

69835-4

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NO. 69835-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTONNIO RAY THOMAS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Antonnio Thomas was denied his right to a fair jury trial under the Sixth Amendment and article 1, sections 21 and 22 when a police witness testified extensively as to his own conclusion of guilt.

2. Mr. Thomas was denied his right to a fair jury trial under the Sixth Amendment and article 1, sections 21 and 22 when, contrary to a pretrial ruling, a state witness testified Mr. Thomas had a gun on the night in question.

3. The trial court abused its discretion in denying Mr. Thomas's motions for a mistrial.

4. The trial court abused its discretion and hampered Mr. Thomas's right to present a defense by excluding Shant'e Spears's testimony that she had received communications from the alleged victim in which the victim admitted she attacked Mr. Thomas.

5. The trial court abused its discretion in admitting cumulative, prejudicial photographs of the alleged victim.

6. Mr. Thomas's right to an open trial was violated when alternate jurors were selected off the record.

7. Cumulative trial error denied Mr. Thomas his constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused has the constitutional right to a trial before an impartial jury, where that jury determines factual issues and decides on guilt. A witness who opines on an accused's guilt violates the accused's right to a trial by jury. A new trial is required unless a jury instruction can cure the error. Here, a police officer testified extensively as to his conclusion that Mr. Thomas was guilty of the charged offense. The trial judge considered the testimony "very prejudicial" and "so irrelevant as to be frightening" that it "may turn out to be reversible error." Yet, the court denied Mr. Thomas's request for a mistrial. Is Mr. Thomas entitled to a new trial?

2. In a pretrial ruling, the trial court barred admission of any evidence that Mr. Thomas had a gun, on the night in question or otherwise, because of its irrelevance and prejudicial effect. A state witness testified he was frightened of Mr. Thomas because he had a gun. Defense counsel reacted immediately and, outside the presence of the jury, moved for a mistrial. Did the trial court abuse its discretion in denying Mr. Thomas's motion for a mistrial?

3. The federal and state constitutions guarantee an accused the right to present a defense and to a fair trial. Moreover, under the rules

of evidence, relevant evidence is presumptively admissible. Where the key issue in this case was whether Mr. Thomas attacked Vivian Heller or whether she attacked him, did the trial court abuse its discretion and deny Mr. Thomas's constitutional rights when it excluded recently-discovered evidence that Vivian Heller admitted to her daughter, Shant'e Spears, that Ms. Heller attacked Mr. Thomas?

4. Under Evidence Rule 403, evidence should be excluded upon objection if "its probative value is substantially outweighed by the danger of unfair prejudice or by considerations of the needless presentation of cumulative evidence." Did the trial court abuse its discretion by admitting repetitive, prejudicial photographs of the alleged victim over objection from Mr. Thomas?

5. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. In addition, under the First Amendment, the public has a right of access to trial proceedings. A violation of this right is not susceptible to a harmless error analysis. Given the trial court's method of choosing the alternate jurors in private, off the record, should this Court reverse the conviction for a

violation of Mr. Thomas's right to a public trial and the public's right to access to the courts?

6. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions, even if no single error requires reversal standing alone. In light of the cumulative effect of the errors assigned above, was Mr. Thomas denied a fundamentally fair trial?

C. STATEMENT OF THE CASE

Antonnio Thomas and Shant'e Spears have children together that they co-parent. 12/12/12 RP 31; 12/13/12 RP 131-32; 12/17/12 RP 79, 192-93; 12/18/12 RP 99.¹ Ms. Spears's mother, Vivian Heller, took the children to California on vacation with her boyfriend, Raymond Jennings. 12/12/12 RP 31, 35-38, 148; 12/18/12 RP 99, 101-02. They ended up in a serious car accident, which caused significant stress within the family. 12/12/12 RP 40-45, 183-86; 12/13/12 RP 25-27, 138, 141-46, 150-52, 161; 12/18/12 RP 104-08, 118-20. Following the

¹ The verbatim report of proceedings are referred to by the first hearing date transcribed in each volume, e.g., "12/3/12 RP" followed by the page number, except for the volume from voir dire held December 6 and 10, 2012, which is referred to as "Voir Dire RP" followed by the page number. The December 6, 2012 proceeding before the Honorable Dean Lum is not referred to herein, thus all references to 12/6/12 RP refer to the proceedings before the Honorable Carol Schapira.

accident, Ms. Spears did not talk to her mother or allow her to see the children for a while. 12/12/12 RP 57-58, 61; 12/13/12 RP 29; 12/18/12 RP 120-21.²

About one month after the accident, on Memorial Day, Mr. Thomas went to socialize at a motorcycle club in Seattle, Washington to which he and Mr. Jennings belonged. 12/12/12 RP 50-51; 12/13/12 RP 134-35, 161-70. Mr. Jennings had invited Ms. Heller to the club that evening as well. 12/12/12 RP 63-65, 151-52.

