

COURT OF APPEALS NO. 63403-8-1

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

STATE OF WASHINGTON

V.

MICHAEL D. ROE,

Appellant.

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

The Honorable David A. Kurtz, Judge

OPENING BRIEF OF APPELLANT

DANA M. LIND
Attorney for Appellant

NIELSEN, BROMAN & KOCH
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel.
2. Appellant was deprived of his right to a unanimous jury verdict.
3. The trial court acted outside its authority in ordering appellant to pay “the costs of crime-related counseling and medical treatment required by H.M.,” in the absence of any restitution hearing. CP 25.
4. The trial court acted outside its authority in ordering that appellant “not possess or control any item designated or used to entertain, attract or lure children.” CP 25.
5. The trial court acted outside its authority in ordering that appellant “not possess . . . alcohol and do not frequent establishments where alcohol is the chief commodity for sale.” CP 25.

Issues Pertaining to Assignments of Error

1. Did appellant receive ineffective assistance of counsel where his attorney elicited damaging evidence on cross-examination of the state's main witness that bolstered the state's case while severely undercutting that of the defense?

2. Was appellant deprived of his right to a unanimous jury verdict where the state presented two acts that could have formed the basis for the first degree incest charge, the state failed to elect which act the jury should rely on, and the court failed to give a unanimity instruction?

3. Did the trial court act outside its authority in ordering as a condition of community custody that appellant pay “the costs of crime-related counseling and medical treatment required by H.M.,” where no restitution hearing had been held and the state presented no proof of the supposed costs?

4. Did the trial court act outside its authority in ordering that appellant “not possess or control any item designated or used to entertain, attract or lure children,” where there was no evidence appellant used any item to lure or attract children in the current case?

5. Did the trial court act outside its authority in ordering that appellant “not possess . . . alcohol and do not frequent establishments where alcohol is the chief commodity for sale,” where there was no evidence appellant abused alcohol or that it contributed to his offense?

B. STATEMENT OF THE CASE

Appellant Michael Roe is appealing from his Snohomish County conviction for one count of second degree incest and one count of first degree incest, purportedly committed against his 16-year-old stepdaughter, H.M. CP 11-12. At Roe's jury trial, H.M. described two events allegedly occurring on the evening of June 19, and the morning of June 20, forming the basis for the charges.¹ 1RP 10-25. Roe testified in his own defense, maintaining he did nothing untoward on June 19 and explaining whatever happened the following morning was inadvertent. 2RP 36-50.

1. State's Case

H.M. testified she was sitting downstairs in the home office working on the computer, when Roe came home late from work on June 19. H.M.'s sister K.M. and their mother Heather Mullen were upstairs. 1RP 10. Roe told H.M. one of his friends complimented H.M. and K.M. for being good kids. 1RP 10.

According to H.M., Roe turned her chair around and pulled her onto his lap. RP 10. H.M. claimed Roe rubbed H.M.'s rib cage with his knuckles and told her she was skinny. 1RP 11. Jokingly, H.M. reportedly responded that she was fat. 1RP 12. H.M. claimed

¹ The trial took place on February 24, 2009 (1RP), and February 25, 2009 (2RP).

Roe grabbed her right breast and said, “no, that this is just fat, but it’s a good fat, don’t worry.” 1RP 12. H.M. testified she removed his hand and said good night. 1RP 13.

H.M. testified the next morning when she woke up, Roe was lying in her bed. 1RP 13. She testified Roe said she needed to get up because they were going for breakfast and started rubbing her back. 1RP 14. According to H.M., Roe pushed her shirt and bra up over her shoulders and put them on the pillows above H.M.’s head. 1RP 15. H.M. was lying on her stomach. RP 16.

While giving H.M. a back massage, Roe reportedly pulled her shorts down a little. 1RP 17. H.M. was wearing two pairs of shorts. 1RP 14. Roe reportedly took one pair off and began rubbing H.M.’s legs. 1RP 18. According to H.M., Roe removed the second pair together with H.M.’s underwear and asked if she ever had a “hard core ass massage.” 1RP 18.

When H.M. said no, Roe reportedly asked if she wanted one. 1RP 20. H.M. said she was unsure. 1RP 20. H.M. testified Roe put her shorts on the bed and started to rub from her buttocks down to her feet. As he rubbed back up toward H.M.’s core, H.M. claimed that in “one big motion,” he touched her vagina. 1RP 22. She claimed it was on “the inside” with his finger. 1RP 22-23. H.M.

testified she was putting her shirt back on, when Roe reportedly leaned down next to her and asked if she ever masturbated. 1RP 22. H.M. claimed that when she said no, Roe asked if she wanted to try. 1RP 24. H.M. testified she grabbed her shorts, backed off the bed and ran into her sister's room. 1RP 24.

