

**FILED**

**Sep 16, 2015**

Court of Appeals

Division III

State of Washington

Supreme Court No. \_\_\_\_\_ 92278-1

(Court of Appeals No. 32730-2-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent

v.

A.L.-A.,

Petitioner.

**FILED**  
SEP 24 2015

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

A.L.-A., appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

A.L.-A. appealed from a Yakima County Superior Court conviction. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUE PRESENTED FOR REVIEW

The State bears the burden to prove the essential elements of a criminal offense. As the crime was charged and prosecuted here, the State had to prove that, with the intent to inflict great bodily harm, A. assaulted her sister with a deadly weapon. To show it was a deadly weapon, the State had to prove that under the circumstances in which it was used, attempted to be used, or threatened to be used, the knife used by A. was readily capable of causing death or substantial bodily harm. Was the evidence presented at trial sufficient, and should review be granted pursuant to RAP 13.4(b)(1), (2)?

D. STATEMENT OF THE CASE

On April 1, 2014, A. L.-A. was 14 years old and living in her mother's home. RP 106. Several months earlier, her older sister, Yesenia's boyfriend had been permitted to move in with the family. RP 107. This created tension within the home, as the couple took over A.'s

bedroom. RP 107. That day, A. and her older sister Yesenia got into an argument. RP 109. According to Yesenia, A. said that if Yesenia did not open the bathroom door, A. would go into Yesenia's room and destroy her possessions. RP 22.

Yesenia telephoned their mother, Carmen Ayala, and told her she needed to come home and control A. RP 23. When Ms. Ayala came home, Yesenia opened the bathroom door, told Ms. Ayala that A. had hit their younger brother "for no reason,"<sup>1</sup> and accused A. of leaving condoms on the older sister's bed. RP 25. According to Yesenia, this last comment made A. "really mad" and A. came over and hit her. Id. Ms. Ayala described what ensued as a "fistfight" between the two sisters. RP 90.

Yesenia was angry and told their mother, "you better hit her, or I'm going to hit her or do something to her." RP 51. According to A., when Yesenia realized that their mother was not going to physically discipline A., Yesenia took A.'s Xbox games into the kitchen and started pouring water on them. RP 114. A. ran to Yesenia's closet to look for her sister's laptop to break it in retaliation. At this point, A. claimed, Yesenia hit A. in the back of the head with a frying pan.<sup>2</sup> RP 115-16.

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<sup>1</sup> A. denied this. RP 111.

<sup>2</sup> The juvenile court found Yesenia more credible than A., and rejected A.'s testimony that Yesenia attacked her with a pan, even though Yesenia's use of a pan to assault her sister was confirmed by Carmen Ayala. RP 97-98, 173, 175.

According to Yesenia, A. threw her television and laptop, breaking them. RP 28. Yesenia then grabbed A.'s Xbox and threw it outside. RP 34. After Yesenia broke the Xbox, A. went to the kitchen with her mother and picked up a knife, which she held to her own throat, crying that she wanted to kill herself, and kill her sister Yesenia.<sup>3</sup> RP 40, 52, 54. Yesenia overheard A. threaten to kill herself three or four times. RP 54. She said she was tired of everything and could not take it anymore. RP 58. Ms. Ayala became alarmed that A. would in fact kill herself, and called the police. RP 99; Ex. 7.<sup>4</sup>

Yesenia went into the kitchen. She saw A. holding the knife by her head with the blade pointing up. Then she swung it in an outward motion from her body. RP 56. Yesenia was a foot or two away from A. RP 42. Yesenia did not believe that A. actually intended to kill her, but her feelings were hurt. RP 44. Yesenia shoved A. against the counter with both hands.<sup>5</sup> RP 45. At this point, according to Yesenia, A. swung at her with the knife, which Yesenia believed resulted in her getting a cut on the outside of her arm. RP 45. Yesenia was not certain that this was how she

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<sup>3</sup> Ms. Ayala did not recall that A. threatened to kill Yesenia. RP 93.

<sup>4</sup> Exhibit 7 is a transcript of Ms. Ayala's 911 call, in which she repeatedly states that A. has a knife and will kill herself.

