

NO. 44321-0-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CLAY J. JONAK,

Appellant.

RESPONDENT'S BRIEF

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STATUTES

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court did not improperly exclude evidence of a prosecution witness's bias.

B. STATEMENT OF THE CASE

1.) Procedural History

On July 26, 2012, the Cowlitz County Prosecuting Attorney filed an information charging Clay Jonak with Theft in the First Degree on, about, or between January 1, 2012 and April 14, 2012. CP 1-2.¹ The case proceeded to a jury trial before The Honorable Dennis Maher, which commenced on November 13, 2012 and concluded on November 15, 2012. RP 86-453.

The jury found Mr. Jonak guilty as charged. RP 453; CP 34. The court imposed a standard range sentence of 60 months. RP 478; CP 35-46. Mr. Jonak filed a timely notice of appeal. 47.

2.) Statement of Facts

Manson Construction stored some dredging equipment in Longview, Washington in a yard on the property of Longview Booming.

¹ RCW 9A.56.030(1)(a) and RCW 9A.56.020(1)(a)

RP 102, 233-35. Some of that equipment was worth tens of thousands of dollars, weighed thousands of pounds, and was of the type that Manson Construction definitely would not be interested in scrapping or recycling. RP 89-92, 96, 99, 114-15, 142-44, 148, 153. Other items at the yard, however, were likely candidates for scrapping. RP 93, 113, 123.

Clay Jonak rented property that was adjacent to the lot in which Manson Construction stored its dredging equipment. RP 235, 246-47, 334. Mr. Jonak was a frequent scraper or recycler of metals. RP 201, 210, 335-36, 338. In March of 2012, Mr. Jonak went to Seattle to meet with Manson Construction and discuss whether the company was looking to scrap anything down at the Longview yard. RP 92-93, 108, 339-41. Mr. Jonak first met with Sean Hillis a thirty-five year employee of Manson Construction and its Vice-President of Equipment. RP 86. Mr. Hillis told Mr. Jonak that Manson Construction should probably do something with the site, but that the first thing that would have to be done is a site visit to see what equipment is wanted and should be redeployed elsewhere and what items the company would want to scrap. RP 93-94. Mr. Hillis then introduced Mr. Jonak to Bob Richardson, a thirty-six year employee of Manson Construction and its Northwest Dredging Operations Manager,

and told Mr. Richardson “that we should get down there and see if we can narrow our [footprint] out.” RP 93-94, 106-07.

Mr. Jonak ended up making two trips to Seattle in which contact was made with Manson Construction, and both times he met with Mr. Richardson. RP 92-94, 108, 112-13, 126-27, 344-45. A business associate of Mr. Jonak, Roger Ison, was present for the first meeting with Mr. Richardson. RP 127-28, 184-85. Mr. Richardson testified that while he thought scrapping some items from the Longview yard may have been a good idea and that he was okay with using Mr. Jonak’s services to accomplish that end, he was not sure what dredging equipment was actually present at the yard and, therefore, what the company would want to keep and what items, if any, the company would want to scrap. RP 109, 111-14, 126, 133, 137, 402. Thus, Mr. Richardson told Mr. Jonak that nothing could be done until he (Mr. Richardson) conferred with his boss and Eric McMann, another Manson Construction employee, and got down to Longview to make that determination. RP 109, 111-12, 114, 137, 402.

Over the course of the two meetings, Mr. Richardson did not discuss with Mr. Jonak which items would be scrapped and not scrapped, what percentage each party would receive from the scrapping proceeds,

insurance, a contract; nor did Mr. Richardson tell Mr. Jonak to get started on the scrapping or give him any authority to scrap any of Manson's equipment. RP 111-14, 116, 400-01. Moreover, Mr. Ison confirmed that, at the first meeting, a start date was not discussed, a pay rate or percentage was not discussed, and though Mr. Richardson told Mr. Jonak that as far as he was concerned Mr. Jonak had the job, Mr. Richardson also told him that he needed to take care of some details first. RP 185, 188, 191, 290, 297-98.

After the second meeting, Mr. Richardson set up and attended a meeting at the Longview yard that took place on April 23, 2012 and included Mr. Jonak, Mr. McMann, and Jim McNalley the Vice-President of Manson Construction. RP 111-12, 116, 145, 401. According to Mr. Richardson and Mr. McMann the purpose of the meeting at the Longview yard was to determine what equipment would go to Northern California with Mr. McMann, what equipment would go up to Seattle, and what was going to be scrapped. RP 111-12, 145-46.

