97386-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 35362-1-III
(consolidated with no. 35363-0-III)

STATE OF WASHINGTON, Respondent,

v.

BRADLEY LEITH MERSON, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Bradley Leith Merson requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on June 18, 2019, affirming his conviction for communicating with a minor for immoral purposes. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

1. Police searched, without a warrant, a cell phone that Merson gave to K.F., a minor girl, and used to converse with her over text message. The Court of Appeals held that Merson lacked a constitutionally protected privacy interest in the phone but did not address his claim to a privacy interest in the messages he sent to K.F., and which police recovered from the phone and introduced against Merson at trial. Because a sender of text messages has a privacy interest in the messages pursuant to *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) and because insufficient evidence establishes that police received consent to

recover the messages without a warrant, the Court of Appeals' ruling should be reversed.

2. The State charged Merson with communicating with a minor for immoral purposes under RCW 9.68A.090(b) based upon messages he sent to K.F. in which they discussed her becoming his wife and the mother of his children and engaged in other non-obscene, non-explicit, but flirtatious banter. This Court has previously limited the reach of RCW 9.68A.090(b) to restrict its intrusion into protected First Amendment Activity. Under the cases limiting the statute to "promoting [children's] exposure to and involvement in sexual misconduct," the charged conduct does not constitute a crime and the conviction should be reversed.

IV. STATEMENT OF THE CASE

Bradley Merson, who was 48 years old at the time, met fourteen-year-old K.F.[1] on a social networking app called Whisper. I RP 139-40, III RP 401-02; CP 25. K.F. had an iPhone given to her by her family, but Merson gave her a Samsung phone to communicate with him. I RP 29-30,

[1] Merson's appeal was consolidated with his appeal of similar convictions arising from a relationship he developed with another underage girl, J.M. I RP 26-27, CP 175, 371, 409. Because only the conviction for communicating with a minor for immoral purposes as to K.F. is at issue here, the facts concerning J.M. are not relevant to the petition.

145-46. They took steps to keep the phone secret from K.F.'s family. Exhibit 3 at line 8-11 (Merson instructing K.F. to hid the phone well and K.F. responding "I won't let them see it."); line 981, 983-84 (Merson and K.F. discussing whether K.F. should take the phone to school to prevent its discovery). Eventually, the relationship became physical. I RP 144. K.F.'s parents learned about the second phone after K.F. skipped school and came home with it. When they confronted her, she told them where she had gotten it. III RP 388-89. K.F.'s parents then contacted the police and gave them both of K.F.'s phones. III RP 387, 389.

Subsequently, police obtained written consent to search the iPhone given to K.F. by her parents. I RP 29-30. But there is no similar evidence of consent to search the Samsung phone given to her by Merson. I RP 30. At a pretrial evidentiary hearing, police testified that K.F. knew the Samsung phone would be searched and did not object, but no witness – including K.F., who testified at the pretrial hearing – claimed that affirmative consent was given to search it. I RP 32, 139-66.

Police used an extraction program to retrieve text messages between Merson and K.F. contained on the Samsung phone. III RP 306, 313, 328. Some of the messages gave rise to the charge of communicating with a minor for immoral purposes. III RP 325, 328, 417-26, CP 322.

Merson asked the trial court to suppress the recovered messages, arguing that police did not obtain consent to search the Samsung phone. II RP 190. The trial court denied the motion, concluding that Merson voluntarily abandoned his interest in the phone by giving it to K.F. II RP 209. Subsequently, the messages were introduced in Merson's trial and K.F. read some of them into the record from the extraction report. III RP 325-28, 418-26. The messages included conversations about getting married and having children (Exhibit 3 at line 783, 1176, 1365; III RP 424-26), conversations in which K.F. texted Merson pictures of outfits she was trying on for a school presentation and they discussed her appearance (Exhibit 3 at line 1188-90; III RP 418-22), and other humorous banter of a flirtatious, but not explicit, nature (Exhibit 3 at line 1470, "I'll play Dr with u too!"; line 152, 156, K.F. describing people walking in on her in the bathroom three times that week and Merson responding, "I want a turn!").