<sup>5</sup> Yesenia claimed that she pushed A. because she was worried A. might hurt their mother. RP 44-45.

sustained the cut, as she did not even notice it until ten or fifteen minutes later, when she felt it sting.<sup>6</sup> RP 47, 59. After Yesenia shoved A., A. ran out the back door. RP 48.

The cut that Yesenia sustained was two to three inches long. RP 75. Photographs taken by a police officer who responded to the 911 call show a shallow short cut on the exterior of Yesenia's arm with a thin trickle of blood at one end. Ex. 1, 2. The police referred A. for a consultation with mental health professionals. RP 70. They did not retrieve or attempt to photograph the knife. RP 70, 79-80, 83.

Based on these events, the State charged A. with four criminal counts: assault in the first degree, felony harassment, malicious mischief in the third degree, and assault in the second degree. CP 42-43. Following a fact-finding hearing, the trial court convicted A. of first-degree assault and malicious mischief, and acquitted her of felony harassment and assault in the second degree.<sup>7</sup> CP 12.

A. appealed her conviction, arguing the evidence was insufficient to show she intended to inflict great bodily harm, or that the knife, as used,

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<sup>6</sup> A. testified that she did not cut Yesenia with the knife. She believed the injury was a fingernail scratch that probably occurred when she was trying to wrest the frying pan from Yesenia's hands. RP 125. The trial court rejected the testimony that the cut was a fingernail scratch, RP 175, but, as A.'s counsel argued, there was nothing about the appearance of the injury that was inconsistent with a fingernail scratch. RP 157.

<sup>7</sup> Because the second-degree assault charge was an alternative to the assault in the first degree charge, the court did not reach this count in its oral ruling, but in the court's written disposition order, it found A. not guilty of the charge. CP 12.

constituted a deadly weapon. On August 18, 2015, the Court of Appeals affirmed her conviction. Slip Op. at 8.

She seeks review in this Court. RAP 13.4(b)(1), (3).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND WITH OTHER DECISIONS OF THE COURT OF APPEALS. RAP 13.4(b)(1), (2).

1. Because the State failed to prove that A. intended to inflict great bodily harm, the evidence was insufficient and review should be granted.

At trial, the State was required to prove that A. actually intended to kill her older sister, Yesenia, or that she intended to inflict injuries so serious that they would create a probability of death.

Under RCW 9.94A.110(4)(c), the mens rea required to commit assault in the first degree is the specific intent to commit great bodily harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). “Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result.” Elmi, 166 Wn.2d at 215 (quoting State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (emphasis added)).

Thus, the State was required to show that A. specifically intended – not just the physical act of holding or even thrusting the knife – but that



she intended to cause the specific result that followed -- the purportedly serious injuries to her sister. See Elmi, 166 Wn.2d at 215. A. never intended to kill or to seriously injure Yesenia, even if her injuries were, in fact, serious.<sup>8</sup> A.'s lack of intent was evident – not only from Yesenia's own testimony, but from the trial court's findings. CP \_\_\_, sub. no. 53 (CL 2). Yesenia testified at trial that she never believed A. seriously threatened to kill her that day during the argument. RP 44. The trial court apparently did not believe so either, since the court acquitted A. of felony harassment, finding no intentional threat to kill. CP \_\_\_, sub. no. 53 (CL 2).

Accordingly, the Court of Appeals decision affirming the conviction is in conflict with decisions of this Court, as well as other decisions of the Court of Appeals. Review should be granted. RAP 13.4(b)(1), (2).

2. Because there was insufficient evidence that the knife, under these circumstances, was a deadly weapon, review should be granted.

The State failed to prove at trial that the knife, in its "inherent capacity and 'the circumstances in which it [was] used,'" was a deadly weapon. See State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995) (quoting statutory language). A weapon's ready capability is

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<sup>8</sup> The seriousness of the injury is not conceded, since Yesenia did not even notice the cut for some time, and officers did not even suggest medical attention be offered to her. RP 45-47, 75.

assessed in terms of its potential for inflicting substantial bodily harm. Id.; see State v. McKague, 172 Wn.2d 802, 805-06, 262 P.3d 1225 (2011) (defining “substantial”).

