

69064-7

69064-7

NO. 69064-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JARRAY WHITE,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOAN E. DUBUQUE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial irregularity was responsive to White's trial counsel's questioning and was not a clear violation of motions in limine. White did not object and declined the court's offer for a curative instruction. Did the trial court abuse its discretion in denying White's motion for a new trial?

2. In closing argument the State properly cited and argued the instructions. White did not object. Did White waive his claim of prosecutorial misconduct?

B. STATEMENT OF THE CASE

While on patrol, at approximately 1:00 a.m. on August 24, 2011, King County Sheriff's Deputies Robert Nishimura and Joseph Eshom observed a white Chevy El Camino make a left hand turn without properly signaling the turn. 5RP 453, 573.¹ The deputies made a U-turn in order to get behind the vehicle and pull it over. 5RP 455, 575. After they had pulled the vehicle over, Deputy Nishimura approached the car on the driver's side, while Deputy Eshom approached on the passenger's side. 5RP 457, 577.

Observing that there was only one person in the car, Deputy

¹ For clarity and consistency, the State adopts the abbreviations for the verbatim report of proceedings used by White.

Eshom then backed off and took a cover position near the rear of the vehicle. 5RP 457, 577.

Deputy Nishimura told the driver that he had pulled him over for failure to signal, and asked to see his driver's license. 5RP 458. The driver, Jarray White, gave the deputy his license. 5RP 459. White then started to reach into his right vest pocket, for no apparent reason. 5RP 459. Deputy Nishimura asked him what he was doing, and what he was reaching for, but White did not respond. 5RP 459, 579. Deputy Nishimura told him to stop, but again White did not respond and continued to dig in his pocket. 5RP 459. White also stared straight ahead. 5RP 459. Now concerned for his safety, Deputy Nishimura asked White to step out of the car so he could perform a pat down of his outer clothing. 5RP 460. At this same time, hearing his fellow officer's words, Deputy Eshom moved toward Deputy Nishimura and the driver's side of the car. 5RP 579.

Deputy Nishimura opened the door so that White could exit the car. 5RP 503. As White got out of the car, Deputy Nishimura asked him if he had any weapons on him. 5RP 461. White asked, unresponsively, "What did I do?" 5RP 461. White then tried to scurry past the deputy, while the deputy grabbed White's right hand

in an attempt to place White's hands behind his back, and turn White away from him, so that he could safely frisk him. 5RP 461, 580. White screamed or growled and broke free from Deputy Nishimura's grasp. 5RP 461, 582. White then squared off with Deputy Nishimura, who grabbed his collar in an attempt to bring him to the ground and subdue him. 5RP 462. Meanwhile Deputy Eshom pulled out his taser in preparation to assist in subduing White. 5RP 580.

White bent down but did not stay on the ground; and was not subdued. 5RP 462. Instead, he was able to reach into his right pocket again, back pedal away from the deputies, turn and run. 5RP 462, 582. The deputies pursued him on foot, while commanding him to stop. 5RP 463, 584. White did not stop, and Deputy Eshom saw him pull a gun out of his vest pocket while he was running. 5RP 581. Deputy Eshom screamed, "Gun!" 5RP 581. He then dropped his taser and went for his gun. 5RP 581. Deputy Nishimura heard the warning, saw that White had a gun, and because he already had his taser in hand, fired it rather than going for his gun. 5RP 465. At some point, right before or after he was tased, White released the gun into the air. 5RP 468, 583. White continued to struggle and eventually both

officers were able to subdue White and get him in handcuffs. 5RP 469, 584. Deputy Eshom then went and retrieved the gun from where White had thrown it. 5RP 585. The gun was a loaded semi-automatic .380 caliber handgun, which was then secured as evidence. 5RP 469-71, 587-89.

Mr. Sasse is an employee of the King County Regional Automated Fingerprint Identification System. 5RP 641. He is a certified ten print examiner with over six years of experience comparing fingerprints for criminal purposes. 5RP 641; 6RP 659. Mr. Sasse concluded he uses a scientific method of fingerprint analysis set out by the International Association for Identification, (I.A.I.) known as A.C.E.V. 5RP 648. A.C.E.V. stands for analyze, comparison, evaluate, and verification. 5RP 646. Mr. Sasse's analysis showed conclusive areas of similarity between White's known prints and the prints from the Judgment and Sentence. 6RP 676, 679, 682.

