take her outside? You are six foot, two hundred (200) pounds. Why not grab her and shove her out the door?").

A rational juror would likely have these questions as well, and would probably have concluded Rhymes could have subdued Giosso within the first few minutes of her tirade rather than allowing it to drag on for, as he testified, 45 minutes. 4RP 80.

There was also evidence to support Giosso, not Rhymes, initiated the fiasco because of her jealousy and suspicion. Giosso did not "recall" seeing a text message from another woman on Rhymes' cell phone, although she admitted she broke his phone before he broke hers. 2RP 152, 3RP 50. She also described herself as an exclusive type of person and knew Rhymes had not wanted that level of commitment in earlier relationships. 3RP 29. She testified they "had casual conversations about not dating other people" and she "was content with [Rhymes'] response" during the discussions. 3RP 75. Giosso also said that "from time to time" she visited Rhymes' Facebook and MySpace pages. 2RP 167.

From all of this evidence a rational juror likely concluded Giosso was to blame for most of her injuries but that Rhymes was directly

responsible for a few bruises, such as the bruise on her arm and chest. For example, Rhymes said Giosso was to blame when she fell headfirst into a wall and baseboard heater because she forced him to let go of her arms after jumping on him and knocking him backward. 4RP 60-61. Rhymes also said Giosso punched her in the head and face, which likely explained the bruising on her hand. 4RP 15, 23. At the same time, however, Rhymes testified he grabbed Giosso's arms and also "jumped up and tackled her." 4RP 14-15, 59-60, 72.

Moreover, a hospital triage nurse reported Giosso's pain level as 4 on a scale of 0 to 10, 0 indicating no pain and 10 being the worst pain. 4RP 17-18, 21-22, 25. At that level a patient need not see the emergency room doctor, but can instead be treated by a physician's assistant. 4RP 6-10. From this a rational juror likely concluded Giosso experienced something less than the "substantial" pain required to establish third degree assault.

Finally, the prosecutor emphasized that any justifiable force used in self-defense must be commensurate to the perceived threat:

Ladies and gentlemen it is lawful to tell yourself, men and women can be victims of violence. Men and women can defend themselves from men and women smaller, bigger, it doesn't make any difference. But the law of self-defense says that it has to be reasonable, that it has to be [no] more force, [no] more than is

necessary to actually defend yourself, the old you know you don't bring a gun to a fist fight, and it also has to be believable.

5RP 72.

When viewing the evidence in the light most favorable to Rhymes, it is hardly surprising jurors asked whether they could consider the inferior degree offense of fourth degree assault. Because under this view the state established the elements of fourth degree assault to the exclusion of degree assault. Therefore, the trial court would likely have given a fourth degree assault instruction had trial counsel proposed one.

2. *Rhymes' trial attorney was ineffective for failing to propose a fourth degree assault instruction.*

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Rhymes meets both requirements here.

Like the lesser offense rule, the lesser degree rule affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Where one of the elements of the offense charged remains in doubt, but the defendant is guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. State v. Pittman, 134 Wn. App. 376, 388, 166 P.3d 720 (2006). This result is avoided when the jury is given the option of finding a defendant guilty of a lesser degree of the offense, thereby giving the defendant the full benefit of the reasonable doubt standard. Beck, 447 U.S. at 633.

Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's decision to not propose an instruction on a lesser is deficient performance where the "all-or-nothing" approach is objectively unreasonable. State v. Hassan, 151 Wn. App. 209, 218-19, 211 P.3d 441 (2009).

Courts consider three factors to determine whether a decision not to request a lesser included offense instruction is legitimate: (1) the sentencing disparity between the greater and lesser offenses; (2) whether the defense theory is the same for both the greater and lesser offenses; and (3) the overall risk to the accused in light of developments at trial. State v.

Breitung, 155 Wn. App. 606, 615, 230 P.3d 614 (2010); State v. Grier, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017, 224 P.3d 773 (2010).

As applied to Rhymes, the standard range for third degree assault, a class C felony, is one month to three months incarceration. RCW 9.94A.501, .515, .525. Fourth degree assault is a gross misdemeanor. RCW 9A.36.041(2). The maximum period of incarceration is 12 months. RCW 9A.20.021(2).

