

NO. 36182-5-II

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

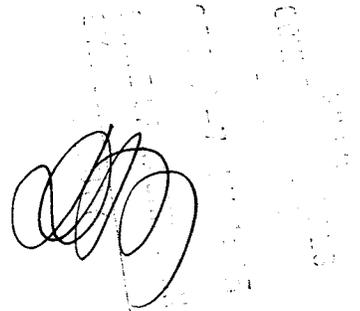
STATE OF WASHINGTON,

Respondent,

v.

TIKI TARU McCOLLUM,

Appellant.



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

The Honorable Lisa Worswick, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact Re: Bench Trial III (7), (8), and (12). Cross CP¹ 13.

2. The state failed to prove appellant took the vehicle by force or threat of force.

3. The trial court erred in concluding appellant was guilty of second degree robbery.

Issue pertaining to assignments of error

Appellant was convicted of second degree robbery for driving off in a car after the owner and his passengers exited the vehicle. There was evidence that appellant got in the back seat of the car and told the owner to drive. Although the back seat passenger believed he saw a weapon in appellant's jacket, the owner of the car was unaware of any weapon, and he testified that appellant never told him to get out of the car. Under these circumstances, did the state fail to prove appellant induced the owner to part with his property by use or threatened use of force?

¹ Although the trial court's findings of fact and conclusions of law pertain to both appellant Tiki McCollum and co-appellant Antonio Cross, the findings and conclusions were filed only in Cross's Superior Court file. The findings and conclusions are included in the record of this consolidated appeal through Cross's designation of clerk's papers. They are referenced in this brief as Cross CP 11-16. A copy of the court's findings and conclusions is attached as an appendix to this brief.

B. STATEMENT OF THE CASE

1. Procedural history

On September 25, 2006, the Pierce County Prosecuting Attorney charged appellant Tiki McCollum and co-appellant Antonio Cross with the first degree robbery of V.Z. Lemus and second degree assault of F.Z. Zuniga. CP 1; RCW 9A.56.190; RCW 9A.56.200(1)(a)(ii); RCW 9A.36.021(1)(c). The state filed a corrected information, alleging that a gun and/or a knife was used during the robbery. CP 7-9. The state later amended the information, changing the robbery victim to Lemus and/or Zuniga. CP 10. McCollum was also charged with four counts of second degree possession of stolen property based on credit cards found in his pocket during a search incident to his arrest. CP 1-3, 7-9, 10-12; 5RP² 420; RCW 9A.56.140(1); RCW 9A.56.160(1)(c).

McCollum waived his right to a jury trial, and the case proceeded to a bench trial before the Honorable Lisa Worswick. CP 6. The court found McCollum and Cross guilty of the lesser offenses of second degree robbery and fourth degree assault and found McCollum guilty on the four possession of stolen property counts. CP 18-19, 29. The court imposed

² The Verbatim Report of Proceedings is contained in eight consecutively paginated volumes, designated as follows: 1RP—3/6/07; 2RP—3/7/07; 3RP—3/8/07; 4RP—3/12/07; 5RP—3/13/07 (a.m.); 6RP—3/13/07 (p.m.); 7RP—3/14/07; 8RP—4/13/07.

standard range sentences, and McCollum filed this timely appeal. CP 22, 29, 34.

2. Substantive Facts

On September 22, 2006, Raechel Evans was at an AM/PM store in Tacoma trying to earn money as prostitute. 6RP 461. She saw two men she knew as former prostitution clients parked in front of the store, and she went over to talk to them. 6RP 460-61. The driver indicated they wanted to have sex for money, but Evans was not interested because she had had a negative experience the last time she was with them, and because they were with a third man she did not know. 6RP 462. Instead, Evans called Tiki McCollum, because he was in the area and he knew other prostitutes who would probably go with the men. 6RP 462. She walked away from the car as McCollum and Antonio Cross approached. 6RP 463.