Jarray White testified that at around 1:30 a.m. on August 24, 2011, he was stopped by King County Sheriff's for failure to signal prior to making a left turn. 5RP 714. He testified that he did not properly signal the turn. 5RP 712. He also testified that Deputy Nishimura got angry with him when he claimed that he had in fact

used his turn signal. 5RP 715-16. White testified that he did not make repeated reaching motions into the right hand pocket of his vest, and that Deputy Nishimura never asked him what he was reaching for or told him to stop. 5RP 719. He testified that the deputy asked him to step out of the car, then grabbed him, pulled him out of the car, and frisked him with the help of Deputy Eshom. 5RP 719-21. White testified that Deputy Eshom then struck him in the back of the head from behind and grabbed his vest and attempted to sling him to the ground. 5RP 714, 725. White testified that he then took off running because he was scared. 5RP 726. He testified that he was then tased with the darts once and stunned at least three times. 5RP 726-27. He testified that his body locked up and he fell to the ground and could not move. 5RP 728. He denies ever reaching for or having a gun, or hearing Deputy Eshom yell, "Gun!" 5RP 728-29. He testified that immediately after he was tased, both deputies jumped on his back and Deputy Nishimura repeatedly stunned him, causing him to defecate and vomit. 5RP 730-32.

He testified that Deputy Nishimura told Deputy Eshom not to let him look to his right, and that Deputy Eshom told him not to move or he would blow his head off. 5RP 733. He testified that

Deputy Nishimura then came back and tased him again. 5RP 734. White further testified that Deputy Nishimura then showed him something in a plastic bag and said, "Look what I found." 5RP 735. He claimed that when fire and aid personnel arrived on scene they refused him care and instead laughed at him. 5RP 739. He further testified that when Deputy Nishimura was putting a protection suit on him, that the Deputy rubbed feces on White's top lip under his nose. 5RP 745. White testified that this is why he was spitting all over the car on the ride to the jail and why he momentarily used some profanity, but did not direct it at the Deputy. 5RP 746.

In rebuttal, the State re-called Deputy Eshom and Deputy Nishimura. Deputy Eshom testified that he never struck the defendant in the back of the head, as the defendant had testified. 7RP 9-10. Additionally, after the defendant was subdued and handcuffed, Deputy Eshom never pointed his gun at the defendant's head, nor did he threaten to blow the defendant's head off. 7RP 10. In rebuttal, the State also produced testimony that neither Deputy Eshom nor Deputy Nishimura tased the defendant after he was handcuffed. 7RP 10, 15.

In rebuttal, the State also called Sergeant Raphael Crenshaw, the Deputy's patrol sergeant, who had responded to the

scene to investigate the use of force in this case, per department policy. 7RP 22-26. Upon his arrival, the defendant was not responsive or cooperative. 7RP 26. Sergeant Crenshaw was present and with the defendant when the medics were talking to him and the defendant was not cooperative with the medics either. 7RP 28-29. Sergeant Crenshaw also reviewed the downloaded data from Deputy Nishimura's taser and it showed that his taser was only deployed once, rather than multiple times as the defendant had testified. 7RP 35-37.

C. ARGUMENT

1. THE TRIAL IRREGULARITY WAS RESPONSIVE TO WHITE'S QUESTIONING AND WAS NOT A CLEAR VIOLATION OF MOTIONS IN LIMINE. WHITE DID NOT OBJECT AND DECLINED THE COURT'S OFFER FOR A CURATIVE INSTRUCTION. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING WHITE'S MOTION FOR A NEW TRIAL.

In response to repeated defense questioning, a witness made reference to the acronym "D.O.C." without actually saying what the acronym stood for. The witness did not explain what D.O.C. meant or what type of prior hearing was being referred to. No further questions or comments were made regarding this evidence. White's trial counsel did not object and defense declined

the court's offer of a curative instruction. The trial court did not abuse its discretion in denying White's motion for a mistrial because the trial irregularity is not likely to have prejudiced the jury or affected the outcome.

In pretrial motions, White moved to suppress any reference to a prior Department of Corrections hearing, in which Deputy Nishimura testified about the facts of this case. 3RP 338. The defense wanted to be able to impeach Deputy Nishimura with his prior testimony in the Department of Corrections hearing but specifically moved to suppress any mention or actual reference to the prior testimony occurring at a "Department of Corrections" hearing. 3RP 339. The parties agreed and the court ruled this prior testimony would be referred to as occurring "at a prior hearing or at another hearing." 3RP 340. The prosecutor agreed to notify Deputy Nishimura about the ruling. 3RP 343-44.