When Mr. Richardson arrived at the Longview yard Mr. Jonak opened up the gate and Mr. Richardson followed him in. RP 116. As soon as Mr. Richardson exited his truck Mr. Jonak told him that somebody had

stolen the cutter.² RP 116. Mr. Richardson was alone with Mr. Jonak at the yard for about half of an hour before Mr. McMann and Mr. McNalley arrived. RP 122. During that time, Mr. Jonak never mentioned to Mr. Richardson that he was the one in fact who scrapped the cutter nor did he mention that he took and scrapped any of the other items that Mr. Richardson noticed were missing. RP 118-22. Instead, Mr. Jonak just walked around the yard with Mr. Richardson as Mr. Richardson identified which items were junk. RP 123.

When Mr. McMann and Mr. McNalley arrived they joined Mr. Jonak and Mr. Richardson looking at the parts and pieces at the yard. RP 146, 151. Mr. McMann noticed that a number of items were missing including the cutter and a three-and-a-half to five ton impeller, and made a statement about “where’s this, where’s that, where’s this.” RP 147. Mr. Jonak said nothing in response. RP 147. Furthermore, when all the men were standing in a group and Mr. Jonak was asked if he had taken any of the stuff he said no and never suggested to the others that he had scrapped any of the items by mistake. RP 152. At that point, Chet Makinster, the

² See RP 89-92 (discussing what a cutter is and valuing the one taken from the Longview yard at \$75,000).

landowner, was called and the Manson Construction employees showed him what they had found. RP 151-52, RP 235-36. Mr. Makinster then called the Sheriff's Office. RP 151.

Mr. Makinster noticed crane-type tracks or tread marks in the area of where the items were now missing and tracks from a dual-tired vehicle. RP 238-39, 242. Mr. Makinster knew that Mr. Jonak had a crane on the property and that he acquired it within that year (2012). RP 240, 250. Mr. Makinster followed the trail of tread marks from the yard to Mr. Jonak's crane. RP 243-44. After following the trail, Mr. Makinster returned to the yard and said to Mr. Jonak "[t]hat machine was down here." RP 244. Mr. Jonak twice denied that it had been. RP 244. While down at the yard, Mr. Makinster overheard Deputy Lorenzo Gladson ask Mr. Jonak if he had taken the missing property and listened as Mr. Jonak replied that he had not. RP 245. Over the period of time that Mr. Makinster was down at the yard with everyone, he testified that, in total, Mr. Jonak told him personally and denied to others, taking the Manson Construction equipment a "half a dozen times or so." RP 245.

When Deputy Gladson arrived to investigate the theft of the Manson Construction equipment he noted, photographed, and followed the

tracks that were present in the ground around where the equipment went missing. RP 257-66, 269-71. Dep. Gladson determined that the source of one of the types of tracks was a crane that was parked near Mr. Jonak's residence, a quarter of a mile away from the yard, and that the source of the dual-tired tracks was Mr. Jonak's Dodge Ram truck. RP 260-66, RP 274. When Dep. Gladson confronted Mr. Jonak about the likelihood that his crane made the tracks in the yard Mr. Jonak continually asserted that the crane was not operational and had not worked in two to three months. RP 271-72, 275. In addition, Mr. Jonak claimed that nobody else had access to the crane. RP 275. Dep. Gladson also asked Mr. Jonak several times if he had taken anything to which Mr. Jonak replied that he had not, that he did not know what had happened to the equipment, and that he had not recycled any metal within the last month. RP 272-73, 285, 297. Mr. Jonak even supplied Dep. Gladson with a written statement in which he denied taking part in or having any knowledge of the theft of the equipment. RP 276, 294. After receiving the written statement Dep. Gladson completed his investigation for the day. RP 276.

The next day, April 24, 2012, Dep. Gladson continued his investigation. RP 276-77. He began by calling metal recycling places from

Cowlitz County all the way to Portland. RP 277. On about Dep. Gladson's twelfth phone call he contacted Bob's Metals in Portland who confirmed that Mr. Jonak was a customer of the business and emailed the Deputy Mr. Jonak's customer records. RP 277. Those records included photographs of some of the Manson Construction equipment that went missing with a date stamp of 4/13/2012. RP 204-05, 278-79, 283-86. That same day Dep. Gladson spoke with David Davis. RP 281-82. Mr. Davis used the Longview Booming property to park his "water rig" and tugboats. RP 170. According to Mr. Davis, about two weeks prior to speaking with Dep. Gladson he had noticed a crane that was usually parked up on top of the property parked at another part of the property next to some steel equipment. RP 170-71. At trial, Mr. Davis identified Mr. Jonak's crane as the crane he saw that day. RP 170-71.