The Court of Appeals compares the instant case to State v. Holmes, a first degree robbery case. 106 Wn. App. 775, 781-82, 24 P.3d 118 (2001). Holmes, which involved an armed robbery of a grocery store in the middle of the night, is inapposite. Id. at 782. The case before this Court merely involved an argument between two sisters, the younger of whom, the appellant, was 14 years old. RP 106. The complainant here, Yesenia, also admittedly threw punches, made threats, and destroyed property during the altercation in the instant case. RP 28, 34-35, 45, 51, 90.

Even in the light most favorable to the State, without a showing that Yesenia was actually endangered, simply showing that A. was swinging the knife in front of her fails to prove what is required under the statute: that in the manner in which it was used, the knife was readily capable of causing death or substantial bodily harm.

Without proof that the knife was used or threatened to be used in such a way as to make it “readily capable” of causing substantial bodily harm or death, for a cut as inconsequential as Yesenia’s to qualify as substantial bodily harm in order to support a conviction for first-degree

assault—a crime reserved for the most serious assaults short of death—this would render the term “substantial” redundant.

The evidence presented at trial failed to establish that the circumstances in which the knife was used prove the knife was a deadly weapon, as required by the statute. Neither does the evidence establish that the knife was readily capable of causing death or substantial bodily harm. RCW 9A.04.110(4), (6); McKague, 172 Wn.2d at 805-06.

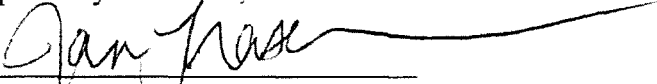
Accordingly, because the Court of Appeals decision is in conflict with decisions of this Court, and with other decisions of the Court of Appeals, review should be granted. RAP 13.4(b)(1), (2).

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court, and with other decisions of the Court of Appeals. RAP 13.4(b)(1), (2).

DATED this 16<sup>th</sup> day of September, 2015.

Respectfully submitted,

  
\_\_\_\_\_  
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Washington Appellate Project  
Attorneys for Petitioner

APPENDIX

**FILED**  
**AUGUST 18, 2015**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32730-2-III
	)	
v.	)	
	)	UNPUBLISHED OPINION
A.L.-A. <sup>1</sup> , (D.O.B. 6/11/99),	)	
	)	
Appellant.	)	

KORSMO, J. — A.L.-A. appeals her juvenile court adjudication of guilt for first degree assault. She contends the evidence was insufficient to prove beyond a reasonable doubt that she intended to inflict great bodily harm or that the knife she used constituted a deadly weapon. Viewing the evidence in the light most favorable to the State, we are satisfied that the evidence was sufficient to prove the assault. We affirm.

FACTS

During the early afternoon of April 1, 2014, then 14-year-old A.L.-A. began to argue with her older sister, Y.A.<sup>2</sup> Report of Proceedings (RP) at 16, 21. When Y.A.

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<sup>1</sup> Under RAP 3.4, we change the title of the case to the juvenile's initials to protect the juvenile's interest in privacy.

<sup>2</sup> This court uses initials when referring to appellant's relatives to protect her privacy.

retreated to the bathroom to take a shower, A.L.-A. began banging on the door and demanding that Y.A. open the door. A.L.-A. repeatedly demanded that her sister open the door and threatened to destroy her sister's possessions if she did not do so. Y.A. eventually opened the door and A.L.-A. went in and out of the bathroom.

Y.A. telephoned their mother, C.A., and told her she needed to come home and control A.L.-A. When C.A. returned home, Y.A. informed her that A.L.-A. had been hitting her younger brother for no reason and had been leaving condoms on Y.A.'s bed. According to Y.A., this last comment incensed A.L.-A. and she started hitting Y.A. with her fist in the face and stomach. In retaliation, Y.A. told A.L.-A. that she was going to break A.L.-A.'s Xbox. This infuriated A.L.-A., who then threw a laptop and television that belonged to Y.A. In response, Y.A. grabbed A.L.-A.'s Xbox and threw it outside.