Mr. Thomas and Ms. Heller testified to different versions of what ensued. Mr. Thomas testified that Ms. Heller and he went out on the club's back patio to talk in private, because they had not seen each other since the accident. 12/13/12 RP 177, 185-86. He lit a cigarette and turned back around to start talking with Ms. Heller when she "popped" him in his face. 12/13/12 RP 189-92. He pivoted to get away from her and stumbled due to a previous injury to his left leg. 12/13/12 RP 193-96; 12/17/12 RP 55-56. Ms. Heller clawed at his back, hitting and yelling. 12/13/12 RP 196. He was eventually able to scramble away and back into the club. 12/13/12 RP 198-99. Mr.

² Ms. Heller testified she did not attempt contact with Mr. Thomas during this time, 12/12/12 RP 57-58, 61, whereas Mr. Thomas testified Ms. Heller still sent him text messages, but fewer than usual. 12/13/12 RP 154; 12/17/12 RP 101-02.

Thomas told other club members that Ms. Heller had attacked him. 12/13/12 RP 200-01. He went home to clean himself up. 12/13/12 RP 197-98, 202-03. He had marks on his face and fingernail fragments under his skin. 12/13/12 RP 204-05. Two days later he received a telephone call from Ms. Heller, which he put on speakerphone in front of his colleague, during which she admitted attacking him. 12/17/12 RP 47-51; 12/17/12 RP 149-52 (testimony of colleague, Jesse Marvin).³

According to Ms. Heller, Mr. Thomas asked to speak with her and then led her to the outside patio in the back of the club. 12/12/12 RP 88-89. They spoke for four or five minutes about matters relating to the accident, during which time she perceived Mr. Thomas getting angrier. 12/12/12 RP 92-98. He then started punching her in the face saying "I'm daddy." 12/12/12 RP 98-100. Ms. Heller could not say how she got away from Mr. Thomas, but when she did, she went back inside the club. 12/12/12 RP 102-04; 12/12/12 RP 158-59 (testimony of Jennings). Later, she went to the emergency department at Harborview Medical Center and eventually underwent surgery on her nose. 12/6/12 RP 41-42, 44-45; 12/12/12 RP 105-06, 120; 12/17/12 RP 12-15; Exhibits 1-8.

³ Vivian Heller admitted she called Mr. Thomas to discuss the incident, but denied she admitted she attacked him. 12/13/12 RP 60-62, 108-09.

The State charged Mr. Thomas with assault in the second degree. CP 1, 18. Pretrial rulings were made by Judge John P. Erlick, but Judge Carol Schapira presided over the trial. *E.g.*, 12/3/12 RP 3, 148-55; 12/4/12 RP 3; 12/6/12 RP 4-5; 12/10/12 RP 247, 248. Mr. Thomas's defense was that Ms. Heller punched him and then had a seizure or otherwise slipped and fell, causing her injuries. *E.g.*, 12/10/12 RP 267-70; 12/13/12 RP 62-63, 65-66, 76-77, 79-80 (Heller testifies to her epileptic condition); 12/18/12 RP 144-47 (Spears testifies to Heller's seizures); 12/19/12 RP 56-58, 63; 12/4/12 RP 4-11 (pretrial offer of proof from nurse practitioner who treats Heller for epilepsy); *see* 12/12/12 RP 173-74 (Thomas told Jennings on night of incident that Heller's injuries derived from her having fallen). The trial was lengthy, and Judge Schapira noted "a number of parts of the stories told by all the witnesses really didn't kind of hold together . . . there was a reasonable doubt." 12/19/12 RP 96. Several evidentiary errors occurred at trial, as discussed below. As a result of the flawed process, Mr. Thomas was convicted of assault in the second degree. 12/19/12 RP 79-81; CP 99-105 (verdict form and judgment).

D. ARGUMENT

1. **Mr. Thomas's conviction should be reversed because he did not receive a fair trial where a police officer testified extensively as to his conclusion that Mr. Thomas is guilty of the charged offense.**

- a. An accused's right to a fair jury trial is invaded when a witness opines on guilt.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008); *see id.* at 589 ("The concept of the jury as the arbiter of disputed facts appears to predate recorded history.").

Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. *Id.* at 591. The jury's role is "inviolable." *Id.* at 590. Witnesses "may not testify as to the guilt of defendants, either directly or by inference." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002); *accord Montgomery*, 163 Wn.2d at 591. Such testimony invades the province of the jury and violates the accused's constitutional right to a trial by jury. *Olmedo*, 112 Wn. App. at 533.

On this basis, the trial court granted Mr. Thomas's pretrial motion to exclude statements by law enforcement opining on Mr. Thomas's guilt. CP 74-75.

- b. Here, the jury's role was invaded when a police officer testified extensively about his opinion that Mr. Thomas was guilty of the charged offense and the evidence upon which he based that conclusion.

The testimony of Detective Thorp, on cross-examination by the State, plainly crossed the line into the jury's province by opining on Mr. Thomas's guilt. On direct examination, Detective Thorp testified:

Q: Now, at the time you went out on June 4th to the residence where Mr. Thomas was living, at that time you believed you had probable cause to arrest; am I wrong or right about that?

A: That is correct, I believed I had probable cause.

12/18/12 RP 34. On cross-examination, the State greatly expanded the questioning to Detective Thorp on this topic, leading him to opine at length on Mr. Thomas's guilt. First, Detective Thorp explained probable cause "is essentially authority to arrest a person. I believe criminal activity has occurred and I can arrest the suspect who conducted that criminal activity." 12/18/12 RP 58. He then told the jury what evidence led him to believe he had probable cause to arrest Mr. Thomas on the assault charge: "It was a combination of Ms.

Heller’s statement both to the initial responding officer, her follow-up statement to me, and the photographic evidence.⁴ They all supported probable cause for assault.” 12/18/12 RP 59. Detective Thorp elaborated on the evidence, “The facts can speak for themselves. Again, the photographs are facts. That shows that she was severely assaulted, and her statement – everyone else’s statement that spoke with the responding officer, they were all consistent in naming Mr. Thomas as the individual who gave her those injuries. There was no –” 12/18/12 RP 59-60. The trial court sustained Mr. Thomas’s objection to Detective Thorp’s testimony, and informed the jury that probable cause is not the same standard the jury is to apply—but only after the jury had heard Detective Thorp tell the jurors not only that he opined Mr. Thomas was guilty but what evidence he used to support that opinion. 12/18/12 RP 60-61.

Outside the presence of the jury, the court characterized Detective Thorp’s testimony as “crazy bad, and I am very concerned about that.” 12/18/12 RP 128. The testimony was “very prejudicial” and “had no business in this case.” 12/18/12 RP 128, 130.⁵ The court

⁴ The admission of these photographs is challenged below.

⁵ The trial court also rejected the State’s insinuation that defense counsel opened the door, noting that the State could have objected to defense counsel’s

noted that “probable cause is one of the lowest standards available in terms of analyzing the evidence[,]” implicitly contrasting it to the rigorous beyond a reasonable doubt standard. 12/18/12 RP 129. “We never tell the jurors that [an officer believed the defendant was guilty] because it is distracting and in fact incorrect that the officers at a moment in time believe there’s probable cause. It’s a complete distraction, and again I think arguably may turn out to be reversible error.” 12/18/12 RP 134. Nonetheless, the court denied Mr. Thomas’s motion for a mistrial; the trial court found her ruling justified because defense counsel had asked Detective Thorp a question unrelated to probable cause, about electronic home monitoring. 12/18/12 RP 135-39.

- c. Because the violation was serious and incurable by an instruction, a new trial is required.

Courts evaluate three factors to determine whether an error warrants a new trial: (1) the seriousness of the error, (2) whether the improper statement was cumulative of evidence properly admitted, and (3) whether the error could be cured by an instruction. *State v. Perez-*

limited questioning of Detective Thorp and that the prosecutor’s questioning went well beyond the evidence elicited on direct examination. 12/18/12 RP 130, 131-32, 132-33.

Valdez, 172 Wn.2d 808, 856, 265 P.3d 853 (2011). This Court reviews the denial of a motion for mistrial for an abuse of discretion. *Id.* at 858.

Here, the error was serious. As the trial court noted, it was “very prejudicial” for the “officer [to testify he] thinks somebody is guilty.” 12/18/12 RP 130. The testimony was “completely impermissible” and “highly prejudicial.” 12/18/12 RP 132. Lay witnesses are not permitted to opine on an accused’s guilt.