A jury convicted Merson and the trial court sentenced him to 41 months' confinement. CP 371-73. On appeal, Merson contended that the trial court erred in denying his motion to suppress because he retained a privacy interest in the messages sent, regardless of who possessed the phone from which they were recovered. *Appellant's Brief* at 12. He further contended that the text messages fell outside the limited range of conduct prohibited by the statute criminalizing communicating with a

minor for immoral purposes, RCW 9.68A.090(b). *Appellant's Brief* at 24-27. The Court of Appeals did not address Merson's argument that he had a privacy interest in the test messages separate from any possessory right to the phone and held only that Merson lacked a privacy interest in the phone after he gave it to K.F. *Opinion* at 4-5. It also concluded that the evidence was sufficient to submit the question whether the messages sought to induce K.F. to engage in sexual conduct with Merson to the jury. *Opinion* at 7. Merson now requests review of these holdings.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The case is appropriate for review under RAP 13.4(b)(1), (3), and (4). As to the first issue, concerning Merson's privacy interest in the text messages contained on another person's phone, the Court of Appeals' holding conflicts with this Court's recognition in *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014) that sending a text message to another person's phone does not extinguish the sender's privacy interest. Because the relationship between the digital communication sent to a phone and the abandonment doctrine presents a significant question of constitutional magnitude under article I, section 7 of the Washington Constitution, review should be granted. As to the second issue, this Court has already recognized that the speech prohibited by RCW 9.68A.090(b) must be limited to avoid infringing on First Amendment rights and previous

rulings construing the statute have addressed only sexually explicit communications. Thus, whether the statute's prohibition reaches non-explicit communications such as those present in this case presents a question of constitutional significance. Furthermore, because rulings on both issues will clarify existing ambiguities in the law, they are likely to be of considerable public interest.

A. Review is appropriate to reconcile the privacy interest in one's sent text messages with the abandonment doctrine.

Washington affords its citizens some of the strongest protections against interception of private communications in the country. *Hinton*, 179 Wn.2d at 871. In *Hinton*, this Court held:

> Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text communication to the possibility of exposure on someone else's phone.

Id. at 873. Although there is always a possibility that such messages may be voluntarily disclosed to a third party, this Court refused to convert the possibility of discovery into a sanction of government intrusion. *Id.* at 874.

In contrast with *Hinton*, which acknowledged that a sender's text messages are a "private affair" under article I, section 7, in *State v.*

Samalia, 186 Wn.2d 262, 375 P.3d 1082 (2016), this Court held that a person may lose their interest in a cell phone and its contents through abandonment. Under the abandonment doctrine, a privacy interest is abandoned "when a defendant leaves an item in a place in which the defendant has no privacy interest as an attempt to evade the police." *Id.* at 277. In *Samalia*, this Court upheld the warrantless search of a cell phone recovered from a stolen vehicle after the defendant fled to evade law enforcement, noting that "given that the area of the search is of critical importance, Samalia had no privacy interest in the stolen vehicle." *Id.* at 279.

The present case lies at the intersection between *Hinton* and *Samalia* and requires consideration of when and under what circumstances a sender of text messages loses his privacy interest in them by virtue of his lack of possession of the phone hardware. The Court of Appeals concluded only that Merson "has not established that he had a privacy interest in the phone he had given to K.F."[2] *Opinion*, at 5. It reasoned that because he gave the phone to K.F., he did not retain a superior privacy

[2] The Court of Appeals also failed to address Merson's argument that the trial court's finding that K.F. and her parents consented to a search of the Samsung phone was unsupported by substantial evidence when the record established only acquiescence rather than affirmative consent to act. *Appellant's Supplemental Brief*, at 3-4. Thus, the Court of Appeals treats the existence of valid consent to search as undisputed. *See Opinion*, at 4 ("The question presented is whether he maintained a privacy interest vis-à-vis K.F. to challenge her consent to the search.").

interest to her. *Id.* But the Court of Appeals did not consider *Hinton* and its holding that the message itself is a private affair that does not become unprotected merely because it can be intercepted. Thus, whether Merson possessed a privacy interest in the phone is only relevant to the extent that his lack of possession of the phone determines his interest in the messages sent to that phone. *Hinton* strongly suggests that the privacy interest in the messages is independent from the privacy interest in the phone's hardware.

Whether a person loses their expectation of privacy in the messages sent to a cell phone by giving the cell phone to another raises significant questions about the scope of privacy afforded to all Washington citizens under article I, section 7 that is likely to be of significant public interest as an emerging concern in the digital era. Accordingly, the Court should accept review under RAP 13.4(b)(3) and (4). Moreover, the Court of Appeals' holding that Merson lacked a privacy interest in the text messages retrieved from the phone conflicts with *Hinton.* Accordingly, review should be granted under RAP 13.4(b)(1).