A.L.-A. then went into the kitchen with her mother, picked up a sharp steak knife and started swinging it back and forth with the blade pointed upward while yelling that she wanted to kill herself and Y.A. A.L.-A.'s mother called the police and Y.A. pushed A.L.-A. into the kitchen counter, fearing that she was going to hurt their mother. In response, A.L.-A. took a step toward Y.A. and swung at her with the knife, cutting Y.A.'s left arm in the process. A.L.-A. ran outside with the knife.

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The State charged A.L.-A. with first degree assault, felony harassment, third degree malicious mischief, and second degree assault. At trial, Y.A. testified that the kitchen knife was "pretty sharp" and estimated that the total length was about seven inches. RP at 40. She also testified that she did not notice the cut on her arm until about ten to fifteen minutes after the incident and that she did not believe that A.L.-A. actually intended to kill her. A police officer testified that the cut on Y.A.'s arm was shallow and about two to three inches long. RP at 75; *see also* State's Exhibit 2.

When A.L.-A. testified, she stated that she had been angry because Y.A. had recently moved home with her boyfriend and taken A.L.-A.'s bedroom. She admitted that she and her sister had been arguing and that she pushed her sister. She also admitted that she cut Y.A., but claimed that she only used her fingernails. She also admitted that she put a knife to her throat and threatened to kill herself, but denied cutting Y.A. with the knife.

The juvenile court found A.L.-A. guilty of first degree assault and third degree malicious mischief. The court entered the following relevant findings of fact:

1.12) The Respondent was holding the knife in her right hand, blade forward and pointed upward, swinging the knife back and forth in a forward motion and at the same time yelling that she was going to kill [Y.A.]. When the Respondent was holding the knife, and threatening to kill [Y.A.], the two were close, only one to two feet apart. The Respondent was capable of carrying out the threat.

1.13) While the record did not establish the length of the blade itself on the seven inch kitchen knife, the facts established that the physical attributes of the kitchen knife in combination with the way it was held, waived [sic] around, threatened to be used (both verbally and physically) and actually swung at . . . [was] capable of significant lacerations of the flesh of the victim, [Y.A.] which could have easily resulted in permanent scarring [sic] and disfigurement (for instance, had the knife slashed her face), *i.e.*, great bodily harm. Thus, the knife was a deadly weapon under RCW 9A.04.110(6).

1.16) The Respondent, close to [Y.A.], lifted the knife over her head and swung the knife at [Y.A.] inflicting a wound on [Y.A.]'s left arm approximately two to three inches long between her shoulder and her elbow, drawing blood. Responding Police Officer Matt Lee described the length of the cut as significant. Given the escalating tensions, the immediately preceding physical assault on [Y.A.], the Respondent's verbal threats to kill [Y.A.] in the kitchen coupled with her wielding the knife and contemporaneous actions evidencing a present willingness to use the knife to carry out the threat, the Court is persuaded beyond a reasonable doubt that Respondent did in fact intend to cause great bodily harm. (It is not essential that "great bodily harm" actually occur.)

1.17) The Respondent's actions were an intentional cutting of [Y.A.] with the knife and were in fact harmful to [Y.A.]. Thus, Respondent's actions constituted an intentional assault.

Clerks Papers (CP) at 54-56.

#### ANALYSIS

A.L.-A. argues that insufficient evidence supports her adjudication for first degree assault because the State failed to prove beyond a reasonable doubt that she intended to inflict great bodily harm or that the knife constituted a deadly weapon. We disagree.



When we review a sufficiency challenge to a conviction, we determine whether “after viewing the evidence most favorable to the [State], any rational trier of fact could have found the essential elements” of the crime “beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (emphasis omitted). “A sufficiency challenge admits the truth of the State’s evidence and accepts the reasonable inferences to be made from it.” *State v. O’Neil*, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007).

A.L.-A. first argues that the State failed to present evidence that she intended to inflict great bodily injury. She points out that she did not lunge at Y.A. or hold the knife in a manner that suggested she intended to hurt Y.A., rather she swung the knife in front of her in an outward motion from her own body and when the altercation ended, she ran out the back door.

