71520-8

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Court of Appeals
Division I
State of Washington

COA No. 71520-8-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD CHENOWETH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable David R. Needy

REPLY BRIEF

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WASHINGTON CASES

A. REPLY ARGUMENT

1. THE TRIAL COURT IMPROPERLY ALLOWED THE DEFENDANT'S WIFE TO TESTIFY DESPITE MR. CHENOWETH'S INVOCATION OF THE SPOUSAL PRIVILEGE.

Mr. Chenoweth relies on the arguments in his Appellant's Opening Brief. Additionally, the provision at issue in Mr. Chenoweth's case is RCW 5.60.060(1), which allows a spouse to invoke the privilege and preclude testimony by a spouse, unless the matter involves a criminal action committed against any child. As argued, this provision, read with the accepted definitions of "child" excludes a person of 19 years of age such as C.C. See Black's Law Dictionary, http://thelawdictionary.org/child; State v. Besabe, 166 Wn. App. 872, 271 P.3d 387 (2012) (noting that RCW 9A.42.010(3) defines a child as "a person under eighteen years of age").

The State contends that the use of the phrase "minor child" in RCW 5.60.060(2), relating to the privilege of a parent or guardian to not be examined regarding communications between the minor child and the minor child's attorney, shows that the phrase "any child" in section (1) must mean any issue of the parent or guardian. SRB, at pp. 15-16. However, section (2) of the privilege statute was not passed at the time of the 1989 re-enactment of the

parent/guardian privilege. See Laws of 1989, Chapter 10 (S.S.B. No. 5034). Rather, section (2) was enacted in 1997. Laws 1997, Ch. 338 (S.H.B. 3900). The 1997 provision provides for an alteration to the general rule of privilege between attorneys and clients, which excepts communications where a third person is present, see, e.g., State v. Martin, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999), and provides that a parent's presence during discussions between his or her minor child and that child's attorney does not destroy the privilege. The provision was specifically a part of Legislative action taken with a focus on juvenile offenders. Laws 1997, Ch. 338 (S.H.B. 3900). Given the structure of the existing statute and the history of section (2)'s passage, the use of the term "minor child" in subsection (2) should have no bearing on the interpretation of section (1), and the term "child" in section (1) is properly read to mean the traditional legal definition of child, as shown in legal reference materials and other Washington statutes.

Further, reading the word "child" to mean a person under the age of 18 is consistent with the foregoing history and the case law discussing this exception to the spousal privilege, which indicates that the purpose of the exception is to accord *children* the special protection of the courts and the laws. State v. Waleczek, 90 Wn.2d

746, 751, 585 P.2d 797 (1978) (noting that in carving out the parent or guardian exception to the marital privilege, the legislature acknowledged the paramount intent to protect children from physical and sexual abuse); State v. Sanders, 66 Wn. App. 878, 884, 833 P.2d 452 (1992) (purpose of exception was to effectuate the strong public policy of protecting children). See also State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718, 720 (1996) (where statute ambiguous, court may look to legislative history for insight into legislative intent).

2. THE "HUE AND CRY" RULE IS *PREMISED* ON THE NOTION THAT THE MERE "FACT OF COMPLAINT" IS ADMISSIBLE AND PROBATIVE TO BOLSTER THE COMPLAINANT'S ACCUSATION, AND THE RULE STATES THAT THE SUBSTANCE OF THE COMPLAINT IS NEVER ADMISSIBLE.

a. Therefore, the State's argument that there was 'no error and no harm' because the trial court did not admit the "substance" or details of the complaint, does not show either the absence of error, or any harmlessness.

Mr. Chenoweth has argued that the trial court erred in allowing multiple witnesses to testify that a year or more after the incidents, C.C. reported, to them, the alleged abuse by Mr. Chenoweth, despite the reports' untimeliness under the hue and cry rule. AOB, at pp. 8-14 (also noting that trial court stated the

complaints were certainly not timely). Admission violated the rule. The Opening Brief detailed cases such as Ferguson which state the rule that a "hue and cry" statement *must* be timely. AOB, at pp. 10-11 (citing, *inter alia*, State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983)).

In response, first, Respondent appears to be arguing that there is never error, or harm, if the trial court excludes the substantive details related to the witness by the person making the complaint. SRB, at pp. 19-20, 22, 26-27. This argument is a miscasting of the basis of the "fact of complaint" or hue and cry rule. Properly applied, "hue and cry" always admits only the fact that a complaint was made. Substance – the details of the incident, the identity of the perpetrator, etc. – is never admissible under the rule, and it is error to allow such details. The error (here) of admitting an untimely complaint is not cured because there wasn't further error under the rule – admitting substantive details.