B. Review is appropriate to consider whether the First Amendment permits the criminalization of flirtatious but non-sexually-explicit text messaging with a minor.

In *State v. Schimmelpfennig*, 92 Wn.2d 95, 101, 594 P.2d 442 (1979), this Court considered the First Amendment implications of the statute prohibiting communicating with a minor for immoral purposes and concluded, "The State may legitimately prohibit speech of a harmful sexual nature to minors, even where that speech is protected by the First Amendment with regard to adults." Accordingly, the *Schimmelpfennig* Court interpreted the scope of the crime to be limited "to communication for the purposes of sexual misconduct." *Id.* at 102.

In the published cases addressing the evidence necessary to convict under the statute, all involve sexually explicit language directed at a child. *Schemmelpfennig* involved an explicit request to a four-year-old child to engage in various sex acts. 92 Wn.2d at 97. In *State v. McNallie*, 120 Wn.2d 925, 926-27, 846 P.2d 1358 (1993), the defendant asked three minor girls if there was anybody in the area who gave hand jobs, suggested it would be possible to earn money by doing so, and handled his penis in front of them. In *State v. Luther*, 65 Wn. App. 424, 425, 830 P.2d 674 (1992), a minor boy asked a minor girl to engage in fellatio with him.

In *State v. Ajutilly*, 149 Wn. App. 286, 290-91, 202 P.3d 1004, *review denied*, 166 Wn.2d 1026 (2009), the defendant described performing sex acts on a purported child and sent the purported child pornographic images and videos. And in *State v. Hosier*, 157 Wn.2d 1, 4-5, 133 P.3d 936 (2006), the defendant wrote a message fantasizing about sexual contact with a seven-year-old on a pair of children's underwear and also left notes in the yard of a 13-year-old girl explicitly describing having sex with her. Because the communications in those cases fall squarely within the statute's prohibition against harmful sexual communications with children, no First Amendment implications arose.

The statements attributed to Merson are markedly different from the statements previously held sufficient to establish a crime under RCW 9.68A.090(b) in that they contain no explicit description of or invitation to sexual misconduct, and only reference sexual activity indirectly at all (by reference to pregnancy after marriage). While *Schimmelpfennig* permits the inference that a course of conduct can comprise communication along with the spoken word, 92 Wn.2d 103, and while Merson's course of conduct toward K.F. eventually led to acts of sexual misconduct, interpreting Merson's text messages to K.F. in light of their subsequent sexual relationship muddies the First Amendment waters rather than clarifying them.

Although Merson's words themselves fall far short of speech of a harmful sexual nature, in affirming the conviction, the Court of Appeals construed language that would almost certainly not be criminal had the relationship never progressed physically as "predatory" and "sexualized" based upon his later conduct. *See Opinion*, at 8. Under the Court of Appeals' interpretation, it is unclear where the line is drawn between constitutionally protected, mildly flirtatious speech and unprotected language promoting sexual misconduct. The opinion creates a significant risk of *post hoc* interpretation of generally innocuous comments as sexually charged and harmful, as a result of subsequent events informing later readings. This decreases the likelihood that a person will know, at the time of speaking, whether the words constitute a crime or not.

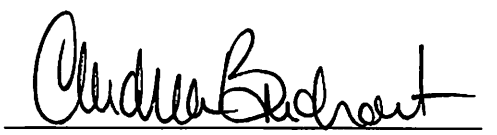
This case provides an opportunity to consider the permissible limits of non-obscene communications with minors in light of the First Amendment considerations. The Court's analysis is likely to be of significant public interest in light of the existing case law's emphasis on sexually explicit speech, as Merson's case will clarify the boundaries between protected and unprotected speech directed at minors. Accordingly, review should be granted under RAP 13.4(b)(3) and (4).

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (3), and (4) and this Court should enter a ruling that (1) Merson retained a constitutionally protected privacy interest in the text messages he sent to K.F.'s phone even though he lacked a possessory interest in the phone, and a warrant or an exception to the warrant requirement was needed to search for the messages; and (2) Merson's non-obscene and non-sexual communications with K.F. do not fall within the limited prohibition of RCW 9.68A.090(b).

