

65275-3

65275-3

NO. 65275-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

L.W., (A minor child)

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove beyond a reasonable doubt that L.W. intended to commit a crime against a person or property within the dwelling.

2. The State presented insufficient evidence of accomplice liability, and the finding that L.W. was ready, willing and able to assist the other youngsters must be stricken.

3. L.W. did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request that the juvenile court consider a lesser included offense supported by facts elicited at trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense. Must L.W.'s conviction for attempted residential burglary be reversed and dismissed where the State failed to prove beyond a reasonable doubt that L.W. intended to commit a crime against a person or property in the dwelling?

2. Mere presence at the scene of a crime is insufficient to prove accomplice liability. Where the State failed to prove that L.W.

solicited, commanded, encouraged or requested, gave aid, or in any way assisted the other youngsters in the commission of an attempted residential burglary, did the State fail to meet its burden and must L.W.'s conviction be reversed?

3. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. L.W.'s sole defense was that he committed only the lesser included offense of attempted criminal trespass. This was consistent with L.W.'s testimony, with testimony that defense counsel elicited on cross-examination, and with defense counsel's arguments. Was L.W.'s constitutional right to counsel violated when his attorney failed to ask the juvenile court to consider the lesser included offense of attempted criminal trespass?

C. STATEMENT OF THE CASE

On date January 7, 2009, L.W. left school at about 11:00 a.m. and got a ride home from his friend, M.M. RP 74, 105.¹ The two young men, accompanied by two of their friends, drove to a house on South Kenyon Street in Seattle, in order to visit a friend of Mr.

¹ The verbatim report of proceedings consists of one volume from several proceedings, taking place between February 26, 2010, through April 7, 2010. The proceedings will be referred to herein as RP ____.

M's. RP 105-06. L.W. did not personally know the owner of the house; nor did he fully understand why his friends wanted to go to this house that day. RP 106. L.W. got out of the car at the local grocery store to buy cigarettes and met his friends near the Kenyon Street house minutes later. Id.

Shortly thereafter, L.W. found his friends walking toward the home of Maryjane Fontanilla. RP 74-75. L.W. and his three friends approached the door of this house and Mr. M. rang the bell several times. RP 107.

While the group waited for Mr. M.'s friend to return, L.W. lit a cigarette and stood under the shelter behind the house to shield it from the rain. RP 107. Mr. M., who was described as Asian, remained near the door. RP 107. L.W. and his friend N.D., who were both described as black, remained behind the house as they waited, sharing a cigarette. RP 108.² At some point, L.W. stated that he heard glass breaking, and that he assumed N.D. broke it, but that he did not know why. RP 111. L.W. then heard the police arrive and he surrendered. Id. Officer Nicholas Carter, one of the responding officers on the scene, verified that L.W. was walking

² The fourth young man apparently remained on the lawn, as he was the first to be apprehended by police, several moments later. RP 55.

toward him in the yard at the moment the glass broke, and could not have been the person breaking the window. RP 65.

Maryjane Fontanilla stated that she was home when L.W. and two other “young kids” rang her doorbell on the morning of January 7, 2009. RP 75. She did not open the door for the youngsters, and they did not enter the house. RP 77-90. Ms. Fontanilla called 911 shortly before she heard the sound of a window breaking in her kitchen. RP 77-80. Although the juvenile court found Ms. Fontanilla credible, the court deemed her to be “mistaken” in her observation of the kids using a “soil mover” or shovel to attempt to open her door. RP 77, 138; CP 17-19.³

L.W. was charged with attempted residential burglary. CP 1. The juvenile court requested that defense counsel become familiar with the case law regarding the lesser included offenses applicable to residential burglary before closing argument, but defense counsel failed to do so. RP 118.

Consequently, L.W. was convicted of attempted residential burglary. CP 17-19; RP 132-38.

³ Officer Craig McRae, who responded to the 911 call, verified that Ms. Fontanilla had never mentioned a shovel in her complaint. RP 102.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT L.W. OF RESIDENTIAL BURGLARY.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, Section 3 of the Washington Constitution⁴ and the Fourteenth Amendment to the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99

⁴ Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. The State did not prove L.W. had the intent to commit a crime against a person or property within the dwelling.