While cross-examining Deputy Nishimura, trial counsel for White asked, "Do you recall testifying in a prior hearing related to this in September of 2011?" 5RP 520. The Deputy responded, "I -- you'd have to refresh my memory of what, specifically, ma'am." Id. Defense then requested a sidebar. 5RP 520. At the sidebar, the prosecutor indicated that the Deputy had been previously informed

of the court's ruling but was probably just confused about the date and thus could not actually answer the question as asked.

5RP 553-54. The court then directed trial counsel, "just show him the transcript from the hearing." 5RP 554.

Instead, when questioning resumed, the defense again asked, "All right, Deputy. So, let's get back to that question. Do you recall testifying in an earlier hearing related to his matter?" 5RP 521. Deputy Nishimura responded by asking, "Is this the DOC hearing you're asking about? If it's on a court hearing, I recall a 3.6 hearing a couple weeks ago." 5RP 521. The defense attorney did not object, but responded with, "And do you recall testifying in an administrative hearing on 9/2/2011?" 5RP 521. The prosecutor then asked for defense counsel to show the witness the transcript she was referring to; and once seeing the transcript the Deputy was no longer confused and questioning resumed. 5RP 521.

After the jury was excused for a break, the defense moved for a mistrial. 5RP 556. Trial counsel argued that it had not put Deputy Nishimura in the position to respond as he did. 5RP 556. However, the prosecutor noted that at sidebar the prosecutor had pointed out that she had notified Deputy Nishimura of the pretrial ruling and that he was probably confused as to the date of his prior

testimony. Id. The court had instructed the defense to show the witness the transcript; and rather than doing so trial counsel repeated its open-ended question immediately following the sidebar. 5RP 556-57. The prosecutor also noted that as soon as defense did eventually show the witness the transcript the witness' expression changed, indicating he now understood what prior testimony trial counsel was referring to. Id. The witness' one-time reference to "D.O.C." was invited by trial counsel's confusing and open-ended question. 5RP 557. The court found that the mention of "D.O.C." by the witness was not sufficient to grant a mistrial, especially when the witness said only "D.O.C." and not department of corrections, and when the defense attorney then immediately referred to the hearing as an administrative hearing. 5RP 559.

White now asks this court to find that the witness' comments were misconduct and the trial court abused its discretion in denying White's motion for a new trial. Witness misconduct generally entails a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. Storey v. Storey, 21 Wn. App. 370, 585 P.2d 183 (1978) *review denied*, 91 Wn.2d 1017 (1978). The Courts have consistently focused on the effect of the testimony or conduct

forming the basis for a witness misconduct appeal. State v. Johnson, 60 Wn.2d 21, 371 P.2d 611 (1962); State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962); State v. Weber, 99 Wn.2d 158, 659 P.2d 1102 (1983). The proper inquiry is whether the inadvertent remark, when viewed against the backdrop of all the evidence, so tainted the proceedings and, “the defendant has been so prejudiced that nothing short of a new trial can insure the defendant will be tried fairly.” State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)); see also Johnson, 60 Wn.2d at 29; Weber, 99 Wn.2d at 164.

In State v. Weber, 99 Wn.2d 158, 659 P.2d 1102, the defendant appealed a trial judge’s denial of the defendant’s motion for mistrial based on an experienced officer’s intentional misconduct. At defendant’s trial for felony eluding, the prosecutor asked the arresting officer whether the defendant had said anything about his conduct. The officer then testified that the defendant had told him, “he felt that he was in a lot of trouble for not stopping.” Weber, 99 Wn.2d at 160. Apparently the prosecutor had failed to provide this statement to the defense prior to trial. Id. Defense counsel immediately objected and the court instructed the jury to

disregard the statement. Id. The prosecutor resumed direct examination and again the officer reiterated this inadmissible evidence. Id. at 161. Defense counsel then moved for a mistrial, which was denied, but the judge again instructed the jury to disregard the statement. Id.