Respondent next looks at Ferguson, and cases from 1952 and 1949 cited in Ferguson, and suggests they actually reject the timeliness requirement. SRB, at pp. 23-27. But the Washington cases do not reject timeliness as a requirement of hue and cry.

In Ferguson the Court specifically stated that the evidence must show "that the complaint was timely made;" the appellant in that case did not prevail on appeal, however, because that criteria was followed, and the error of admitting certain substantive details of the complaint, such as the identity of the claimed perpetrator, was held harmless in the case. State v. Ferguson, 100 Wn.2d at 135-36.

State v. Goebel is similar; there, the Court stated that the complaint must be "promptly made" for hue and cry to apply, and noted that the rule does not permit the witness to relate substantive details of the hue and cry. State v. Goebel, 40 Wn.2d 18, 24-25, 240 P.2d 251 (1952).

And in the case of State v. Alexander, 64 Wn. App. 147, 152, 822 P.2d 1250 (1992), the Court of Appeals merely found that the defendant had *waived* his "timeliness" objection under the hue and cry rule, by not making that objection below. The Court fully noted the existence of the timeliness requirement, which is central to the rule. State v. Alexander, 64 Wn. App. at 150 (quoting State v. Murley, 35 Wn.2d 233, 236-37, 212 P.2d 801 (1949) (stating that the credibility of the complaining witness "may be supported by evidence of her timely prior out-of-court complaint.")).

When the Alexander Court said that "the State no longer bears such a burden," the Court was **not** stating that the modern hue and cry rule lacks the timeliness requirement. SRB, at p. 27 (quoting Alexander).

Instead, the Court was describing an ancient, discredited doctrine in rape cases, where the absence of evidence of a timely complaint *created an inference that the victim's entire accusation was fabricated* -- compelling the State to affirmatively show in its case-in-chief, as an essential element of the proof, that the victim did make a "hue and cry." Alexander, 64 Wn. App. at 152.

That ancient doctrine has long and rightly been disapproved of. But the timeliness requirement is a full, modern requirement for admission under the hue and cry rule of *evidence*. AOB, at pp. 10-13. It is no mere technicality, or holdover -- the rule is grounded in the reasoning that an outcry made soon after an incident – *compared* to accusations made against a person a long time later – may be reliable *enough* to overcome the general prohibition against hearsay. See also State v. Bray, 23 Wn. App. 117, 121–22, 594 P.2d 1363 (1979). The hue and cry doctrine centrally requires that the complaint be timely, and here the court admitted multiple facts of complaint despite finding untimeliness.

For further example, in State v. Ackerman, the Court of Appeals rejected the appellant's argument that the hue and cry rule was violated by a testifying witness. The Court noted the contours of the rule and found no error where the trial court had found the complaint timely, and had also limited the testimony to the fact of complaint only, not substantive details:

> The fact of complaint or "hue and cry" doctrine is a case law exception to the hearsay rule. State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). It allows the State in a sex offense case to present evidence in its case in chief that the victim made a timely complaint to someone after the assault. State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). Details of the complaint and the identity of the offender are not permitted. Id. In the pretrial hearing on admissibility, P.K.'s schoolmates and the school counselor testified P.K. made a complaint of abuse and they further provided details of her statements. But at trial, the court only allowed testimony that P.K. stated she had been abused. These statements establishing that she made timely complaints were properly admitted under the fact of complaint doctrine. DeBolt, 61 Wn. App. at 63, 808 P.2d 794.

State v. Ackerman, 90 Wn. App. 477, 481-82, 953 P.2d 816, 819 (1998); see also State v. Tewee, 176 Wn. App. 964, 970-71, 309 P.3d 791, 794 (2013), review denied, 179 Wn. 2d 1016, 318 P.3d 280 (2014) (where trial court decided victim's disclosures were timely under "hue and cry," and detective could therefore testify to

fact of disclosure, defendant later waived objection that the witness testified to substantive details, when he did not object).

Next, the State argues that it was proper for the court to admit the hearsay simply in order to show what the witnesses "did next." This is erroneous. SRB, at pp. 20-23.

Of course, Mr. Chenoweth's jury was never instructed, by cautionary instruction stated by the court at the time this evidence was admitted through the multiple witnesses, or by any final written jury instruction, that C.C.'s making of complaints of abuse were not admitted for their truth. They were so admitted to the jury, wrongly.