RESPECTFULLY SUBMITTED this 18 day of July, 2019.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Bradley Leith Merson, DOC #928483
Coyote Ridge Correctional Center
PO Box 769
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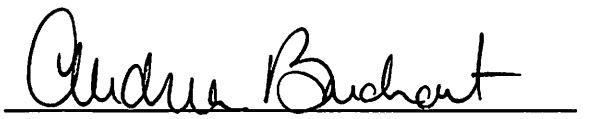
And, pursuant to prior agreement of the parties, by e-mail through the court's electronic filing portal to:

Michael J. Ellis
Deputy Prosecuting Attorney
Yakima County Prosecuting Attorney
Michael.ellis@co.yakima.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 18 day of July, 2019 in Kennewick, Washington.



Andrea Burkhart

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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,	)	
	)	No. 35362-1-III
Respondent,	)	(Consolidated with
	)	No. 35363-0-III)
v.	)	
	)	
BRADLEY LEITH MERSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Bradley Merson appeals from seven convictions arising in two separate files for becoming sexually involved with young teenage girls. He challenges solely the single conviction for communicating with a minor for immoral purposes. Concluding that he had no reasonable expectation of privacy in the cell phone that he gave to his victim and that the evidence was sufficient to support the jury's verdict, we affirm the convictions and remand to strike various legal financial obligations (LFOs).

FACTS

The facts essential for this appeal revolve around a cell phone that Mr. Merson, then 48, gave to fourteen-year-old K.F. Her parents already had given her an iPhone, but they exercised supervisory authority over that phone. Merson gave K.F. a Samsung Galaxy phone in order that his relationship with the child could be kept hidden from her

APPENDIX

parents. He instructed her to keep the phone's existence a secret[1] and to use only that phone when contacting him.

The two used the Galaxy phone to engage in extensive text messaging conversations over several months, as well to exchange photos and to speak to each other.[2] K.F. also used that phone to contact others, but she kept its existence secret from her parents. It came to light, however, after K.F. had truancy issues and she disclosed her relationship with Merson to her parents, who also became aware of the phone. They brought their daughter and both phones to the police in order to discuss the relationship between K.F. and Merson. They told the officers that the Galaxy phone had been a gift to K.F.

The family cooperated with law enforcement. K.F. placed multiple calls to Merson that were recorded with her consent. When told that law enforcement desired to check both telephones for evidence of communication with Merson, the parents handed them to police. K.F.'s parents signed a written consent for a forensic search of the iPhone. The consent form, however, did not mention the Galaxy.

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[1] This recalls Gandalf's repeated admonition to Frodo upon receiving the One Ring from Bilbo: "keep it safe, keep it secret!" J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 63, 68 (Ballantine Books 1972) (1954).

[2] The contents of some of those conversations will be discussed in the latter part of this opinion.

Law enforcement recovered numerous communications from the Galaxy phone that became an exhibit at trial. K.F. read some of the text messages to the jury.

The defense moved to suppress the results of the search of the Galaxy phone, arguing that his consent was needed to search the phone since he paid for the monthly service and used it to text message K.F. The trial court disagreed, concluding that Mr. Merson did not have a privacy interest in the phone and that K.F.'s parents could properly consent to the search by law enforcement.

The cases went to separate jury trials in the Yakima County Superior Court. After jurors returned seven guilty verdicts, the trial court imposed an exceptional sentence. Mr. Merson then timely appealed to this court.

ANALYSIS

This appeal raises two substantive challenges to the conviction for communicating with a minor. Although Mr. Merson raises multiple challenges to the search of the Galaxy phone, we need only discuss whether he had a reasonable privacy interest in the phone. We then turn to his sufficiency of the evidence argument before briefly discussing his LFO challenges.

Search of Galaxy Phone

The dispositive question is whether Mr. Merson had a privacy interest that would allow him to challenge the search of the Galaxy phone. We conclude he did not.

Under art. I, § 7[3] of the Washington constitution, the consideration is whether a defendant's "private affairs" have been invaded without authority of law. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). That term "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* at 511. An unreasonable intrusion into those interests constitutes a search. *Id.* at 510.

A person has a privacy interest in his or her own cell phone. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). The problem for Mr. Merson is that he gave the cell phone to K.F. The question presented is whether he maintained a privacy interest vis-à-vis K.F. to challenge her consent to the search. Under well-established state authority, he did not.