To establish an attempted residential burglary, the State was required to prove that L.W. had taken a substantial step toward two elements: (1) that he entered or remained unlawfully in a dwelling; and (2) that he intended to commit a crime against a person or property therein. RCW 9A.52.025(1); State v. Stinton, 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

In addition, since L.W. was convicted as an accomplice, the State was required to prove that he had knowledge of the

attempted burglary and promoted its commission, and either: 1) solicited, commanded, encouraged or requested another person to commit the crime; or 2) aided or agreed to aid another person in planning or committing the crime. RCW 9A.08.020(2). Mere presence is insufficient to support a conviction under the theory of accomplice liability. State v. Alsup, 75 Wn. App. 128, 876 P.2d 935 (1994) (mere presence and knowledge of criminal activity insufficient to show that defendant is accomplice, unless the State shows aid in commission of crime); State v. Luna, 71 Wn. App. 755, 862 P.2d 620 (1993) (mere presence, even coupled with assent to crime, insufficient to prove complicity without proof that defendant was ready to assist with crime).

First, since L.W. was never inside the dwelling in this case, the State could not prove unlawful entry. RP 59-60. When there is no unlawful entry into a dwelling, the State may not rely on an inference of unlawful intent, and must prove the intent to commit a crime beyond a reasonable doubt. County Court of Ulster County v. Allen, 442 U.S. 140, 167, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); State v. Brunson, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995). The finder of fact, be that jury or judge, must look at all of the circumstances surrounding the act in determining whether the

inference applies. State v. Bergeron, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985). The court may not infer intent to commit a crime from evidence that is “patently equivocal.” State v. Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations – attempted burglary or malicious mischief); but see State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (holding inference to be appropriate in situation where facts were unequivocal, including defendant who admitted to prying lock off restaurant door at 3:30 a.m.).

In L.W.’s case, there was no entry into the residence, so the State was required to prove the inference beyond a reasonable doubt. Yet, the inference of his intent to commit a crime was not supported. The homeowner, Ms. Fontanilla, as well as the officers, agreed that none of the youngsters were found inside of the home, and it was also clear that nothing was stolen or removed from the property. RP 59. None of the youngsters was found with burglars’ tools or other indicia that would support the inference. As a consequence, the evidence of L.W.’s intent was patently equivocal, and the State failed to prove his intent to commit a crime within the dwelling. Therefore, the juvenile court’s conclusion that L.W. was

guilty of attempted residential burglary was not supported by the evidence.

The State also failed to prove L.W.'s culpability as an accomplice. The juvenile court specifically found that L.W. was not responsible for breaking the window, nor was he one of the three individuals attempting to "jimmy" the door.⁵ The juvenile court's only reference to L.W.'s involvement was the following:

I am satisfied that he was present with the other three youth at the door as they were trying to break in the house before the glass was broken, although there's no evidence he broke the glass. I do find beyond a reasonable doubt that he was an accomplice by his presence there ready, willing and able to assist.

RP 134 (emphasis added).

Soon afterwards, the court returned to this theme and continued: "I think that the accomplice liability is proven because it's more than mere presence. Presence at the scene was with the intent to encourage the others and that's fine."

The juvenile court's conclusory references to L.W.'s liability as an accomplice are insufficient as a matter of law. Even in cases where a defendant was responsible for driving other individuals to

the scene of a crime, where it was not proved that he had knowledge of, or the intention to aid or assist in the commission of the crime itself, the State failed to prove accomplice liability. Luna, 71 Wn. App. at 760; see also State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993). The juvenile court's findings regarding L.W. are that he was "present," and that he was "ready, willing, and able to assist." RP 134. These findings are without foundation, however, as the court's specific findings exculpate L.W. from the very conduct for which the court simultaneously finds him ready, willing, and able to engage in. RP 134-35.