The Supreme Court acknowledged conflicting caselaw on whether the intent of the witness was important to witness misconduct analysis. Id. at 164. Ultimately the Court ruled that, “The judge should not consider whether the statement was deliberate or inadvertent. That inquiry diverts the attention from the correct question: Did the remark prejudice the jury, thereby denying the defendant his right to a fair trial?” Id. at 164-65. To determine whether a trial was fair, or more specifically the prejudicial effect of an irregularity during the course of trial; this court should consider the seriousness of the irregularity, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. Johnson, 60 Wn.2d 21, 371 P.2d 611; Weber, 99 Wn.2d 158, 659 P.2d 1102.

Appellate courts review the denial of a motion for a new trial under an abuse of discretion standard. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); State v. Hopson, 113 Wn.2d 273,

778 P.2d 1014 (1989). An appellate court will find that a trial court abused its discretion only if, “no reasonable judge would have reached the same conclusion.” State v. Hopson, 113 Wn.2d at 284, citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989). Only errors affecting the outcome of the trial will be deemed prejudicial.

The trial judge is best suited to judge the prejudice of a statement in the context of a given case. State v. Hopson, 113 Wn.2d at 284, citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). It is the trial judge “who heard the testimony, who observed the jurors and . . . was in a peculiarly favorable position for determining justly the question whether or not the defendant had been accorded a fair trial.” State v. Taylor, 60 Wn.2d 32, 40, 371 P.2d 617, 622 (1962).

Here, Deputy Nishimura said “DOC” without commenting on what DOC was or what it stood for; or even the type of hearing defense counsel was asking about. This reference was unsolicited by the prosecutor. There was no misconduct on the part of the prosecutor. More importantly, trial counsel for the defendant failed to immediately object; rather, she requested a sidebar. 5RP 520-21.

Appellant now contends that the statement "DOC" by Deputy Nishimura was intentional because he was warned on sidebar. Brief of Appellant, 4. This is not accurate. The prosecutor and the defense attorney and the judge were present for the sidebar, Deputy Nishimura was not. Moreover, nobody communicated with or instructed Deputy Nishimura about anything immediately before or after the sidebar. Rather, defense counsel reiterated her open-ended and confusing question that directly called for the witness' request for clarification.

The inadvertent comment was not repeated and the prosecutor did not refer to this comment at any time throughout the remainder of the trial. Rather, the comment was a brief and isolated irregularity in the trial which neither party focused on in the presence of the jury. The comment standing alone did not so taint the proceedings as to warrant a new trial.

2. IN CLOSING ARGUMENT THE STATE PROPERLY CITED AND ARGUED THE INSTRUCTIONS. WHITE DID NOT OBJECT. WHITE WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT.

White claims that the prosecutor committed misconduct when discussing the concept of reasonable doubt during closing

argument. There was no objection to this argument at trial, and White's argument on appeal is based upon a strained interpretation of the prosecutor's comments. In the argument at issue, the prosecutor encouraged the jurors to discuss any doubts that they had with their fellow jurors in order to determine whether such doubts were reasonable. This was entirely proper argument and consistent with the jury instructions. To the extent that the argument could have been misconstrued, White's challenge on appeal is waived because any possible prejudice could have been avoided by a proper objection and a curative instruction.

During closing argument, the prosecutor discussed the reasonable doubt instruction. The prosecutor referenced the elements of the charged offense and argued:

When you're looking at those three elements and you're pondering and examining whether the State has met its burden, what is reasonable doubt? As Jury Instruction No. 3 has told you now, it is not beyond all doubt. You can't decide this case beyond all doubt because you weren't there. If you were there, you wouldn't be a juror. So it's beyond a reasonable doubt. It's got to be based on it's evidence or lack of evidence, and it's reasonable doubt -- it's a doubt for which a reason exists. It's not mere speculation.

The instructions talk about an objective and reasonable examination of the evidence. The instructions talk about leaving passions or prejudice aside in deciding this case facts based on the

evidence of this case. But what the instructions do not tell and you what you're not required to do is to check your common sense at the door. It's your collective, objective reasoning. It's your collective, reasonable basis and reasonable examination of the evidence. That's what a reasonable doubt is.

7PR 781.

There was no objection to the prosecutor's argument about reasonable doubt at trial. White now claims that the prosecutor's argument diminished the presumption of innocence and diminished the State's burden of proof.

The law governing White's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v.

McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

“Where the defense fails to object to an improper comment, the error is considered waived ‘unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’” McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel’s failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

White has not met his burden of showing that the prosecutor’s argument was improper, let alone flagrant and ill-intentioned. White’s claim that the prosecutor suggested that all 12 jurors had to agree that a doubt was reasonable is an incorrect characterization of the prosecutor’s argument. As reflected in the above quote, the prosecutor never made such an argument. Instead, she encouraged the jurors to discuss any doubts with their fellow jurors in order to decide whether the doubt was reasonable. There is nothing wrong with this argument as it is consistent with the law. The trial court instructed the jurors that “you have a duty to

discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.” CP 66. As the Washington Supreme Court has noted, “We want juries to deliberate, not merely vote their initial impulses and move on.” State v. Cross, 156 Wn.2d 580, 616, 132 P.3d 80 (2006).

Not only does White’s claim of misconduct rely upon a strained interpretation of the prosecutor’s argument, but his argument concerning prejudice presumes that the jury would disregard the trial court’s specific instruction that each juror had to make his or her own decision on reasonable doubt. Prior to closing argument, the trial court instructed the jury as follows:

Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

CP 66. The court further instructed the jury to disregard any argument by counsel that was inconsistent with the court’s instructions. CP 66. The jury is presumed to have followed the court’s instructions. State v. Gamble, 168 Wn.2d 161, 178,

225 P.3d 973 (2010). White cannot show that he suffered any prejudice.

White briefly argues that the prosecutor's argument was improper because a reasonable doubt can be unarticulated, and he complains that the prosecutor's argument suggested otherwise. This assertion is inconsistent with Washington law. Nearly one hundred years ago, the Washington Supreme Court, addressing a challenge to a reasonable doubt instruction, observed:

As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given. When a cause has been submitted to a jury, it retires to its room for the purpose of consultation, discussion, and deliberation. These precede the verdict. In practice it is known that verdicts are sometimes reached only after long and acrimonious debate in the jury room. While it is true that the jury is not required to report to the court a reason for its verdict, it is equally true that in the consideration of the evidence one juror has a right to call upon another for a reason for his faith. The very word 'deliberation' presupposes a painstaking and conscientious purpose upon the part of each juror to weigh the evidence in order that an intelligent verdict may be reached. If discussion and an interchange of views upon the evidence were not contemplated, the law would dissolve the jury after one unsuccessful ballot. Discussion tests the reasonableness of the conflicting views of the jurors, and weeds out fanciful and imaginary doubts.

State v. Harsted, 66 Wash. 158, 163, 119 P. 24 (1911). The prosecutor's argument was entirely consistent with Harsted.

Moreover, in this case, because White made no objection, he must show that the prosecutor's comments were so flagrant and ill-intentioned that an instruction could not have cured any prejudice. The Washington Supreme Court has recognized that a curative instruction can remedy the prejudice caused by an improper argument about the reasonable doubt standard. In State v. Warren, the prosecutor repeatedly argued that "reasonable doubt... doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt." 165 Wn.2d at 24-25. After Warren objected, the trial court gave a curative instruction, restating the reasonable doubt standard and explaining that the jury should give the benefit of the doubt to the defendant. Id. On appeal, the Washington Supreme Court held that the prosecutor's comments sought to undermine the State's burden of proof and were flagrantly improper. Id. at 27. However, the court affirmed Warren's convictions, concluding that the improper argument was cured by the trial court's supplemental instruction. Id. at 28.

The prosecutor's comments in Warren were more egregious than White's characterization of the argument in this case. If a curative instruction was capable of curing the prejudice in Warren,

such an instruction certainly would have cured any possible prejudice caused by the comments at issue in this case. Because White failed to object, he has waived his claim of prosecutorial misconduct.

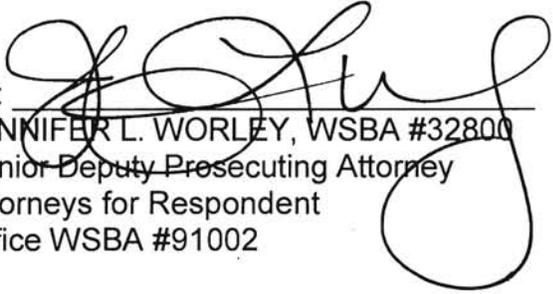
D. CONCLUSION

For the reasons cited above, this Court should affirm White's conviction.

DATED this 25 day of March, 2013.

Respectfully submitted,

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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 M. Winkler, 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. JARRAY WHITE, Cause No. 69064-7-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.

Betty H. Huddleston
Name

Done in Seattle, Washington

3/26/13
Date