The driver of the car, Vicente Lemus Zuniga³ called 911 just before 11:00 p.m., reporting that his car had been stolen. 4RP 320. Police responded and spoke with Lemus, his cousin Felipe Zuniga, and their friend Ciro Castillo. The men spoke very little English, and communication was difficult. 3RP 158; 4RP 321. Because Lemus spoke more English than the others, the responding officer focused his attention

³ Vicente Lemus Zuniga is referred to in this brief as “Lemus,” as he was at trial.

on Lemus, using a combination of English and Spanish words to ask questions and record the responses. 4RP 322-23.

The officer's high school Spanish turned out to be inadequate, however. 4RP 348. For example, he thought Lemus reported that the car was taken by force, that they were told to get out of the car, that one of the men had a gun, and that the other displayed a knife. 4RP 325, 330-31. Once an interpreter was available, Lemus clarified that in fact he never said anything about a gun or a knife because he never saw any weapon, and he never told police that the men threatened him and ordered him out of the car. 3RP 177, 199. The officer also thought Zuniga said he saw a black automatic handgun, but Zuniga did not recall giving that description. 3RP 237; 4RP 332. Nor did Zuniga tell police that Lemus was taken out of the car at knifepoint. 4RP 270.

While police were talking to Lemus and Zuniga, the car was discovered in an alley next to the store. 3RP 187, 201; 4RP 326. A short time later, McCollum and Cross were apprehended in a parking lot about two blocks away, and Lemus and Zuniga identified them as the men who drove off in the car. 4RP 329, 338-39.

Lemus testified at trial through a Spanish-English interpreter that he, Zuniga, and Castillo went to the AM/PM to buy gas and sodas. 3RP 158-59. He admitted that a woman he knew from a bar was at the store

when he parked the car, but he denied talking to her or attempting to purchase sex from her. 3RP 194-95.

According to Lemus, he was parked outside the store when suddenly two men were in his car without his permission. 3RP 157, 159. The men got into the back seat with Zuniga, however, and Lemus did not actually see them. 3RP 159.

Lemus testified that the men did not try to do anything to them. 3RP 161. He understood they were telling him to start the car or move the car and they wanted to go for a ride. 3RP 161-62, 198. Instead, Lemus got out of the car and told Zuniga and Castillo to get out as well. 3RP 161. When the three of them left the car, one of the intruders moved to the front seat and drove off. 3RP 163. At that point, Lemus went inside the store and asked the clerk to call 911. 3RP 164, 167.

Lemus testified that the men never said anything threatening and did not demand that they get out of the car. 3RP 165, 199. He felt threatened because the men got in his car without permission, but he never saw a gun or any other weapon. 3RP 165, 177, 182, 197.

Zuniga testified, also through an interpreter, that he, Lemus, and Castillo stopped at the AM/PM on the way home from a friend's house, and they sat in the car for 20 minutes deciding who would go inside to buy sodas. 3RP 214. Like Lemus, Zuniga denied any knowledge of or

involvement in attempting to hire a prostitute. 3RP 215-16. He testified, however, that a woman stopped by the car and spoke with Lemus briefly. 3RP 216.

After they had been sitting in the parking lot for 20 minutes, a man opened the back door of the car and got in uninvited. 3RP 218. A second man got into the backseat as well. 3RP 220. The first man said something in English which Zuniga did not understand, speaking very low, and the second man was speaking more aggressively, arguing with Lemus. 3RP 220-22. Lemus became angry and got out of the car, saying he was going to call the police. 3RP 222. Zuniga and Castillo got out of the car as well, and the men drove off in the car. 3RP 229.

According to Zuniga, one of the men directed Zuniga to look down at something he had in his jacket. 3RP 219. Zuniga first testified that he could not see what the man had, because it was dark. 3RP 219. He then testified that he had seen part of what the man was holding, and it looked like a weapon. 3RP 228-29. Zuniga then testified he did not know if the weapon was a gun or something else, and he did not see the object very well. 3RP 237; 4RP 262.