Armed with the fruits of his investigation Dep. Gladson returned to the Longview Booming property on April 25, 2012 to arrest Mr. Jonak. RP 282. During the transport of Mr. Jonak to the Sheriff's Office Mr. Jonak asked Dep. Gladson what evidence he had against him. RP 282. After Dep. Gladson described the evidence that he had gathered Mr. Jonak stated that Mr. Richardson had thrown him under the bus. RP 282-86. At

one point Mr. Jonak told Dep. Gladson that Mr. Richardson had given him permission to scrap the Manson materials. RP 286.

In addition to Manson Construction employees, Mr. Makinster, and Mr. Davis the State called three other witnesses including Sharon Gaines. RP 218-232. Ms. Gaines contacted the prosecutor's office in August of 2012 to provide information about Mr. Jonak's case. RP 224. She testified at trial that when she asked Mr. Jonak about his pending theft case that he told her that he taken some items from Mr. Makinster's property and scrapped them for money. RP 222-23. When she asked him why he did this Mr. Jonak indicated that he had a lot of debts to pay and could not pay his bills, amongst other reasons. RP 223. Ms. Gaines testified that Mr. Jonak insisted that police were not going to do anything because they had no evidence against him. RP 223 Following their conversation she was of the impression that the charges were being dropped. RP 224. Mr. Jonak attempted to demonstrate Ms. Gaines's bias through an email she allegedly wrote to Mr. Jonak that was derogatory in nature. RP 226-28. Ms. Gaines, after reviewing the email, denied sending it. RP 228.

Ms. Gaines was not a neutral witness. She claimed that Mr. Jonak invited her to leave her place in Tehama, Texas to share his residence in Longview. RP 220. Ms. Gaines testified that she arrived in Longview on June 14, 2012 to a “nightmare;” she thought she was going to be staying at a house on the riverfront but instead found a “trailer in the middle of a landfill, basically.” RP 221. Ms. Gaines continued by asserting that Mr. Jonak manipulated her in order to get her to Longview, that she lost everything she owned in the process of getting to Longview, and that his place was located in a very dangerous area for her disabled child. RP 221. She only stayed with Mr. Jonak for four days before he kicked her out, and according Ms. Gaines, put “a disabled child and a disabled woman on the street.” RP 230. In addition, she accused Mr. Jonak’s girlfriend of “trying to hurt [her] little boy.” RP 221, 225. That Ms. Gaines appeared “impartial” after testifying is untenable.

Nonetheless, Mr. Jonak called a witness, Kathy Knapp, for the sole purpose of impeaching Ms. Gaines. RP 318-24. Ms. Knapp testified that Ms. Gaines was “very, very nasty toward him [(Mr. Jonak)],” that “[e]very time she would call, she was very threatening towards Clay,” and that “one day she said she had talked with some drug dealers in town, gave

them the address and the phone number, and Christy's name and Clay's name, and they were going to go out there and beat them two up, and break their legs." RP 322. Furthermore, Ms. Knapp testified that Ms. Gaines was focused on Mr. Jonak in a very negative way. RP 324.

Mr. Jonak testified on his own behalf. RP 333-396. He explained that he had reached an agreement with Mr. Richardson to begin scrapping Manson Construction equipment at the Longview yard with a tentative fifty-fifty split of the proceeds. RP 346-47. He claimed that Mr. Richardson's exact words were that "the stuff was pretty much scrap" and "to go ahead and start." RP 346. After Mr. Jonak's second trip to Seattle he began scrapping some of Manson Construction items and testified that he drove up a third time with receipts from the scrapping transactions. RP 348-49, 352-53. Because Mr. Richardson was not there Mr. Jonak stated that he left the receipts with Mr. Richardson's secretary. RP 352-53. With regard to the April 23, 2012 meeting in Longview, according to Mr. Jonak the purpose of the meeting was to finalize the financial terms of the agreement that was already in place. RP 346, 352.

When at that meeting the Manson Construction employees began complaining about the missing items Mr. Jonak testified that he asked Mr.

Richardson if he was going to say anything about their recycling agreement to them. RP 356. Mr. Jonak testified that Mr. Richardson continually failed to speak up despite Mr. Jonak's pleas that he do so and Mr. Jonak began to get concerned. RP 356-57. That said, Mr. Jonak admitted that he did not say anything to anyone about the agreement and denied that he had taken anything when asked by those at the meeting. RP 378, 381. Mr. Jonak explained that he was relying on Mr. Richardson to clear everything up since Mr. Richardson was his contact at Manson Construction. RP 381.