H.M. climbed into her sister's bed and covered up. 1RP 25. Roe followed H.M. into the room and asked K.M. to give them a few minutes. 1RP 26. H.M. claimed that once K.M. left, Roe got in bed and put his arm around H.M. 1RP 27. Roe apologized and said H.M. didn't need to tell her mother because it was an accident. According to H.M., Roe apologized several more times before leaving. 1RP 28, 1RP 47.

H.M. did not tell her mother anything had happened until she got home from work that night. 1RP 29, 33. H.M. told her mother Roe had taken off her clothes and touched her. 1RP 33. Mullen confronted Roe and called police. RP 103. Roe asked for the chance to explain, but Mullen ordered him to leave. 1RP 34, 103. When police arrived, Roe was waiting for them outside. After

taking everyone's statements, including Roe's,² the police arrested Roe. 1RP 36, 169, 179.

2. Defense Case

When Roe met Mullen, he had no children of his own and no experience with young people. 1RP 59; 2RP 19. By his own admission, he had a "short fuse." 2RP 20. In fact, he and Mullen had separated the preceding winter. 2RP 29. During the interim, Roe took a parenting class and sought counseling for anger issues. 1RP 59, 136. He also went to a class on managing emotions during stressful events. 2RP 31.

H.M. testified that when Roe and Mullen reunited, Roe seemed to be making an effort toward being a better stepparent. 1RP 60. H.M. testified she and Roe got along well during the several months preceding June 2008. 1RP 36. Roe testified similarly. 2RP 32.

Roe testified that he was working late on June 19. When he returned home, H.M. was working on the computer downstairs. 2RP 36-37. Remembering his coworker's compliment about H.M. and K.M., Roe spun H.M. around in her chair, told her of the

² In his statement, Roe explained he touched H.M.'s vagina on accident. 1RP 182.

compliment, thanked her for being a good kid, and gave her a hug and a kiss on the cheek. 2RP 37-38. Roe denied pulling H.M. onto his lap, rubbing her ribs, telling her she was skinny or touching her breast. 2RP 38.

Much of Roe's testimony concerning the morning of June 20 was similar to H.M.'s. Roe went into her room to wake her up for breakfast. 2RP 42. H.M. has curtains that block the light and keep the room dark. 2RP 42. Instead of flipping on the light like he used to do, Roe decided to be less abrupt in waking H.M. 2RP 44. He tried to wake her by gently shaking her, but when that didn't work, he flicked her ear lightly and H.M. woke up. 2RP 45.

When H.M. complained about being woken up so early, Roe asked if she wanted her back cracked. Roe testified H.M. frequently asked to have her back cracked. 2RP 45. H.M. was lying on her stomach, and Roe tried to crack her back while sitting on her buttocks. 2RP 45. When Roe could not crack H.M.'s back, he asked if she would like a back rub. H.M. agreed. 2RP 45. Roe admitted he pushed H.M.'s shirt up over her shoulders. 2RP 46. When he did so, H.M. told him he had just removed her bra. 2RP 46. Roe reminded H.M. she was faced down and he couldn't see anything. 2RP 46.

Roe testified H.M.'s shorts were riding up on her lower back, so he folded them over at the waistband. 2RP 46. Roe asked if H.M. ever had a butt rub. H.M. said no, but consented when Roe asked if she wanted one. 2RP 46. Roe testified he slipped H.M.'s shorts down to her knees. 2RP 46. Roe was kneeling on the bed next to H.M. massaging from her core down to her toes, as suggested in massage trade magazines. 2RP 47. As he continued, Roe placed H.M.'s shorts up by H.M. 2RP 47.

Roe testified he asked if H.M. was uncomfortable. H.M. said "a little," and put her shirt back on. Roe continued rubbing H.M.'s legs down to her feet. As he rubbed back up toward H.M.'s core, "[his] hand made contact with her crotch." 2RP 47. He said the contact lasted "half a second" and was more like "a bump." 2RP 49. It happened as he was messaging H.M.'s legs with his thumbs.

So as I was going up, I was going in this direction with my thumbs on the back of her leg and made contact with the crotch in that position there.