Montgomery, 163 Wn.2d at 591. Yet, that’s precisely what Detective Thorp did. 12/18/12 RP 59-60. He told the jury he believed Mr. Thomas was guilty of the charged crime, and he bolstered his testimony by listing the evidence he believed pointed to Mr. Thomas. *Id.*

Moreover, it was not simply the testimony of any witness opining on Mr. Thomas’s guilt, it derived from the mouth of a police officer, cloaked in the prestige of that position. *Montgomery*, 163 Wn.2d at 595 (quoting *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)) *cf.* *United States v. Ortiz*, 362 F.3d 1274, 1278 (9th Cir.2004) (discussing prestige of government as applies to prosecutorial vouching).

Next, Detective Thorp’s testimony was not cumulative of any other properly admitted evidence. As the trial court emphasized

outside the presence of the jury, it is almost never appropriate for a police officer to provide his opinion of the accused's guilt. 12/18/12 RP 130-31, 134, 135. And the prosecutor's questioning and Detective Thorp's testimony went far beyond the single question from defense counsel. *Compare* 12/18/12 RP 34 *with* 12/18/12 RP 58-60; *see* 12/18/12 RP 130, 131-32, 132-33.

Third, the prejudicial effect of Detective Thorp explaining to the jury not only that he thought Mr. Thomas was guilty of assault, but also itemizing the evidence that he found persuasive in reaching that conclusion could not be cured by the court's comments, made exclusively to counsel, that "[t]he officer's determination about what happened is completely different from the work that the jury has to do. . . . The jury will hear the facts and make a determination." 12/18/12 RP 60. Even if any instruction could cure the "very prejudicial" testimony, the trial court did not tell the jury, as she did counsel, the probable cause is "one of the lowest standards available in terms of analyzing the evidence." 12/18/12 RP 129. The court did not compare the standard to beyond a reasonable doubt, or even strike the detective's testimony. *See* 12/18/12 RP 60-62. Detective Thorp's conclusion that Mr. Thomas

was guilty and his itemizing the evidence for the jury was a bell that could not be unrung.

The trial court abused its discretion in denying Mr. Thomas's motion for a mistrial. This court should reverse and remand.

2. The trial court abused its discretion in denying a mistrial when the State's witness testified, contrary to a pretrial ruling, that Mr. Thomas had a gun on the night in question.

The trial court also abused its discretion when it denied another motion for a mistrial after a State's witness testified that Mr. Thomas had a gun on the night in question. Upon Mr. Thomas's pretrial motion, Judge Erlick ruled that the State could not present evidence that Mr. Thomas had or displayed a gun at the motorcycle club on the night in question. 12/4/12 RP 136-40; CP 70-71.

Despite the pretrial order, Raymond Jennings testified that he was scared to confront Mr. Thomas because Mr. Jennings "remembered [Mr. Thomas] had a gun, so I figured that's what he hit her with was the gun." 12/12/12 RP 159. Defense counsel reacted immediately to the prejudicial statement, interposing an objection and requesting a sidebar. *Id.*; see 12/12/12 RP 169 (noting jury would have noticed defense counsel's immediate reaction to prejudicial testimony). The jury was instructed to disregard the comment, and was led out of the

courtroom while the parties discussed Mr. Thomas's motion for a mistrial. 12/12/12 RP 159-70. Upon denying Mr. Thomas's motion, the court called the jury back into the courtroom, reminded the jury to disregard the comment, that it could not be considered in any way and that there is no issue regarding a gun in the case. 12/12/12 RP 172-73. But the trial court abused its discretion in denying the mistrial motion because the error was serious, Mr. Jennings's testimony was not cumulative of properly admitted evidence, and the limiting instruction did not cure the taint. *Perez-Valdez*, 172 Wn.2d at 856.

First, the error was serious on two grounds. The evidence Mr. Thomas had a gun was entirely irrelevant and highly prejudicial. *E.g.*, *State v. Freeburg*, 105 Wn. App. 492, 20 P.3d 984 (2001) (reversing conviction because admission of weapon not harmless). In *Freeburg*, evidence that the accused had a loaded handgun when arrested was admitted as evidence of flight. 105 Wn. App. at 497. The gun evidence was not linked in any way to the charged offense. *Id.* at 500-01. "Evidence of weapons is highly prejudicial, and courts have 'uniformly condemned . . . evidence of . . . dangerous weapons . . . which have nothing to do with the charged crime.'" *Id.* at 501 (quoting *United States v. Warledo*, 557 F.2d 721 (10th Cir. 1977)) (third ellipses

added). In that case, as here, the admission of evidence the accused had a weapon is not harmless error. *Id.* at 502. In further support of the severity of the error, the jury viewed defense counsel's immediate reaction to the testimony, calling additional attention to the evidence and causing the jury to speculate as to why the evidence was so objectionable. 12/12/12 RP 169.