Additionally, under misdemeanor sentencing, even if the court imposed the maximum 12 months, it would have discretion to suspend the entire sentence in favor of probation. RCW 9.92.060. Such flexibility is not possible under the Sentencing Reform Act for felony convictions. RCW 9.94A.505 (Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range.); Wahleithner v. Thompson, 134 Wn. App. 931, 941, 143 P.3d 321 (2006) ("The SRA represents a significant limitation on judicial discretion, and as a determinate system, permits none of the sentencing flexibility available for misdemeanors, such as suspending sentences or deferring prosecutions.").

Furthermore, because Rhymes' third degree assault conviction was for an "offense against a person," RCW 9.94A.411, the trial court was

authorized to impose 12 months community custody with conditions. Former RCW 9.94A.545 (2008). Of course, a class C felony conviction can be included in an offender score for a future sentence, while a conviction for fourth degree assault cannot. RCW 9.94A.525(2).

Rhymes' defense of self-defense would have applied equally to both third degree and fourth degree assault. As in Grier, Rhymes would not have compromised her defense theories by requesting the fourth degree assault instruction. Grier, 150 Wn. App. 642 (citing State v. Ward, 125 Wn. App. 243, 249, 104 P.3d 670 (2004)).

Finally, trial counsel's "all-or-nothing" approach here was risky. It is not disputed Giosso sustained bruises and swelling on her face, head, arm, and chest. As a result of her condition medical personnel decided to do a CAT scan and take x-rays. 4RP 13, 16. Rhymes acknowledged that however the injuries happened, they happened during the tussle with him. 4RP 16. He also testified he was consistently able to push Giosso off with little effort when she jumped on him. 4RP 94, 109.

Counsel's belief the jury would find all of Rhymes' force to be justified was unreasonable under the totality of the circumstances at trial. Grier is instructive on this point. The court there found trial counsel ineffective for failing to propose lesser included manslaughter instructions

even though there was "scant direct evidence" of Grier's intent to kill, or that Grier was even armed, and the "relatively strong evidence" of self-defense or defense of another. Grier, 150 Wn. App. at 642-43. The court found it unreasonable for defense counsel to ask jurors to outright acquit Grier on the insufficient evidence of the intent element alone because there was evidence Grier was guilty of some offense. Grier, 150 Wn. App. at 643; see also Pittman, 134 Wn. App. at 390 ("Because Pittman committed an offense similar to the one charged, his counsel's 'all or nothing' strategy exposed him to a substantial risk the jury would convict on the only available option, attempted residential burglary.").

Here, too, a rational juror would likely be uncomfortable acquitting Rhymes outright because he was significantly larger in size than Giosso and Giosso came out of their clash with more severe bruising and swelling than he did. Hence the guilty verdict of the only assault charge available to the jury. Because the facts warranted a fourth degree assault instruction, Rhymes' trial counsel was deficient for failing to propose one.

Counsel's deficient performance prejudiced Rhymes. In other words, it is reasonably likely that given the chance, the jury would have convicted Rhymes of fourth degree assault rather than third degree assault. Pittman, 134 Wn. App. at 390. The record directly supports this assertion:

the jury asked whether it could consider fourth degree assault but, because there was no instruction, the court responded that it could not. Regardless of the reason for the jury's question, depriving it of the opportunity to find Rhymes guilty of a lesser crime undermined confidence in the verdict.

Reversal is required when a defendant is entitled to a proposed instruction on a lesser degree but does not receive it. See State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). The same result should obtain here; counsel's ineffective assistance was the only obstacle to the instruction.

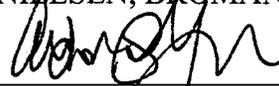
D. CONCLUSION

Trial counsel's failure to propose an inferior degree instruction for fourth degree assault deprived Rhymes of his constitutional right to effective representation. This Court should reverse the conviction and remand for a new trial.

DATED this 13 day of August, 2010.

Respectfully submitted,

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OFFICE MANAGER
JOHN SLOANE

State v. Christopher Rhymes

No. 64879-9-I

Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Christopher Rhymes
26440 156th PL SE
Convington, WA 98042-

Containing a copy of the brief of appellant, in State v. Christopher Rhymes,
Cause No. 64879-9-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.



John Sloane

Done in Seattle, Washington

8-13-10

Date