2RP 48.

Roe was shocked and embarrassed. 2RP 48. He also testified that when he made contact, "it felt moist." 2RP 48. Roe thought, "oh, my God, is she getting aroused from this back massage which was never the intention." 2RP 48. While "bumbling

for something to say,” Roe asked if H.M. ever masturbated. 2RP 49-50. Thinking H.M. might want some privacy, Roe asked if she wanted to. 2RP 50. H.M. said no and ran out of the room. 2RP 50.

Roe testified he followed H.M. into her sister’s room to apologize and to explain the touch was an accident. 2RP 52. Roe testified he did not ask H.M. not to tell her mother, but apologized for the accidental touch and embarrassing H.M. 2RP 52-53.

3. Cross-Examination of H.M.

On cross-examination, defense counsel questioned H.M. about an interview she gave with the defense earlier in the month. RP 63. Counsel specifically elicited a statement she gave accusing Roe of touching her vagina twice:

Now, on February 4th in that interview, about this, the 20th, the day of “the touch,” you said that he actually touched your vagina twice. Do you remember telling us that?

A Yes.

Q. Okay. But that’s not what you either put in that statement nor told your sister, am I correct? You didn’t say there were two touches, then?

A No.

Q. Okay. And when asked when Mike's [Roe's] fingers that penetrated your vagina, you said it was during both touches?

A. Yes.

Q. Okay. But this morning in your testimony Ms. Twitchell [the prosecutor] was eliciting, you didn't say that he touched you twice, you said he touched you and it was then when you grabbed your things and ran into your sister's room. So, now were there two touches or just one touch?

A. There were two because if I ever – then he asked me if I ever masturbated, and then he touched me again.

Q. Okay, So then, you are saying today that there were two touches after all?

A. Yes.

Q. Okay. But the first time that anyone heard about the two touches was on February the 4th at that defense interview, am I correct?

A. Yes.

RP 63-64.

On redirect, the prosecutor clarified the second touch happened right before H.M. ran out of the room and that it involved "an insertion into [her] vagina." 1RP 67-68.

C. ARGUMENT

1. ROE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Roe received ineffective assistance of counsel when his attorney elicited H.M.'s allegation that Roe touched her vagina twice. H.M. asserted it only happened once on direct, and there was no benefit to be gained by impeaching her on this point. Because the allegation Roe touched H.M. twice undercut Roe's defense that there was only one inadvertent touch, Roe was prejudiced by his counsel's deficient performance.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 686, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial

strategy or tactics, it constitutes ineffective assistance. Maurice, 79 Wn. App. at 552.

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694.

There was no legitimate tactic for defense counsel to elicit H.M.'s accusation that Roe touched her not once – but a second time – when he reportedly asked her if she wanted to masturbate. For whatever reason, the prosecutor left this second allegation alone on direct. Defense counsel likewise should have left it alone. Considering that the defense did not dispute that Roe accidentally touched H.M.'s vagina once, and there was only one first degree incest charge, there was little to be gained by revealing H.M. made one prior inconsistent statement alleging there were actually two touches. On the other hand, there was much to be lost by revealing this second touch allegation, because it undercut the main theory of the defense – that the touching was inadvertent.

Roe testified he accidentally and momentarily bumped H.M.'s vagina. Circumstantial evidence supported his defense.

H.M. testified Roe was fully dressed that morning. 1RP 60. Nothing in Roe's physical appearance indicated to H.M. that Roe was sexually excited. 1RP 63. Moreover, H.M., K.M. and their mother each testified Roe never previously showed any sexual interest in either sister. 1RP 65, 125; 2RP 7. These circumstances support Roe's testimony the touch was inadvertent.

In response, the state may argue that it was merely required to prove penetration, not purposeful action, and therefore whether Roe's touch was inadvertent was irrelevant. See e.g. 2RP 188-189 (prosecutor's closing argument). Any such argument should be rejected. Common sense dictates that an inadvertent touch is not likely to actually penetrate the vagina, as required to prove sexual intercourse. RCW 9A.44.010(1). Penetration countenances a deliberate touch. Accordingly, if the jury were inclined to believe the touch was inadvertent, it would be more inclined to believe there was no penetration. In that same vein, a touch that happens twice would seem much less likely to be inadvertent and therefore more likely to have penetrated on one or more of those occasions.