Moreover, a defendant may only be held liable for the conduct of which he has specific knowledge. State v. Cronin, 142 Wn.2d 568, 577, 14 P.3d 752 (2000), State v. Roberts, 142 Wn.2d 471, 14 Wn.3d 713 (2000) ("RCW 9A.08.020 supports a conclusion that the legislature intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge"). Here, where the youths that L.W. was arrested with committed an act of property damage, the State presented no evidence that L.W. had any knowledge of the plans of the other individuals. At most, L.W.

⁵ The court also doubted the complaining witness's credibility: "I do agree with the defense as to Ms. Fontanilla's testimony about the shovel. I don't think that – well, I think that she was mistaken on that because there was no shovel

may have shared knowledge of malicious mischief, although even the State's witnesses placed him in full view at the time the window was broken. RP 65. The State's failure to present evidence that L.W. shared in the objective to specifically commit a residential burglary renders the case legally insufficient. "The fact that a purported accomplice knows that the principal intends to commit 'a crime' does not necessarily mean that accomplice liability attaches for any and all offenses ultimately committed by the principal." Roberts, 142 Wn.2d at 736; Cronin, 142 Wn.2d at 577.

c. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to prove beyond a reasonable doubt that L.W. intended to commit a crime within the dwelling where he was

found at the scene..." RP 138.

arrested, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. L.W. DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

a. L.W. had the constitutional right to the effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI,⁶ XIV; Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be

⁶ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

convicted and the innocent go free.” Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney’s performance below objective standards of reasonable representation, and, if so, (2) did counsel’s deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

In reviewing the first prong of the Strickland test, appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel’s performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the

defendant demonstrates “counsel’s errors were so serious as to deprive the defendant of a fair trial.” Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to ask the juvenile court to consider the lesser included offense of attempted criminal trespass. L.W. was charged with attempted residential burglary. RCW 9A.52.025(1); RCW 9A.28.020.

Although the record indicates that L.W. was present on the lawn of the home in question, no overt acts connected to a burglary were attributed to him; in fact, the arresting officer stated that he was certain L.W. was not responsible for the broken window. RP 65.

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed in a manner supported by substantial evidence. State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) (counsel’s failure to request jury instruction constituted ineffective assistance). To determine if defense counsel’s failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147,

rev. denied, 150 Wn.2d 1024 (2003); State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006).

i. The juvenile court would have considered the lesser included offense of attempted criminal trespass if offered. In determining if the defendant has met this burden, the court must review the entire record in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Under Washington law, a defendant is entitled to have the fact-finder consider a lesser included offense if the proposed lesser offense meets the legal and factual prongs of the Workman test. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 10.61.006. The legal prong is met where each of the elements of the lesser offense is a necessary element of the offense charged, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. Workman, 90 Wn.2d at 447-48; see State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). As the Supreme Court stated in Berlin, "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." 133 Wn.2d

at 551 (citing Beck v. Alabama, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

Here, defense counsel elicited ample evidence, both on direct and cross-examination, that supported the juvenile court's consideration of the lesser included offense of attempted criminal trespass. The evidence established that all of the young people involved in the incident were on their way home from school, and that this incident happened in the middle of the day. RP 51-53, 74-75. Evidence also showed that the group of youngsters, including L.W., remained outside the residence of Ms. Fontanilla, never breaching the doorway or windows. RP 59-60. L.W., in fact, admitted to committing the lesser included offense in his testimony, when he stated that he stood under the eaves of the house to smoke his cigarette. RP 107.

More importantly, it was clear that the juvenile court would have considered the lesser included offense, because he told both counsel this during the trial. RP 104. The juvenile court specifically directed both counsel to familiarize themselves with the lesser included offenses of criminal trespass and its attempt. RP 104. The court even steered counsel to the specific case law supporting

the lesser included instruction, State v. Pittman, 134 Wn. App. at 390; RP 104.

The evidence presented at trial supported the lesser included offense of attempted criminal trespass, and the juvenile court would have considered the instruction, had it been offered.

ii. Defense counsel's failure to request the lesser included offense constituted deficient performance. Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent his client. In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). "This includes investigating all reasonable lines of defense," including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384) (finding counsel's failure to file suppression motion ineffective); Thomas, 109 Wn.2d at 229. See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3rd ed. 1993).