Second, the evidence Mr. Thomas had a gun was not cumulative of any other properly admitted evidence. As discussed, Mr. Thomas had moved to exclude any reference to the gun, and his motion was granted. 12/4/12 RP 136-40; CP 70-71.

Finally, the court's limiting instruction could not cure the taint. As set forth above, evidence of a weapon is highly prejudicial, particularly where entirely unrelated to the other evidence of the charged offense. Moreover, the testimony should be regarded in the cumulative with Detective Thorp's testimony that this defendant was the one who assaulted Ms. Heller. *See* Section E.1, *supra*; Section E. 5, *infra*.

3. The trial court denied Mr. Thomas's right to present a defense and abused its discretion by excluding evidence that Ms. Heller admitted attacking Mr. Thomas.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). These provisions require that an accused receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (emphasis added); *accord Washington*, 388 U.S. at 19.

While only relevant evidence is admissible, relevance is a low threshold. *See* ER 401, 402. Evidence is relevant if: (1) the evidence has a tendency to prove or disprove a fact (probative value), and (2) the fact is “of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, *Wash. Practice* § 82, at 168 (2d ed. 1982)); *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986)). Moreover, “[e]vidence tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.” *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added); *see Rice*, 48 Wn. App. at 12 (“Facts tending to establish a party’s theory of the case will generally be found to be relevant”).

So long as a defendant’s evidence is minimally relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). “Relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” *Id.*

Thus, although the trial court generally has discretion to determine whether evidence is admissible, an accused's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

Here, the trial court hampered Mr. Thomas's defense when it excluded evidence that Ms. Heller confessed she punched Mr. Thomas. The evidence from Ms. Spears was plainly relevant. The defense theory was that Mr. Thomas did not assault Ms. Heller, but that she attacked him. Evidence from Ms. Spears that Ms. Heller told Ms. Spears she attacked Mr. Thomas would have corroborated Mr. Thomas and Jesse Marvin's testimony in support of Mr. Thomas's defense. *See* 12/18/12 RP 73-79, 123-25 (Spears prepared to testify Heller told her she punched Thomas once for each grandchild); 12/17/12 RP 149-52, 180-83 (Marvin's testimony he overheard call from Heller to Thomas where Heller admitted attacking Thomas); 12/17/12 RP 48-51 (Thomas's testimony that Heller called and admitted attacking him); 12/13/12 RP 185-93 (Thomas's testimony that Heller attacked him). The exclusion directly implicated Mr. Thomas's ability to corroborate his defense.

Due process demands an accused be permitted to present evidence that is relevant and of consequence to his theory of the case. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924; *Rice*, 48 Wn. App. at 12. Because the court's exclusion of relevant evidence denied Mr. Thomas's Sixth Amendment right to present a defense, the error requires reversal unless the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. As discussed, Mr. Thomas's defense was that Ms. Heller attacked him. The excluded evidence directly supported the defense. Moreover, as the trial court itself recognized, the State's evidence left plenty of room for reasonable doubt. 12/19/12 RP 96 (Judge Schapira notes at sentencing she probably would not have found Thomas guilty because "a number of parts of the stories told by all the witnesses really didn't kind of hold together. . . .So I thought there was a reasonable doubt."). The State cannot show the excluded evidence would not have had an effect on the jury.

In *Maupin*, our Supreme Court reversed a murder conviction where the trial court erroneously excluded evidence of a witness who saw the victim with someone other than the defendant on the day of the alleged crime. 128 Wn.2d at 928, 930. Though the excluded evidence would not have necessarily resulted in an acquittal, it “casts substantial doubt on the State’s version of the crime.” *Id.* at 930. Thus it was “impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt.” *Id.*

To reverse the conviction, this Court need not find that Mr. Thomas’s version of events is “airtight.” *Jones*, 168 Wn.2d at 724. A reasonable jury hearing the excluded evidence may have reached a different result. *See id.* Accordingly, the error was not harmless and requires reversal of Mr. Thomas’s convictions with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

4. The trial court’s admission, over objection, of extensive photographs of Ms. Heller lying in a hospital gurney and injured prejudiced Mr. Thomas.