On direct, H.M. testified there was only one touch. By the end of cross-examination, however, she was adamant there were two. Accordingly, as a result of defense counsel's cross, the jury

was less likely to believe Roe's conduct was inadvertent and did not result in penetration. Defense counsel's actions prejudiced Roe with respect to the first degree incest charge.

Defense counsel's actions also prejudiced Roe with respect to the second degree incest charge. Had defense counsel not elicited the second (and therefore more likely deliberate) touch, jurors may have had a reasonable doubt as to whether Roe touched H.M.'s breast the night before. Even apart from Roe's denial, there was reason to doubt it happened. H.M. made no mention of it in her statement to police on June 20. 1RP 39. H.M. also acknowledged the first time she reported it to the detective was not until July. 1RP 43. Nor did she tell her sister about it the morning she ran into her room. 1RP 78, 89. Moreover, when asked by the forensic nurse on June 20 if she had any history of sexual assault, H.M. said no. CP 69; 2RP 5-6.

Perhaps most significantly, however, when H.M. talked to the detective in July, she claimed that after Roe touched her breast, she immediately ran upstairs and told her sister. 2RP 10. But K.M. testified H.M. made no such disclosure. 1RP 89. H.M. also told the detective she told her mother about the breast touch on June 21. 2RP 11. The detective remembered receiving a call from H.M.'s

mother on June 23, but did not recall Mullen saying anything about H.M.'s breast. 2RP 12. Finally, H.M. admitted she fibbed about "stupid things," including school and taking her medication for ADHD. RP 53, 70-71. Perhaps she fibbed about other things as well.

Accordingly, there were many reasons to doubt Roe committed second degree incest on June 19. Upon hearing he touched H.M.'s vagina not once, but twice, the next morning, jurors were more likely to resolve these doubts against Roe in favor of the state. Because of defense counsel's deficient performance, there is reason to doubt the outcome of both charges. This Court should reverse both of Roe's convictions.

2. ROE WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction or the court must instruct the jury to agree on a specific criminal act. Coleman, 159 Wn.2d at 511.

These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt. Coleman, 159 Wn.2d at 511-12.

A recent decision by Division Two is directly on point. State v. York, __ Wn. App. __, __ P.3d __, 2009 WL 2751147 (Wash. App. Div. 2). Richard York was convicted of four counts of second degree child rape. The first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she spent the night at Cindy York's house "like, every Friday night" and that York would have sex with her "[most of the time." York, 2009 WL 2751147, * 1 (citation to record omitted).

In closing argument, the prosecutor supported count four by stating that:

[S.B.] talked about a pattern ... she said it happened a lot.... It's not anything you can hang a number on. And she said it happened all the time or some of the time or none of the time. RP at 430.

York, 2009 WL 2751147, *1.

The Court of Appeals reversed York's conviction, reasoning:

Here, the evidence supporting count four was S.B.'s testimony that she spent the night at Cindy's house once a week for about a year and that York had sex with her on most of those occasions. This evidence presented the jury with multiple acts of like misconduct, any one of which could form the basis of count four. See Coleman, 159 Wash.2d at 511, 150 P.3d 1126. Because the State did not specify an act for count four, the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts S.B. described, supported the count four conviction beyond a reasonable doubt.

Id. at *2.

The same is true here. The state presented evidence of two penetrations that could have formed the basis for the first degree incest count. On direct, H.M. alleged that Roe's finger went inside her labia "in one big motion" as he was rubbing the backs of her legs from her feet upwards toward her core. On cross, she testified he inserted his finger a second time when he asked if she masturbated. In closing argument, the prosecutor did not specify which of these two acts the jury should rely on to convict Roe of first degree incest. 2RP 136-153, 187-194. Instead, she discussed the allegation of penetration very generally. Id. Nor did the court instruct the jury it must be unanimous as to which of the acts Roe committed. CP 32-50. The court's failure to so instruct the jury

violated Roe's right to a unanimous jury verdict. This Court should reverse his conviction for first degree incest.

3. THE COURT ACTED OUTSIDE ITS AUTHORITY IN IMPOSING SEVERAL COMMUNITY CUSTODY CONDITIONS.

Whether the trial court acted outside its statutory authority in imposing community custody conditions is an issue that may be raised for the first time on appeal. Sate v. Riles, 86 Wn. App. 10, 14, 936 P.2d 11 (1997) (citing State v. Moen, 129 Wn.2d 535, 545-47, 919 P.2d 69 (1996); State v. Wiley, 63 Wn. App. 480, 482, 820 P.2d 513 (1992); RAP 2.5(a)(1)). Moreover, Roe has standing to challenge these conditions even though he has not been charged with violating them. Riles, 86 Wn. App. at 14.