C. ARGUMENT

1. THE TRIAL COURT DID NOT DENY MR. JONAK HIS RIGHT TO CONFRONT WITNESSES BECAUSE IT PROPERLY LIMITED THE SCOPE OF HIS CROSS-EXAMINATION AND IMPEACHMENT OF MS. GAINES.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* (quotation and citation omitted). Likewise, "a court's limitation of the

scope of cross-examination will not be disturbed unless it is the result of [a] manifest abuse of discretion.” *Id.* (citing *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984)). In addition, a reviewing court “can affirm on any grounds supported by the record.” *State v. Huynh*, 107 Wn.App. 68, 74, 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)).

A defendant’s right to confront and meaningfully cross-examine “adverse witnesses is guaranteed by both the federal and state constitutions.” *Darden*, 145 Wn.2d at 620 (citations omitted). Confrontation in the form of cross-examination assures “the accuracy of the fact-finding process” by testing the “perception, memory, [] credibility,” and bias of witnesses. *Id.* (citations omitted). Thus, “the right to confront must be zealously guarded.” *Id.* Indeed, “latitude must be allowed in cross-examining an essential prosecution witness to show motive for his testimony.” *State v. Knapp*, 14 Wn.App 101, 107, 540 P.2d 898 (1975). Moreover, a defendant may establish bias through impeachment by introducing extrinsic evidence, including third party testimony. *United States v. Abel*, 469 U.S. 45, 49, 105 S.Ct. 465, 83

L.Ed.2d 450 (1984); *Huynh*, 107 Wn.App. at 74 (holding that “extrinsic evidence of acts or conduct may be introduced to prove a witness's bias.”).

The right to cross-examine adverse witnesses, however, is not absolute as the scope of the examination can be limited by the trial court. *Id.*; *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310 (1950) (“Where the right [to cross-examination] is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court.”). Furthermore, the trial court may limit “the extent to which defense counsel may delve into the witness' alleged bias ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or *interrogation that is repetitive or only marginally relevant.*” *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (emphasis added) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). When a defendant offers extrinsic evidence that only has an indirect bearing on the bias or prejudice of a witness the trial court can exclude that evidence under the rule that extrinsic evidence cannot be used to impeach a witness on collateral issues. *State v. Carlson*, 61 Wn.App. 865, 876, 812 P.2d 536 (1991).

Here, Mr. Jonak sought to establish the bias of Ms. Gaines by introducing extrinsic evidence in the form of an email that she purportedly wrote to him in which she apparently expressed some anger towards him.³ RP 227-28, RP 372-76. Ms. Gaines denied having sent the email when she was cross-examined. RP 227-28. As a result, Mr. Jonak attempted to discuss and admit the email during his direct examination. RP 372-76.

While the trial court's decision to sustain an objection for lack of foundation was likely incorrect, the record supports additional grounds for affirming the trial court's decision to keep the email out of evidence. Br. of App. 9-10. For instance, to the extent that the email provided evidence that Mr. Gaines was biased against Mr. Jonak the content of the email would be repetitive and only marginally relevant. That Ms. Gaines was biased against Mr. Jonak was evident from her testimony despite her claim of being impartial. RP 221-22, 230-31. In addition, as noted above, Mr. Jonak called Ms. Knapp as a witness for the sole purpose of impeaching Ms. Gaines. RP 318-24. Ms. Knapp testified that Ms. Gaines was "very, very nasty toward him [(Mr. Jonak)]," that "[e]very time she would call,

³ The record is silent as to the actual content of the email. In referencing the email, however, defense counsel noted its "nasty content." RP 376. Presumably, the email also provided information that Ms. Gaines was doing very well. RP 231.

she was very threatening towards Clay.” and that “one day she said she had talked with some drug dealers in town, gave them the address and the phone number, and Christy’s name and Clay’s name, and they were going to go out there and beat them two up, and break their legs.” RP 322. Furthermore, Ms. Knapp testified that Ms. Gaines was focused on Mr. Jonak in a very negative way. RP 324. After Ms. Knapp’s testimony, but before the attempt to admit the email, Mr. Jonak himself testified to his relationship with Ms. Gaines; said testimony did not compliment Ms. Gaines. RP 363-372.

Simply put, Ms. Gaines’s bias was well established prior to the attempt to admit the email through Mr. Jonak. Therefore, the record supports the position that the admission of the email for the purpose of presenting evidence of bias would be repetitive and to that end only marginally relevant. As a result, the trial court would have been well within its permissible discretion to deny impeachment by way of the introduction of the email in question.