Defense counsel argued that the state had not proven robbery because the only reason McCollum got into the car and told Lemus to drive was so that he could find them another prostitute. Lemus and

Zuniga were nervous and antsy when they spoke to the police because they had been waiting for a prostitute, not deciding who should buy sodas. 6RP 507-08. At most, McCullum seized the opportunity and drove off in the car when Lemus and Zuniga jumped out, but the state did not prove he intended to deprive Lemus of the car. 6RP 508.

The court found that the state failed to prove there was a weapon, and thus McCollum and Cross were not guilty of first degree robbery. 7RP 534, 536. The state also failed to prove Zuniga was the victim of robbery, because he had no possessory interest in Lemus's car. 4RP 278; 7RP 535. The court determined that Lemus had been robbed, however, finding that McCollum and Cross caused Lemus to be in reasonable fear of harm by getting into his car and telling him to drive, that McCollum's actions were threatening, and that Lemus's property was taken from him against his will by use of force. 7RP 535-36; Cross CP 13.

C. ARGUMENT

BECAUSE THERE WAS NO EVIDENCE MCCOLLUM TOOK THE VEHICLE BY FORCE OR THREAT OF FORCE, THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HE WAS GUILTY OF SECOND DEGREE ROBBERY.

As a matter of due process, the state must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90

S. Ct. 1068 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); State v. Green, 94 Wn.2d 216, 219, 616 P.2d 628 (1980). Robbery requires proof that the taking occurred by the “use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking,” and “the degree of force is immaterial.” RCW 9A.56.190. “Any force or threat, no matter how slight, which induces an owner to part with his property...” is sufficient to prove robbery. State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). The term “induce” means “to move and lead (as by persuasion or influence).” Webster’s Third New Int’l Dictionary, 1154 (1993).

The type of force contemplated by the robbery statute is the use of force or threat which frightens or persuades a person to give up his personal property. For example, in Handburgh, the court relied upon the following facts to sustain a robbery conviction:

It was undisputed the defendant made a verbal threat to Leonard when she asked him to return her bicycle; only the nature of the threat was disputed. In addition, there was testimony the defendant threw rocks at Leonard before she ever approached him. She eventually left the scene—and her bicycle—because she was hurt and scared.

Handburgh, 119 Wn.2d at 293.

In State v. Redmond, 122 Wash. 392, 210 Pac. 772 (1922), the defendant pressed a gun to the head of a bank messenger and commanded him to drop his bag of currency. The court found sufficient evidence of force and fear to constitute a robbery and noted that it “is generally held that if the taking of property be attended with such circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person, it is robbery.” Redmond, 122 Wash. at 393.

Here, the court found that McCollum and Cross were acting in a threatening and aggressive manner when they got into Lemus’s car, in that McCollum displayed what appeared to be a weapon and Cross was acting agitated. Cross CP 13. Although Zuniga testified that McCollum directed Zuniga to look inside his jacket, where Zuniga saw what he believed to be a weapon, there was no evidence that Lemus was aware of that. In fact, Lemus testified he never saw any weapon and never heard anyone mention a weapon. 3RP 161, 166, 177, 182. He was unaware that Zuniga believed he saw a weapon until some time after the incident. 3RP 182.

No robbery occurs unless there has been a forcible taking of property against the will of the owner or someone having a possessory interest in the property taken. State v. Tvedt, 153 Wn.2d 705, 711, 714-

15, 107 P.3d 728 (2005) (discussing unit of prosecution for robbery); State v. Latham, 35 Wn. App. 862, 865, 670 P.2d 689 (1983), review denied, 102 Wn.2d 1018 (1984).

In Latham, the two defendants beat up the owner of a car and his passenger before driving off in the car. Latham, 35 Wn. App. at 863-64. The defendants were convicted of separate counts of first degree robbery against the owner and the passenger. The Court of Appeals reversed the convictions relating to the passenger, however, holding that a person must have an ownership interest in or dominion and control over the property taken for the taking to constitute a robbery. Id. at 864-65. Since the passenger did not own the stolen car and was not in possession of it when it was taken, the defendants could not be guilty of robbing the passenger. Id. at 866.

