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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it admitted the statements made on a 911 tape as excited utterances?
2. Did the State present sufficient evidence to convince a rational fact finder that defendant was guilty of unlawful imprisonment?
3. Should this court decline to establish the rule that an uncorroborated hearsay statement be insufficient as a matter of law to sustain a conviction when Washington law prohibits the admission of uncorroborated hearsay statements?

B. STATEMENT OF THE CASE.

1. Procedure

On August 19, 2008, the State charged TRISTAN FELEPADUIDE BRIGHT, hereinafter “defendant,” with one count of unlawful imprisonment and one count of assault in the fourth degree, both crimes alleged to be acts of domestic violence. CP 1-2¹.

¹ Citations to Clerk’s Papers will be to “CP.” As the verbatim reports of proceedings were not numbered sequentially, the State will cite to “RP” followed by the title of the volume, i.e. volume II will be to “RP II,” and the multiple date volume will be to “RP (multi).”

On April 9, 2009, the parties proceeded to a bench trial before the Honorable Fredrick W. Fleming in Pierce County Cause Number 08-1-03837-0. CP 3-4; RPI 1. The State had acquired a material witness warrant for the victim, Lakesha Edwards, as she had successfully avoided all attempts to serve her subpoena. *See* RP (multi) 12-13. Ms. Edwards never appeared for trial, but she did appear on defendant's behalf at sentencing. RPIII 14.

On April 13, 2009, the court held a CrR 3.6 hearing to determine if Ms. Edwards's statements on a 911 tape were admissible as excited utterances and if their admission would violate defendant's right to confrontation under *Crawford*.² RPII 17-30. The court listened to the 911 tape, as well as argument from both parties. RPII 17-30; Exhibit 1. Ultimately, the court admitted the 911 tape as an excited utterance:

If you look at the totality of the circumstances here, you have a woman that was in a house for some period of time with her children and was able to escape. She indicated that she didn't know what he was using, but that he was using and that he had a weapon, a knife, but she was able to run outside, busted through the screen door, grabbed her keys, got into the car, but she wasn't worried about herself then and there. She was worried about she had two children still in the house. If there weren't any children in the house, she could have driven away and the emergency would have been over, but not only was it not over, there were two children in the house.

He came outside, and as I understood it, he came out in red shorts, no shirt, and had a knife, and she had a discussion

² *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)

with him. But, the primary focus of her attention was on not just the threat of harm to herself -- it wasn't -- it was that she was worried about the harm to her children.

He had a weapon he was using, and she was frantic, and she was calling for help from the car with her cellular phone, a 911 call. That, to me, gets you to the excited utterance, reporting what's going on, and it's not testimonial, Mr. Depan. She wants somebody to come and help her to assist in helping her children. She was under stress and concern for her children, just like a mama bear.

RPII 29-30. The court also found that admission of the statements did not violate defendant's right to confrontation under *Crawford*. RP 30.

Directly following the hearing for admission of the 911 tape, the court held another hearing to determine if Officer Smith's police report was admissible under ER 803(a)(5).³ RPII 30. Officer Smith testified that he had no independent recollection of the event and reading his police report did not assist his memory. RPII 33. The court allowed the officer to read the portions of his report that related to his observations of Ms. Edwards. RPII 58. However, the court excluded Ms. Edwards' statements to Officer Smith as testimonial. RPII 56-57.

³ ER 803(a)(5) is the recorded recollection exception to the hearsay rule, even though the declarant is available as a witness:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted the memorandum or record may be read into evidence but may not, itself, be received as an exhibit unless offered by an adverse party.

Defendant testified on his own behalf. RPII 87-105. After defendant rested, the court found defendant guilty as charged. RPII 116-18. The court based its decision on Ms. Edwards' statements in the 911 tape, and defendant's testimony. RPII 116-18.

On May 1, 2009, the court sentenced defendant. RPIII 4. Defendant had an offender score of two, making his standard range on the unlawful imprisonment conviction four to 12 months. CP 9-20. The fourth degree assault conviction was a misdemeanor, giving it a standard range of zero to 365 days. CP 21-25. The State requested a standard, mid-range sentence of nine months on the felony, with nine to 18 months of community custody, a no contact order with Ms. Edwards, and standard fines. RPIII 5, 10. The State also asked for 365 days on the misdemeanor, with 185 days suspended and two years of supervised probation. RPIII 5.

Defendant requested a low-end, standard-range sentence of four months. RPIII 7. Both defendant and Ms. Edwards urged the court not to impose a no-contact order. RPIII 9, 14. Ms. Edwards informed the court that alcohol triggers uncharacteristic behavior in defendant and that he needed medication for anger management. RPIII 14.

The court followed the State's sentence recommendation, including the no-contact order. RPIII 13, 14. The court indicated it would be willing to revisit the no-contact order at a later hearing, if defendant provided proof of mental health or anger management treatment. RPIII 14-15.

Defendant filed a timely notice of appeal. CP 5.