The "common authority" doctrine of *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), was adopted "as the proper guide" to address "questions of consent issues under Const. art. I, § 7." *State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984). Under this standard, a person with equal authority may consent to a search. *Id.* at 543-544. A person who shares authority with another "has a

[3] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

lessened expectation that his affairs will remain only within his purview." *State v. Leach*, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989).

Merson had purchased and given the cell phone to K.F., but also paid for the monthly service plan. He was not present when the child and her parents turned the phone over to police and authorized the search. In light of these facts—particularly the gift of the phone and the child's possessory right to share it with others—any privacy interest that Mr. Merson might have retained was not superior to hers and does not constitute solely his "private affairs."

He has not established that he had a privacy interest in the phone he had given to K.F. For that reason, the trial court correctly denied the motion to suppress.

Evidentiary Sufficiency

Mr. Merson next challenges the sufficiency of the evidence to support the communicating with a minor conviction. Although this is a closer issue than the previous one, it ultimately fails. The evidence allowed the jury to conclude as it did.

Long settled standards also govern review of this issue. Our sufficiency review is that dictated by the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 317-318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Specifically, the test for evidentiary sufficiency is "whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Washington likewise follows this standard. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). Under *Jackson*, the question presented is whether the trier of fact *could* find the element(s) proved, not whether it should have done so.

In reviewing insufficiency claims, the appellant necessarily admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, this court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

This statute has been the subject of prior court constructions that aid our understanding of its reach. The seminal modern case involving this statute is *State v. Schimmelpfennig*, 92 Wn.2d 95, 594 P.2d 442 (1979). There the court concluded that the word "communicate" was not unconstitutionally vague. *Id.* at 103. Noting that the word was one of common usage, the court determined that it "denotes both a course of conduct and the spoken word." *Id.* The court also concluded that looking at the context of the statute in the criminal codes, the statute gave "ample notice" of legislative intent to

prohibit "sexual misconduct." *Id.* at 102. Asking young children to enter a van and engage in sexual activities was immoral conduct. *Id.* at 103.

Of a similar vein is *State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993). There the defendant asked three young girls, ages 10 and 11, about the availability of "hand jobs" and exposed his penis to them. He was convicted of two counts of communicating for immoral purposes. *Id.* at 926-928. The court rejected the defendant's vagueness argument, determining that "sexual misconduct" was not limited to activities proscribed in chapter 9.68A RCW. *Id.* at 933. The goal of the communicating statute is to prohibit "communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." *Id.* Thus, the statute "incorporates within its scope a relatively broad range of sexual conduct involving a minor." *State v. Jackman*, 156 Wn.2d 736, 748, 132 P.3d 136 (2006).

K.F. testified at trial to some of the text messages recovered from the Galaxy phone. Mr. Merson argues that those messages did not amount to a violation of the statute because they did not seek to induce K.F. to engage in sexual conduct with him. We believe the jury was free to disagree.

Appellant relates the testimony at some length in his brief, emphasizing that there was not any express request to act in the here and now. However, that is an overly narrow view of the statute and his communications while ignoring the "course of

conduct." *Schimmelpfennig*, 92 Wn.2d at 103. He told K.F. that he wanted her to be his wife and the mother of his children; he expressed his interest in obtaining pictures of her, particularly pictures showing her butt; told her how much he liked her butt and that "I want it;" asked if she sent to or received from other guys sexy pictures; asserted that he wanted to walk in on her unexpectedly in the shower or using the toilet; he also wanted to "play doctor" with her. At a minimum, these last references suggest voyeurism and child molestation. In sum, the entirety of these comments show a long-term sexualized conversation with a 14-year-old that ultimately resulted in his seduction of the child.

The text messages served a predatory purpose of exposing K.F. to sexual misconduct. As in *McNallie*, this behavior promoted a sexualized relationship between the two and exposed the child to sexual misconduct. We believe this evidence was sufficient to support the jury's conclusion.

Financial Obligations

Lastly, Mr. Merson challenges the imposition of discretionary LFOs involving incarceration and medical costs, as well as the imposition of the criminal filing fee and the DNA collection fee. In the interests of judicial economy, the State agrees that the costs should be struck from the judgment and sentence.

We accept the concession in light of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). On remand, the court should strike the noted discretionary fees.

Affirmed and remanded.

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:

Fearing, J.

Lawrence-Berrey, C.J.

BURKHART & BURKHART, PLLC

July 18, 2019 - 2:36 PM

Transmittal Information

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