Even relevant evidence is inadmissible if it is substantially more prejudicial than probative. ER 403. As our Supreme Court recently noted, “Highly prejudicial images may sway a jury in ways that words cannot.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286

P.3d 673 (2012). “Such imagery, then, may be very difficult to overcome with an instruction.” *Id.* Because of the prejudicial nature of the repetitive photographs the State sought to admit, Mr. Thomas objected to their admission as cumulative and overly prejudicial. 12/6/12 RP 46-47; 12/13/12 RP 104-06.⁶ Eight of the photographs depicted Ms. Heller lying in a hospital gurney with a neck brace, with a breathing tube in her nose, and hooked up to numerous other intravenous devices, cords and tubes. Exhibits 1-8. Although the only injuries Ms. Heller complained of were to her face, the first photograph shows Ms. Heller’s full body, lengthwise and positioned with her face away from the camera. Exhibit 1. It is simply a scene shot and bears no relevance to the injuries claimed. The remaining six photographs zoom in on Ms. Heller’s face. Exhibits 2-8. While these photographs arguably bear more relevance, they are cumulative. Accordingly, the probative value of each is slight. Moreover, the State also admitted Exhibit 15, another close-up photograph of Ms. Heller’s facial injuries. 12/13/12 RP 104-06.

Although the court initially indicated it might exclude several of the exhibits, ultimately the trial court excluded only one of the

⁶ Copies of the nine photographic exhibits, of which only exhibit 7 was excluded, are attached as an Appendix.

photographs, Exhibit 7. 12/6/12 RP 53, 68-75. This exhibit was excluded because it is out of focus and looked similar to Exhibit 6, but not because it was prejudicial. 12/6/12 RP 73-75. The trial court allowed in the remaining eight cumulative photographs, displaying the alleged victim as helpless and severely wounded. This was an abuse of discretion. *See State v. Crenshaw*, 98 Wn.2d 789, 806-07, 659 P.2d 488 (1983) (cautioning courts and prosecutors must exercise restraint in admitting gruesome and repetitive photographs when the criminal act is amply proved by noninflammatory evidence); *State v. Sargent*, 40 Wn. App. 340, 348-49, 698 P.2d 598 (1985) (holding trial court abused its discretion in admitting several photographs of victim's body). In *Sargent*, the trial court admitted four autopsy photographs and two photographs showing the victim on a waterbed. 40 Wn. App. at 348-49. This Court reversed, holding that one autopsy picture would have been sufficient to show premeditation inferable from the force of the blows to the victim's head and the pictures on the waterbed were cumulative of testimony. *Id.*

Likewise here, the trial court abused its discretion by admitting eight separate photographs of Ms. Heller injured and in a hospital gurney because the slight probative value was substantially outweighed

by the likelihood of prejudice. Ms. Heller, her treating physician, the responding officer, and Raymond Jennings all testified to the nature of her injuries. *E.g.*, 12/6/12 RP 44-45; 12/12/12 RP 104-05, 109-13, 159; 12/17/12 RP 12-15, 21-23. “The State may present ‘ample evidence’ to prove every element of the crime [but] prosecutors do not have ‘carte blanche to introduce every piece of admissible evidence’ when the cumulative effect of that evidence is inflammatory and unnecessary.” *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006) (quoting *Crenshaw*, 98 Wn.2d at 807). But, in addition, the jury was exposed to eight different photographs of Ms. Heller. These photographs depict her in a vulnerable, injured state. They cry out for compassion rather than for a reasoned evaluation of the evidence. Evidentiary errors require reversal “if the error, within reasonable probability, materially affected the outcome.” *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). A new trial is necessary because the cumulative effect of these photographs carried a strong risk of prejudice and the value

placed on them by the jury cannot be quantified. *Salas*, 168 Wn.2d at 673.

5. By selecting alternate jurors off the record, the trial court violated Mr. Thomas's and the public's right to a public trial.

Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984) (quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 91 L. Ed. 2d 1546 (1947)).

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."); Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury . . .").