Defense counsel is ineffective for failing to propose an instruction that assists the finder of fact in understanding a critical component of the defense. "Where counsel in a criminal case fails

to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel's performance is deficient." In re Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007); Thomas, 109 Wn.2d at 229; Kruger, 116 Wn. App. at 693-95 (attorney's failure to provide diminished capacity instruction in assault case rendered defense "impotent").

Here, although the juvenile court directed counsel to read Pittman in preparation to discuss lesser included offenses, two days later, defense counsel stated in closing argument:

Depending on what your Honor is inclined to find, I would put out there that I haven't had a chance to review the case that you talked about, your Honor, the attempted criminal trespass, but I would hazard a guess that probably because the entry into that building is required for criminal trespass in the first degree. So if anything happened, I don't think that it would preclude a finding of criminal trespass in the second degree under premises, but I haven't had a chance to review the case.

RP 118.⁷

Defense counsel's failure to read the relevant case law in preparation to argue for the lesser included offense of attempted criminal trespass is per se deficient performance. Thomas, 109

⁷ The juvenile court had requested that counsel read State v. Pittman on March 15, 2010. Closing arguments were held on March 17, 2010. RP 104, 118.

Wn.2d at 229 (“A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases”).

Since defense counsel had failed to read the pertinent case, he was unprepared to argue the nuances of the law, distinguishing between the lesser included offenses of criminal trespass and attempted criminal trespass. As this Court held in Pittman, only attempted criminal trespass is a lesser included offense of attempted residential burglary. 134 Wn. App. at 384-85. It was clear from the juvenile court’s findings that the court misread Pittman, but defense counsel was in no position to correct the court or to advocate for his client, not having read the case himself. RP 118.⁸

As this Court held in Hubert, “An attorney’s failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.” 138 Wn. App. at 929-30. Given the facts of this case and the defense presented, defense counsel’s failure to propose that the juvenile court consider

⁸ The court stated: “the way I read this case is that if the charge is an attempted residential burglary, you cannot find either degree of trespass as a lesser-included, but I wanted to give people a chance to –” RP 118. Defense counsel did not correct the court by citing the actual holding of Pittman.

the lesser included offense of attempted criminal trespass was deficient performance.

iii. L.W. was prejudiced by the failure of his attorney to propose the lesser included offense. L.W. was entitled to have the juvenile court consider the lesser included offense, as the evidence supported it, meeting both the legal and factual prongs of the Workman test. Berlin, 133 Wn.2d at 545-46.

The absence of this instruction essentially nullified L.W.'s entire defense, as the juvenile court was clearly under the mistaken impression that criminal trespass was the only lesser included offense that the court could consider, due to the court's incorrect interpretation of Pittman, 134 Wn. App. at 390. RP 118. The penalties for the lesser and greater offenses vary significantly. Attempted residential burglary is a class C felony, while attempted criminal trespass is only a misdemeanor. Defense counsel clearly believed that L.W. had only trespassed on the witness's property, and stated so on the record. RP 118. His failure to ask the juvenile court to consider the correct lesser included offense, therefore, cannot be explained by trial strategy. Pittman, 134 Wn. App. at 390.

L.W. was thus prejudiced by his lawyer's deficient performance, which resulted in his conviction for the greater offense of attempted residential burglary.

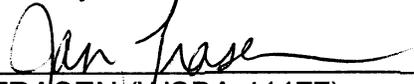
c. L.W.'s conviction must be reversed. L.W. did not receive a fair trial because his attorney did not propose an instruction, nor ask the juvenile court to consider the lesser included offense of attempted criminal trespass. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Pittman, 134 Wn. App. at 390.

E. CONCLUSION

For the foregoing reasons, L.W. respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 21st day of October, 2010.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project (91052)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 65275-3-I
)	
L.W.,)	
)	
Juvenile Appellant.)	

2010 OCT 21 PM 4:57
COURT OF APPEALS FILED

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF OCTOBER, 2010.

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