Further, as argued in the Opening Brief, inadmissible hearsay is not made admissible – including via a "non-hearsay" rationale -- under the rubric that it is simply offered to show 'what the officer did next' and the like. See, e.g., People v. Crump, 319 Illinois. App.3d 538, 543-44, 745 N.E.2d 692 (2001).

In this regard, the State writes that the witnesses, in particular the several social workers who were among the many allowed to testify to the fact of complaint, could so testify because they generally "were testifying about C.C. being vulnerable." SRB, at p. 20. The reasoning offered appears to be this – these witnesses were telling the jury about their examinations or

observations of C.C.'s mental status, and it would be "illogical" for those witnesses to not also tell the jury that the reason they were doing that was because he had made accusations of sex crimes against him by his father, so, 'next,' they interviewed C.C. SRB, at p. 22.

But the police or other witnesses do not get to relate the complainant's own statements and claims of a defendant's wrongdoing, e.g., 'the victim stated to us that he was sexually abused!,' under the logic that the witness was collecting evidence or investigating – i.e., 'what they did next.' See AOB, at pp. 12-13; see also State v. Edwards, 131 Wn. App. 611, 614-15, 128 P.3d 631 (2006) (rejecting State's claim of a non-hearsay reason for offering out of court statements, as to explain why detective started his investigation, where such matter is not in controversy) (citing ER 401 and State v. Roberts, 80 Wn. App. 342, 352–53, 908 P.2d 892 (1996)).

Similarly, the social workers were not entitled to relate C.C.'s facts of complaint simply because their assignment to evaluate him originated back to assertions of abuse – these individuals, like police officers, simply found themselves investigating, or found

themselves assigned to, the matter of C.C.[1] That is why they did what they did 'next.'

State v. Iverson, cited by Respondent, is not to the contrary. SRB, at pp. 22-23. The Iverson case involved a *bench* trial, in which the court -- as trier of fact -- stated on the record at the time of its evidentiary ruling that it was not admitting the out-of-court statement for its truth, and noted in its written CrR 7.1 findings that it had not considered the statement for its truth, only as part of the explanation of the police department's investigation into whether the declarant was the person protected by a no-contact order against the defendant. State v. Iverson, 126 Wn. App. 329, 336-37, 108 P.3d 799, 802 (2005).

The present case is different, as it does not involve a trier of fact that was legally instructed or cautioned, much less knew of its own accord, to not take the witnesses' testimony about C.C.'s complaints as proof of the charges.

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[1] These particular witnesses properly testified about their actions in the case, and there was no evidentiary right to go further by relating the fact of C.C.'s complaints of abuse. Adult Protective Services case worker Kim Tyler testified that she was assigned to "the case" of C.C. by her supervisor and thus she interviewed C.C., 12/9/13RP at 120-22; and Compass Mental Health therapist Bonnie Edwards testified she assessed C.C. because she assesses all people who walk or are sent through the door of her facility for services, per DSHS guidelines. 12/9/13RP at 143-48.

Ultimately, the trial court's reasoning was in error when the court concluded the evidence was admissible despite the untimeliness disqualifier. Allowing multiple witnesses to bolster the State's claims by repeatedly testifying to C.C.'s making of the complaint was not admissible under the fact of complaint or "hue and cry" rule, because the statements were not timely under that rule's fundamental requirement.

b. <u>The error was harmful in the particular circumstances of this case, and requires reversal</u>. The hue and cry errors were affirmatively harmful and require reversal, an argument that is not obviated by the fact that the court, properly, admitted no substantive details of the complaint.

As argued in the Opening Brief, these many witnesses caused reversible prejudice – for all the very reasons that parties plaintiff desire to proffer "hue and cry" evidence.

In addition to the social workers, the jury was told that C.C. reported the incidents to multiple persons, including but not limited to his sister Laura Lind, and his mother Jaianni, and this heavily bolstered his trial testimony. C.C. himself was permitted to testify that he told his mother about the matter. He was further permitted to testify that he also made the complaint to Adult Protective

Services. And Officer Holmes also testified to the fact of complaint. 12/9/13RP at 80-83; 12/11/13RP at 33-35; 12/9/13RP at 100-02; 12/9/13RP at 121-22, 137-38.

A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The hearsay errors require reversal here. The prosecutor, in this case of no physical evidence, argued forcefully in closing that the supporting evidence in the case included Jaianni Chenoweth's testimony about C.C. coming forward, because he became uncomfortable about what he said had happened. 12/11/13RP at 63-64. The State used the fact of the disclosures to bolster its argument that C.C.'s claim was credible, for that reason. 12/11/13RP at 72. This theme was again repeated in the prosecutor's rebuttal. 12/11/13RP at 93. Within reasonable probabilities, the hearsay errors had a material effect on the outcome of Mr. Chenoweth's trial.