In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Const. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community

concern or outrage regarding violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 501; accord *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley*, 558 U.S. at 213; *State v. Sublett*, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012); *State v. Wise*, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012); *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Likewise, in an opinion authored by Supreme Court Justice Charlie Wiggins, Division Two recently held that the selection of alternate jurors is a part of jury selection that must be open to the public under the experience and logic test. *State v. Jones*, 175 Wn. App. 87,

95-104, 303 P.3d 1084 (2013). Under the experience prong, the court found the selection of alternate jurors traditionally has been open to the public because in the general experience it is part of voir dire held in open court. *Id.* at 96-101. The court noted that “Washington’s first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors.” *Id.* at 98 (citing Laws of 1917, ch. 37, § 1). When that rule was replaced by Criminal Rule 6.5, the selection of alternates remained a part of general voir dire. *Id.* at 99 (citing CrR 6.5; RCW 10.49.070). Several pattern instructions and local rules compel the same conclusion. *See id.* at 99-101 (citing various rules and pattern instructions). “Taken together, both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court.” *Id.* at 101. The *Jones* Court further held logic dictates alternate juror selection must be presumptively open in fairness to the defendant and to remind the trial court of the importance of its functions. 175 Wn. App. at 101-02.

Thus, absent an on-the-record *Bone-Club* analysis, the trial court cannot close alternate juror selection. *Id.* at 102-03. Like in *Jones*, here the trial judge selected alternates in a procedure noted on the record but during a time at which the court was not actually on the public record. *See id.* at 102-03; 12/19/12 RP 3.⁷ The trial court simply stated:

We're going on the record. We made it on the record. We just did a random selection of little pieces of paper and the defense picked Juror No. 3 as the first alternate and the State picked Juror No. 4 as the second alternate. So they'll be dismissed with instructions at the end of closing [argument].

12/19/12 RP 3. Like in *Jones*, the results were announced in public after the selection occurred. 175 Wn. App. at 102. "Thus, the alternate juror drawing occurred off the record and outside of the trial proceedings." *Id.* As the court noted in *Jones*,

The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been. Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record. This lack of assurance raises serious questions regarding the overall fairness of the trial, and

⁷ Although no such showing is required for appellate review of a public trial violation, spectators were present during Mr. Thomas's trial. 12/6/12 RP 24.

indicates that court personnel should be reminded of the importance of their duties.

175 Wn. App. at 102.

Because the drawing of alternate jurors was done during a court recess off the record without a *Bone-Club* inquiry, Mr. Thomas's conviction should be reversed and the matter remanded for a new trial. *See Wise*, 176 Wn.2d at 18; *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005); *Easterling*, 157 Wn.2d at 181; *Jones*, 175 Wn. App. at 96, 103-04.

6. Cumulative trial errors denied Mr. Thomas his constitutional right to a fair trial.

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Thomas a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v.*

Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *Coe*, 101 Wn.2d at 789; *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury’s verdict. The trial judge not only recognized the likelihood of reversible error on appeal and that “very prejudicial” evidence was erroneously admitted, but she also commented that, if seated on the jury, she would have had reasonable doubt as to Mr. Thomas’s guilt. 12/18/12 RP 130, 131-32; 12/19/12 RP 96. In addition to the “stories” of the witnesses not holding together, 12/19/12 RP 96, the jury received extensive prejudicial evidence that should have been excluded: Detective Thorp told the jury his professional opinion that Mr. Thomas was guilty of assault based on witness statements and the photographs; Mr. Jennings

testified Mr. Thomas had a gun, which was entirely irrelevant to the charges, was specifically excluded from the trial, and carries inherent prejudice; and the jury saw repetitive photographs of Ms. Heller receiving treatment in the emergency room and injured. On top of these prejudicial admissions, the trial court excluded evidence essential to the defense that Ms. Heller was the aggressor—Ms. Spears’s testimony about a conversation with Ms. Heller. Adding to the unfairness of the trial, the court selected alternates during a recess off the record.

Mr. Thomas’s conviction should be reversed because in the cumulative the trial errors denied him a constitutionally fair trial.

E. CONCLUSION

It cannot be said that Mr. Thomas had a fair trial. The jury erroneously received several pieces of evidence that were highly prejudicial—testimony from a police officer explaining the reasons he believes Mr. Thomas is guilty, testimony that Mr. Thomas had a gun, and extensive, repetitive photographs of the alleged victim in a hospital gurney with injuries made to look serious by the various apparatus surrounding her. But not only did the jury receive this information unnecessarily but it was precluded from learning of evidence

corroborating Mr. Thomas's defense. Finally, contrary to our robust constitutional right to a public trial, the trial court held part of voir dire—the selection of alternate jurors—off the record and during a recess. Standing alone, or in the cumulative, these errors denied Mr. Thomas a fair trial.