Furthermore, the record supports the argument that the email only had an indirect bearing on Ms. Gaines’s bias given her denial that she was the author of the email and the lack of an offer of proof as to the content of

the email. RP 227-28. Accordingly, introduction of the email or testimony about the email would, if at all, only impeach Ms. Gaines on a collateral issue, i.e., the provenance of the email, rather than whether she was biased against Mr. Jonak. Thus, again, the trial court would have been well within its permissible discretion to deny impeachment by way of the introduction of the email in question.

2. ANY ERROR IN LIMITING MR. JONAK'S CROSS-EXAMINATION OR IMPEACHMENT OF MS. GAINES WAS HARMLESS BECAUSE HER PURPORTED BIAS WAS EFFECTIVELY EXPLORED ON CROSS-EXAMINATION, THROUGH DEFENSE WITNESSES, AND HER TESTIMONY PRODUCED LITTLE PROBATIVE EVIDENCE.

“[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007) (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). That said, “[i]t is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless.” *Guloy*, 104 Wn.2d at 426 (citing *Harrington v. California*, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 1727-28, 23 L.Ed.2d 284 (1969)). An error is

harmless if the reviewing court “is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.* In other words, “[i]f there is no ‘reasonable probability that the outcome of the trial would have been different had the error not occurred,’ the error is harmless. *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

Here, assuming arguendo that trial court violated Mr. Jonak’s rights under the confrontation clause by not allowing the contested email into evidence said violation is so insignificant as to be harmless because there is no reasonable probability that the that outcome of the trial would have been different had the error not occurred. As argued above, Ms. Gaines’s bias was already well established through her own testimony, by cross-examination, through Ms. Knapp, and to a lesser extent Mr. Jonak, all before Mr. Jonak attempted to admit the email in his case in chief. There is no reasonable probability that the outcome of the trial would have been different if only some additional evidence was admitted to further illustrate Ms. Gaines’s bias against Mr. Jonak. This is especially true

when there was disagreement between the parties as to who was the actual sender of the email.

More importantly, Ms. Gaines was not the linchpin of the State's case. In fact, Ms. Gaines's testimony is mentioned in closing only very briefly. RP 425 *compare with* RP 419-449. Instead, the State relied primarily on the testimony of the Manson Construction witnesses, Mr. Richardson in particular, and the words and actions of Mr. Jonak at the scene of the theft to establish its case. Given Mr. Jonak's repeated denials of taking anything when everyone arrived at the scene, his false story that his crane was inoperable, and his failure to tell the other Manson Construction employees that he thought he had an agreement to take the equipment, one need not wonder why the jury did not believe his self-serving explanation of what really happened, i.e., that he did use his crane to take and recycle Manson Construction's equipment but that he had permission from Mr. Richardson, especially because he only told this version after he was arrested. Between the strength of the State's evidence and the fact that if an error occurred it was insignificant, any error in this case was harmless.

D. CONCLUSION

For the reasons argued above, Mr. Jonak's conviction should be affirmed.

Respectfully submitted this 11th day of September, 2013.

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APPENDIX A

RCW 9a.56.030

Theft in the first degree.

*** CHANGE IN 2013 *** (SEE 1552-S.SL) ***

(1) A person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;

(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another;

(c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty; or

(d) Metal wire, taken from a public service company, as defined in RCW 80.04.010, or a consumer-owned utility, as defined in RCW 19.280.020, and the costs of the damage to the public service company's or consumer-owned utility's property exceed five thousand dollars in value.

(2) Theft in the first degree is a class B felony.

[2012 c 233 § 2; 2009 c 431 § 7; 2007 c 199 § 3; 2005 c 212 § 2; 1995 c 129 § 11 (Initiative Measure No. 159); 1975 1st ex.s. c 260 §9A.56.030 .]

Notes:

Applicability -- 2009 c 431: See note following RCW 4.24.230.

Findings -- Intent -- Short title -- 2007 c 199: See notes following RCW 9A.56.065.

Findings and intent -- Short title -- Severability -- Captions not law -- 1995 c 129: See notes following RCW 9.94A.510.

Civil action for shoplifting by adults, minors: RCW 4.24.230.

Property crime database, liability: RCW 4.24.340.

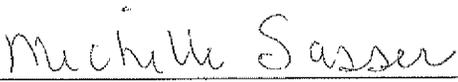
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on September 11th, 2013.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

September 11, 2013 - 10:08 AM

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