3. THERE WAS NO WAIVER OR CONCESSION OF THE CONSTITUTIONAL ERROR OF THE COMMENT ON THE EVIDENCE.

a. Mr. Chenoweth did not concede or waive the issue of the improper jury instruction, which he objected to and took exception to as a comment on the evidence, both in its original

form and with the court's added *caveat* that the jury is the judge of credibility.

It is contrary to the fully-developed record on this trial issue, for the Respondent to contend that Mr. Chenoweth somehow conceded, or waived, the issue of his objections to the court's instruction 9a, as an unconstitutional comment on the evidence violating Wash. Const. art IV, § 16. See Brief of Respondent, at p. 28.

There was certainly no waiver or concession. First, comments on the evidence are manifest constitutional error under RAP 2.5(a)(3) and therefore can be raised for the first time on appeal.

And Mr. Chenoweth did object to "any instruction whatsoever being given" to the effect that corroboration was not necessary to find the defendant guilty of the charge. 12/11/13RP at 50. He argued such instruction was (1) a comment on the evidence, (2) invaded the jury's province to determine credibility and weigh the testimony of the trial witnesses, and (3) was inconsistent with the reasonable doubt instruction which instructs the jury to consider not only the State's evidence adduced, but any lack of evidence. 12/11/13RP at 47-58.

In its effort to persuade this Court that the defendant conceded or waived this issue, the Respondent misreads the record by writing that defense counsel stated "we" concede the issue. SRB, at p. 28. The State writes that the defense acknowledg[ed] that "the Washington Supreme Court has upheld the instruction, and we are bound by its ruling."
SRB, at p. 28 (citing 12/11/13RP at 51).

But defense counsel, in this argument to the trial court, was reading from a *decision* of the Court of Appeals, where that Court stated that the Supreme Court in Clayton had upheld the non-corroboration instruction, and therefore the *Court of Appeals* was bound by it. State v. Zimmerman, 130 Wn. App. 170, 181-82, 121 P.3d 1216 (2005) (citing State v. Clayton, 32 Wn.2d 571, 572, 202 P.2d 922 (1949)). There was no defense concession, or waiver, of the issue for appeal.

It is true that defense counsel at trial did not hone his argument along the particular reasoning that the instructional language's obvious impropriety (as seemingly communicating the trial court's view of the merits) lacked the cure of being an 'accurate legal statement' regarding non-necessity of corroboration. This is not of material moment. The defense made the correct objection

(comment on the evidence, etc.), the trial court accepted the defense objections and exceptions, and then analyzed the jury instruction under the appropriate legal framework. The court correctly stated that the questions raised by the defense were whether the instruction was a comment on the evidence that inappropriately emphasized the testimony of one witness over another, and so on. 12/11/13RP at 52.

However, the court then went on to wrongly answer to the question that it had correctly identified. The court erred *as a matter of law* when it held that the instruction was not commenting on the evidence because Washington law expressly states it requires no corroboration for incest. 12/11/13RP at 52.

As discussed extensively in the Opening Brief, incest is not a chapter 44 crime.[2] There was no defense concession, or waiver, of the legal issue that was properly placed before the trial court.

This is pivotal. The cases and authorities discussed in the Opening Brief make clear that this instruction's language would be deemed a glaringly violative comment on the evidence except that it is – as far as rape and other chapter 44 cases – a correct

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[2] The charge of rape under 9A.44 was dismissed at the close of the evidence, 12/11/13RP at 41-47; CP 73 (Order of Dismissal); yet it was after that that the prosecutor urged the 9A.44 instruction upon the trial court. 12/11/13RP at 47-51.

statement of the Legislature's affirmatively-expressed law on the specific matter of 9A.44 offenses. Zimmerman found the non-corroboration instruction to be non-error very reluctantly, suggesting it was a comment on the evidence irregardless, but feeling obliged to uphold the instruction under the categorical rule that a jury instruction that correctly states the law is, per se, never a comment on the evidence. Zimmerman, 130 Wn. App. at 180-83.

For the foregoing reasons, there was no waiver or failure to place the proper legal challenge before the trial court. And in any event as noted this error may be raised *entirely* for the first time on appeal under RAP 2.5(a)(3).