DATED this 6th day of November, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX

12-165428

State Exhibit



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12-165428

State Exhibit

2



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State Exhibit

3

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State Exhibit

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State Exhibit

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State Exhibit

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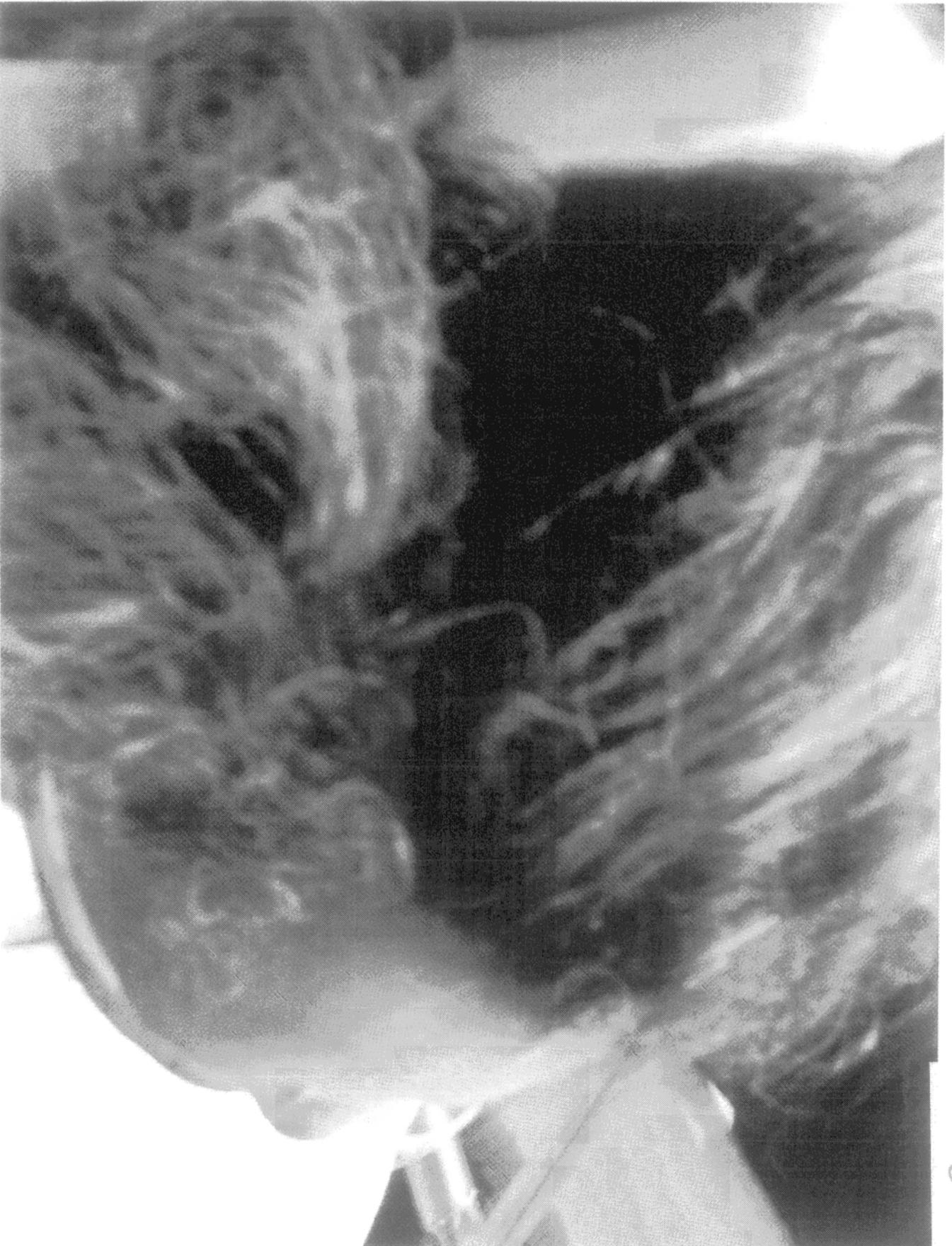
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State Exhibit - 15

12-165428

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

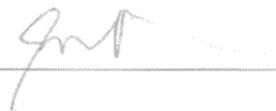
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 69835-4-I
)	
TONY RAY THOMAS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2013, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] TONY RAY THOMAS 12470 33 RD AVE NE APT 620 SEATTLE, WA 98125	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2013.

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