As in Latham, the property taken in this case was a car. Lemus was the owner, and his passenger Zuniga had no ownership interest in or dominion and control over the car. 4RP 278. As the court below recognized, McCollum could not be convicted of robbing Zuniga. See 7RP 535. The defendants in Latham were properly convicted of robbing the owner of the car because they had used force against the owner in taking his property. In this case, unlike Latham, there was evidence of force used only against the passenger, not the owner of the car.

The Supreme Court explained in Tvedt that there are two necessary characteristics of a robbery: there must be a taking of property, and the taking must be forcible and against the will of the owner. Tvedt, 153 Wn.2d at 711, 714-15. It follows, then, that because property must be taken from the owner to constitute robbery, the force must be against the owner as well. Thus, in this case, the state had to prove the car was taken against Lemus's will, by a force or threat which induced Lemus to part with his car.

There is no evidence in the record of any force or threat against Lemus. Because Lemus had no knowledge of the alleged threat to Zuniga, that threat did not induce him to part with the car and does not establish robbery. Moreover, Lemus testified the men who got into the car did not try to do anything to them, he was never threatened, and he was never ordered to get out of the car. 3RP 161, 199. Although Lemus assumed he was being threatened because the men had gotten into his car without permission, the only thing the men said was that they wanted to go for a ride. 3RP 198.

If these facts constitute a robbery, then any face-to-face theft would become a second degree robbery, merely because it was from the person or in the presence of another, making the force requirement

redundant. See United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989), cert. denied, 491 U.S. 907 (1989).

The observations of the court in Wagstaff are apropos. In Wagstaff, the court reversed on grounds of insufficient evidence a federal conviction for robbery involving an unarmed thief. There, the defendant entered a bank, donned a ski mask and sunglasses, walked into the tellers' area, and started removing money from a cash drawer. He was at all times at least eight feet from the nearest teller, and he did not say anything or present a note. Wagstaff, 865 F.2d at 627. The court explained that if it were to uphold the conviction, "it is hard to imagine a theft of money from a bank that could not be characterized as 'forceful,' 'purposeful,' and 'aggressive.' Any face-to-face theft would seem to create 'a dangerous situation' ..." Id. at 628-29. The court concluded that this interpretation of the statute "would seem to make the 'intimidation' requirement redundant."⁴ Id. at 629.

Division One distinguished Wagstaff in State v. Collinsworth, 90 Wn. App. 546, 966 P.2d 905 (1997), review denied, 135 Wn.2d 1002 (1998). There, the defendant entered several banks and demanded money, telling the bank employees he was serious. Although he made no overt

⁴ The federal statute, 18 U.S.C. § 2113(a), embodies an "intimidation" element. "Intimidation under the Federal statute has been described as "...conduct and words ... calculated to create the impression that any resistance or defiance by the teller would be met with force." United States v. Jones, 932 F.2d 624, 625 (7th Cir. 1991).

threatening gestures and displayed no weapon, the trial court found that his actions demonstrated an intent to create fear and induce the tellers to hand over the money. Collinsworth, 90 Wn. App. at 551. The fact that the defendant did not display a weapon or overtly threaten the tellers did not preclude a robbery conviction, because a clear, concise, and unequivocal demand for immediate surrender of property carries an implicit threat to use force. Id. at 553.

The court then noted that in Wagstaff, there was no teller nearby and the defendant did not say anything or present a note demanding money. Because Collinsworth, on the other hand, expressed his demand for money directly to the tellers, the court held that the evidence was sufficient to support the robbery convictions. Id. at 554.