> Because judicial comments on the evidence are explicitly prohibited by the Washington Constitution we conclude that Levy raises an issue involving a manifest constitutional error, and his claim may be heard on appeal even though he did not object to the instructions at trial.

State v. Levy, 156 Wn. 2d 709, 719-20, 132 P.3d 1076, 1081 (2006). Here, Mr. Chenoweth's counsel did object, multiple times, below, and he is not precluded from arguing the issue in this forum, including by pointing out that incest is a chapter RCW 9A.64 crime,

not chapter 44, conclusively making the jury instruction a constitutional error.[3]

b. The instruction was constitutional error. Without the "cure" of the instruction being an accurate statement of the law, all the misgivings of the courts and the committee on jury instructions come to the fore. For example, the Zimmerman decision noted that the Supreme Court's committee on jury instructions recommends against using such an instruction – ever -- and the Court noted that it did "share the Committee's misgivings," but held that it was bound by the fact that the statement was – in that case -- a correct legal statement and therefore categorically could not be a comment on the evidence. Zimmerman, 130 Wn. App. at 182–83.

4. REVERSAL IS REQUIRED.

a. Reversal for the hearsay error, or the instructional error. Reversal is required for the comment on the evidence individually, just as reversal is required for the hearsay error, individually. Reversal is also required for cumulative error.

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[3] As argued in the Opening Brief, the instruction was also misleading, prevented the defense from arguing its theory of the case, invaded the province of the jury, and diluted the standard of proof of beyond a reasonable doubt. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011); State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. 14.

First, on review, the Court will presume a comment on the evidence was prejudicial. State v. Bogner, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963). The State cannot meet its burden to show that the wrongly-given instruction did not have the direct effect of allowing the jury to find criminal guilt based on the allegations of C.C. alone, as being enough to convict Mr. Chenoweth. The statement by the court in Instruction 9a was deeply harmful because it appeared to express this very attitude toward the merits of the case, and this is the problem with comments on the evidence. See Clayton, at 572-74; State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). Notably, the Court in Lane reversed because the trial court commented on a matter that supported the credibility of a prosecution witness – and that witness was not even the accusing complainant. Lane, 125 Wn.2d at 839.

Here, jury instruction 9a was even more prejudicial in and of itself. The instruction expressly singled out the accuser as a particular witness from among all the evidence proffered or elicited by the parties, and announced that this particular witness – apparently unlike any other piece of evidence – carried such a

value that the jury could properly decide the case at hand based on *it alone*. Zimmerman at 174, 180-81.

Yet it is still even more prejudicial than the foregoing, in this case, that, because of instruction 9a, the State in closing argument was able to pronounce – with support in the court's legal instructions – that the absence of other evidence beyond C.C.'s words was of little or no importance. The State specifically relied on instruction 9a to emphasize all the things that the State had *no burden to do*:

> What this instruction merely tells you is that it is sufficient if you find the evidence credible, if you find the witness credible, and you feel the State has proved to you beyond a reasonable doubt based on that testimony that the crime was committed, we don't have to provide any other evidence. We don't have to provide any corroboration.

12/11/13RP at 63-64. Instruction 9a was constitutional error that allowed this argument and all the more requires reversal because of it.

b. Cumulative error, in the circumstances of the case.

The trial should also not have included any of the "hue and cry" testimony regarding disclosure that came from multiple witnesses under the fact of complaint rule, which repeatedly bolstered C.C.'s trial claim. And the jury should never have been told that it could

rely on C.C.'s testimony alone, or told to ignore the defense argument in closing that there was an absence of evidence – two related errors that dramatically favored the State in this case where there was a paucity of supporting evidence. Mr. Chenoweth's counsel *tried* to argue that the prosecution's case lacked the crucial corroboration it needed. 12/11/13RP at 75-76, 85-86. But the erroneous jury instruction thoroughly supported the *State's* argument. Then, in an additional error that contributes to cumulative prejudice, the court wrongly instructed the jury to disregard the defense argument asking why there was not other evidence from witnesses who could have been helpful. AOB Assignment of Error 4. But the prosecutor, in rebuttal, again dismissed the need for the State to show any corroboration, stating that acts such as the defendant was accused of do not get committed "in front of other people." 12/11/13RP at 90.

All of these errors individually require reversal, but they also aggregated and together carried a cumulative prejudicial impact on the verdict. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court should reverse.

B. CONCLUSION

Based on the foregoing, Mr. Chenoweth respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 12 day of March, 2015.

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Washington Appellate Project - 9105
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71520-8-I
v.	)	
	)	
CHAD CHENOWETH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF MARCH, 2015.

X_____

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