(i) In the Absence of a Restitution Hearing, the Trial Court had no Authority to Impose the Costs of Crime-Related Counseling and Medical Treatment of H.M.

The trial court was without authority to require Roe to pay the costs of H.M.'s crime-related counseling and medical bills without the benefit of a hearing. A sentencing court's power to order restitution is purely statutory. State v. Ewing, 102 Wn. App. 349, 353-54, 7 P.3d 835 (2000); State v. Smith, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). An order imposing restitution is void if statutory provisions are not followed. For instance, the appellate

court invalidated an order of restitution requiring a child molestation defendant to pay \$20,800 for counseling of two older daughters and \$1,560 for his youngest daughter's future counseling, where restitution was ordered at the sentencing hearing, but the amount was not set within the former 60-day time limit mandated by the statute in effect at the time of the offense. State v. Duback, 77 Wn. App. 330, 891 P.2d 40 (1995).

The state has the burden of establishing by a preponderance of the evidence a causal connection between the restitution requested and the crime with which the defendant is charged. State v. Kinneman, 122 Wn. App. 850, 95 P.3d 1277 (2004), affirmed, 155 Wn.2d 272, 119 P.3d 350 (2005). Where a defendant disputes facts relevant to the determination of restitution, the state must prove the appropriate amount by a preponderance of the evidence at an evidentiary hearing. State v. Hughes 154 Wash.2d 118, 110 P.3d 192 (2005).

Here, the state had not sought restitution at the time of the sentencing hearing. The trial court erred in imposing restitution that was neither requested nor proven. The court's order requiring Roe to pay for H.M.'s medical and counseling expenses should be vacated.

(ii) The Court Erred in Imposing Conditions that Are Not Crime-Related.

The trial court erred in prohibiting Roe from possessing “any item designated or used to entertain, attract or lure children,” and from possessing alcohol or frequenting any establishment where alcohol is the chief commodity. Neither condition is statutorily specified or permitted as a “crime-related” prohibition.

Unless a condition is waived by the court, the conditions of community custody must include:

those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

RCW 9.94A.715(2)(a) (emphasis added).

The following conditions are provided for in RCW 9.94A.700(4):

- (a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

- (c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) The offender shall pay supervision fees as determined by the department; and
- (e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

The following conditions are provided for in RCW

9.94A.700(5):

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol;
- (e) The offender shall comply with any crime-related prohibitions.

Emphasis added.

Accordingly, any conditions not specified by statute must be crime-related. A "crime-related prohibition" is an order that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(13) (partial).

There is no connection between the crime of conviction here and the requirement that Roe not possess alcohol or frequent establishments that sell alcohol. Although the court could prohibit

Roe from consuming alcohol under RCW 9.94A.700(5)(d), further prohibitions were not authorized unless crime related. There is no evidence possessing alcohol or going to bars in any way contributed to Roe's crime of conviction. Accordingly, the condition was not crime-related and not authorized.³ See, e.g., State v. Jones, 118 Wn. App. at 207-08 (because alcohol did not contribute to Jones' offense, the requirement of alcohol treatment was neither crime-related nor reasonably related to Jones' offense and therefore not authorized by statute).

Similarly, there was no evidence Roe's possession of "any item designated or used to entertain, attract or lure children" contributed to Roe's crime of conviction. There was never any allegation that he used items designed to lure children in committing the charged offenses. Accordingly, the court was without authority to impose this condition. The illegal conditions should be stricken from Roe's judgment and sentence. Jones, 118 Wn. App. at 207-08.

³ As an aside, there are reasons to possess alcohol other than to drink it. As the host of a party, Roe might like to have alcohol available for guests, while not intending to drink any himself. Similarly, there are reasons to go to bars other than to drink alcohol. For instance, Roe might want to watch a game on a nicer television screen.

D. CONCLUSION

Roe received ineffective assistance of counsel, which impacted the jury's verdict on both charges. This Court should reverse both of the resulting convictions. This Court should also reverse the first degree incest charge because the court failed to insure a unanimous jury verdict. Finally, this Court should strike the illegal sentencing conditions, if any conviction remains.

Dated this 30th day of September, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63403-8-I
)	
MICHAEL ROE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] MICHAEL ROE
DOC NO. 328222
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2009.

x. *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 SEP 30 PM 4:23