Applying this reasoning, the evidence here is insufficient to support McCollum's robbery conviction. There was no evidence of any demand or even request that Lemus turn over his car which would support a finding that McCollum threatened to use force against Lemus. Lemus understood only that the men told him to drive the car because they wanted to go for a ride. There was other evidence that McCollum was trying to help Lemus and his passengers find a prostitute, and that was the reason for getting in the car and suggesting the drive. The evidence does

not show that McCollum obtained Lemus's property through the use or threatened use of force.

Due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. Winship, 397 U.S. at 364; Hundley, 126 Wn.2d at 421. Even viewing the evidence in the light most favorable to the prosecution, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), this Court should find that the evidence here showed a lack of force and the state failed to carry its burden of proof.

D. CONCLUSION

The state failed to prove McCollum took the car from the owner by force or threat of force, and his conviction for second degree robbery must be reversed.

DATED this 6th day of September, 2007.

Respectfully submitted,



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Attorney for Appellant

APPENDIX



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-04524-8
06-1-04525-6 ✓

vs.

TIKI TARU McCOLLUM,
ANTONIO RICARDO CROSS,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable Lisa Worswick, Judge of the above entitled court, for bench trial on the 6th day of March, 2007, the defendants having been present and represented by attorneys, Edward DeCosta (Cross), and Dana Ryan (McCollum), and the State being represented by Deputy Prosecuting Attorney Gregory L. Greer, and the Court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on September 25, 2006, an Information was filed charging the defendants with one count each of robbery in the first degree and assault in the second degree, and charging



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1 defendant McCullom with an additional four counts of possession of stolen property in the
2 second degree.

3 That on March 12, 2007, an Amended Information was filed under both defendant's
4 cause numbers;

5 That the Amended Information differed from the original Information by adding a second
6 victim, Felipe Zuniga, to Count I (the robbery in the first degree charge);

7 That at the conclusion of the evidence-gathering procedure of the trial, and before closing
8 argument to the Court, the State asked the Court to consider lesser included crimes under Count I
9 and II;

10 That the Court agreed with the State and as to each defendant, considered the lesser crime
11 of robbery in the second degree under Count I and the lesser crime of assault in the fourth degree
12 under Count II;

13 II.

14 That the victims, Felipe Zuniga and Vicente Lumus, do not speak English and there was a
15 language barrier which made it difficult to determine what happened in some instances.

16 III.

17 That the evidence shows as follows:

18 (1) On September 22, 2006, shortly before 11:00 p.m., Vicente Lumus, Felipe Zuniga
19 and Ciro Castillo were parked in a car at the AM/PM convenience store located at 8247 Pacific
20 Avenue, in Tacoma;

21 (2) The car was owned by Vicente Lumus; back-seat passenger, Felipe Zuniga, had
22 no possessory interest in the car;
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1 (3) While seated in the driver's seat, Vicente Lumus spoke with Raechal Evans, a
2 prostitute, that approached his car and inquired about purchasing acts of sex, but no agreement
3 was made;

4 (4) Raechel Evans left after a short while and phoned defendant McCollum;

5 (5) Shortly after the phone call, both defendants approached Vicente Lumus's car and
6 both got into the back seat;

7 (6) Prior to this event, neither the defendants nor the victims knew each other;

8 (7) The defendants were acting in a threatening and aggressive manner when they got
9 into Vicente Lumus's car; defendant McCullom was talking low and showing what appeared to
10 be a weapon and defendant Cross was acting agitated;

11 (8) Once in the car, defendant McCullom immediately told Vicente Lumus to drive
12 off, which caused Vicente Lumus to reasonably fear that harm may come to him or his
13 passengers;

14 (9) Vicente Lumus then got out of the car and told his friends, Felipe Zuniga and Ciro
15 Castillo to get out, also;

16 (10) Vicente Lumus and Felipe Zuniga got out of the car because they were fearful of
17 the defendants;

18 (11) Once the victims got out of Vicente Lumus's car, the defendants immediately
19 drove off with the car;

20 (12) Although the defendants' acts in taking the car were forceful, threatening and
21 against the will of Vicente Lumus and his passengers, the State did not prove that either
22 defendant possessed a gun or knife during the incident;
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1 (13) The defendants were arrested just outside of a nearby fast-food restaurant shortly
2 after they stole the car from Vicente Lumus;