As relevant here, under RCW 9A.36.011, first degree assault occurs when a person, “with intent to inflict great bodily harm . . . assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.36.011(1)(a). “Great bodily harm” is defined as “bodily injury which creates a probability of death or which causes a significant permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c). Intent is present when a person “acts with the objective

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or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010.

“Evidence of intent . . . is to be gathered from all the circumstances of the case.” *State v. Ferreira*, 69 Wn. App. 465, 468, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989)).

Here, the evidence shows that A.L.-A. was angry and out of control before she wielded the knife. As tensions between her and her sister escalated, A.L.-A. destroyed some of Y.A.’s personal property and hit her in the face and stomach with her fists. She then grabbed a knife from the kitchen and swung it back and forth while threatening to kill Y.A. After Y.A. pushed her, A.L.-A. thrust the knife forward, cutting Y.A.’s left arm. Viewing this evidence in the light most favorable to the State, the State presented sufficient evidence to support the court’s finding that A.L.-A. intended to inflict great bodily harm on Y.A.

A.L.-A. also argues that the State did not meet its burden of showing she was armed with a deadly weapon. Again, we disagree. Objects other than firearms and explosives qualify as deadly weapons if the State proves, under the circumstances of the case, that the object was “readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). In turn, “substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but

substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any body part.” RCW 9A.04.110(4)(b).

A.L.-A. argues that the State failed to show that the knife *actually* caused substantial bodily harm because the minor cut at issue in the case does not qualify as substantial disfigurement. She points out that the cut was two- to three-inches long and that Y.A. did not even notice when it was inflicted. This argument misses the mark.

The nature of the actual injury inflicted is only one factor in determining whether the knife was capable of inflicting substantial bodily harm. *State v. Holmes*, 106 Wn. App. 775, 781-82, 24 P.3d 1118 (2001). Other factors include the intent and ability of the user, the degree of force, and the part of the body to which it was applied. *Holmes*, 106 Wn. App. at 782. Thus, the issue here is whether the knife, under the circumstances in which it was used, or threatened to be used, was readily capable of causing temporary but substantial disfigurement. *State v. Shilling*, 77 Wn. App. 269, 273, 492 P.2d 233 (1972) (“[r]eady capability is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm.”). In *State v. Barragan*, 102 Wn. App. 754, 761, 9 P.3d 942 (2000), for example, a pencil was deemed a deadly weapon where the evidence showed that the defendant forcefully swung the pencil’s pointed end at the victim’s eye and threatened to kill the victim. “[T]here must be some manifestation of willingness to

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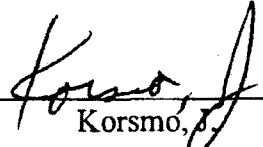
use the knife before it can be found to be a deadly weapon under RCW 9A.04.110(6).”

*State v. Gotcher*, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988).

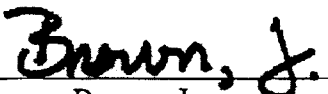
A.L.-A. manifested a ready willingness to use the knife to cause severe injury. She swung the knife in an upward motion in close proximity to her sister and cut her arm. While the resulting cut was not deep, the potential for impairment, as RCW 9A.04.110(6) requires, was great. Viewed in a light most favorable to the State, the State presented sufficient evidence that the knife was possessed in such circumstances that it was readily capable of causing substantial bodily harm and thus a deadly weapon. We therefore conclude that sufficient evidence supports the adjudication of guilt for first degree assault.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Korsmo, J.

WE CONCUR:

  
Brown, J.

  
Siddoway, C.J.

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August 18, 2015

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CASE # 327302  
State of Washington v. Abigail Lopez Ayala  
YAKIMA COUNTY SUPERIOR COURT No. 148002492

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

  
Renee S. Townsley  
Clerk/Administrator

RST:ko  
Attach.  
c: E-mail Hon. Doug Federspiel

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. ) COA NO. 32730-2-III  
 )  
 A.L-A., )  
 )  
 Juvenile Petitioner. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

TAMARA HANLON, DPA  
 [tamara.hanlon@co.yakima.wa.us]  
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U.S. MAIL  
 HAND DELIVERY  
 AGREED E-SERVICE  
 VIA COA PORTAL

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2015.

X \_\_\_\_\_ 

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