3 (14) At the time of his arrest, defendant McCullom possessed four credit cards which
4 were found in a pocket of his pants by the arresting police officer;

5 (15) All four of the credit cards found in defendant McCullom's pants pocket had been
6 stolen in a burglary committed the previous day at the home of Dean Firkins;

7 (16) All four credit cards were the property of Dean Firkins;

8 (17) Although one of the four credit cards had Dean Firkins' wife, Vickie Firkins'
9 name on it, this card also had the same account number as one of the other four credit cards
10 found with Dean Firkins' name on it. Therefore, both Dean and Vickie Firkins shared an
11 undivided half interest in the cards, as they were community property;

12 (18) The arresting officer also found paperwork in Dean Firkins' name in the pants
13 pocket of defendant McCullom at the time of his arrest;

14 (19) The defendant knew the credit cards were stolen;

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16
17 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

18 CONCLUSIONS OF LAW

19 I.

20 That the Court has jurisdiction of the parties and subject matter.

21 II.

22 That all relevant events or at least one element of the crime occurred in Pierce County.
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III.

1 That under Count I, both Tiki Taru McCullom and Antonio Ricardo Cross are guilty
2 beyond a reasonable doubt of the lesser included crimes of robbery in the second degree as
3 charged in Count I, in that, on September 22, 2006, the defendants acting as primaries and/or
4 accomplices, intentionally took personal property of Vicente Lumus (his car) against his will and
5 by force with the intent of depriving him of that property;

7 That both Tiki Taru McCullom and Antonio Ricardo Cross are guilty of the lesser
8 included crime of assault in the fourth degree as charged in Count II, in that, on September 22,
9 2006, the defendants did an act with the intent to create in Vicente Lumus and Felipe Zuniga
10 apprehension and fear of bodily injury, and in fact the defendants' acts did create such
11 reasonable apprehension and fear of bodily injury to these two victims;

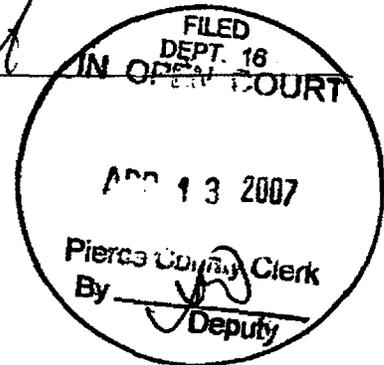
12 That Tiki Taru McCollum is guilty of four counts of possession of stolen property in the
13 second degree as charged in Counts III, IV, V, and VI, in that, on September 22, 2006, the
14 defendant knowingly possessed four separate stolen access devices (credit cards) belonging to
15 Dean Firkins and that he knew these four items of property were stolen.

16 DONE IN OPEN COURT this 13th day of April, 2007.

18 *Lisa Wornat*
19 JUDGE

20 Presented by:

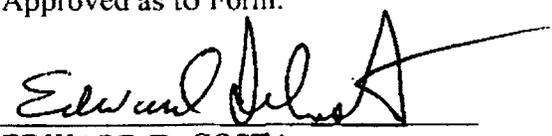
21 *Gregory L. Greer*
22 GREGORY L. GREER
23 Deputy Prosecuting Attorney
24 WSB # 22936
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Approved as to Form:

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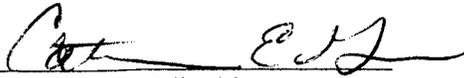
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Tiki McCollum*, Cause No. 36182-5-0-II, directed to:

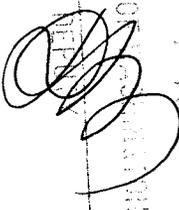
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Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

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



Catherine E. Glinski
Done in Port Orchard, WA
September 6, 2007

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STATE OF WASHINGTON
BY 
COURT REPORTERS