2. Facts

On August 18, 2008, at 1:41 a.m., Lakesha Edwards called 911. RPII 61. Ms. Edwards was distraught after her boyfriend, defendant, hit her and would not let her leave her house. Exhibit 1.⁴ After an unknown period of time, Ms. Edwards was able to surreptitiously acquire her car keys, and escaped the house by breaking through her screen door. Exhibit 1. Ms. Edwards locked herself inside her car to call 911, while defendant stood outside the car, yelling at her. Exhibit 1. As defendant had a knife, Ms. Edwards was concerned over the safety of her children, sleeping inside the house. Exhibit 1. Ms. Smith remained on the phone with the 911 operator until police arrived. Exhibit 1.

Officer Smith arrived on scene after other officers had detained defendant. RPII 73-74. Defendant was unarmed at the time Officer Smith arrived. RPII 75. Officer Smith found Ms. Edwards still in her car across the street from the house. RPII 75. Officer Smith observed Ms. Edwards crying hysterically and it took him several minutes to calm her down so she could talk to him. RPII 75. Officer Smith did not see a knife, nor did

⁴ The stated facts come from information adduced from listening to the 911 tape, designated as Exhibit 1. Defendant's transcription of the tape contained in his brief is incomplete. The State does not suggest that the summary of the evidence in its response is an adequate substitute for the court's independent review of the 911 tape.

he observe any injuries on Ms. Edwards. RPII 79-80. Ms. Edwards did indicate she had injuries. RPII 81-82.

Defendant testified on his own behalf. RPII 87. According to defendant, he and Ms. Edwards were having an argument about whether one of his children from a prior relationship could move into her house. RPII 88-89. Defendant stated that he and Ms. Edwards were shouting at each other, but it was not physical. RPII 91-92, 93. Defendant stated that he never hit Ms. Edwards, grabbed her, pushed her, or held her down. RPII 92, 99. Defendant also claimed that he never threatened her in any way. RPII 95. Defendant denied that he could be heard yelling at Ms. Edwards on the 911 tape. RPII 102-03. Defendant claimed Ms. Edwards was having a panic attack during the argument. RPII 94. He said he is supportive of her when she has her attacks, but he always yells at her when she has them. RPII 104-05.

According to defendant, during the argument Ms. Edwards just left the house. RPII 92. She had asked him to leave, but when he refused she went outside. RPII 93. Defendant found her locked in her truck and on her cell phone. RPII 95. Defendant claimed that he thought she was on the phone with her mother or her sister, so he tried to talk to her through the window, to calm her down. RPII 95, 97. Defendant told her, "Let's go into the house so we can be able to settle this out peacefully without, you know, the neighbors getting involved or the police coming to the house." RPII 96.

Defendant eventually went back into the house to go to sleep.
RPII 98. When he heard sirens, he got up and got dressed. RPII 98.
Defendant believed that Ms. Edwards' mother or sister called the police.
RPII 97. When the responding officers asked where the knife was, he
responded that there were "plenty of knives in the kitchen." RPII 99.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION WHEN IT ADMITTED THE TAPE
OF MS. EDWARDS'S 911 CALL AS AN
EXCITED UTTERANCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. *Thomas*, 150 Wn.2d at 854.

Under ER 803(a)(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition" is admissible as a hearsay exception. A statement must satisfy three qualifications before it qualifies as an excited utterance. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Excited utterances, for purposes of the excited utterance hearsay exception, are spontaneous statements made while under the influence of

external physical shock before declarant has time to calm down enough to make a calculated statement based on self interest. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Three requirements must be met for hearsay to qualify as excited utterance: (i) a startling event or condition must have occurred; (ii) the statement must have been made while declarant was still under the stress of startling event; and, (iii) the statement must relate to the startling even or condition. *Hardy*, 133 Wn.2d at 714.

A “declarant’s statement alone - the bare words of the utterance - is insufficient to corroborate the occurrence of a startling event.” *State v. Young*, 160 Wn.2d 799, 809, 161 P.3d 967 (2007). However, circumstantial evidence “such as the declarant’s behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement was made,” is sufficient to corroborate the occurrence of a startling event. *Young*, 160 Wn.2d at 810.

The startling event or condition need not be the charged offense. *See Young*, 160 Wn.2d at 810. A later event may recreate “stress earlier produced and caus[e] the person to exclaim spontaneously.” *Id.* at 810 (quoting *State v. Chapin*, 118 Wn.2d 681, 687 (1992)). In such a situation it is the later event, not the original trauma, that satisfies the first element of the excited utterance exception. *Id.*

Whether the declarant makes statements while still under the stress of an event is a factual determination. *State v. Sims*, 77 Wn. App. 236,

238, 890 P.2d 521 (1995). A key factor is “whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnson v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). Spontaneity is critical. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

In *Young*, the defendant inappropriately touched the 11-year old victim when he put his hand down her pants. 160 Wn.2d at 802. The victim ran to her neighbor’s house and informed the people there as to what had happened. *Id.* According to the friends and family at the neighbor’s house, the victim was “crying really hard,” “upset,” “really scared,” and “borderline hysterical.” *Id.* at 802-03. The trial court admitted the victim’s statements as excited utterances. *Id.* At trial, the victim recanted her statements that Young had touched her inappropriately. *Id.* at 804. On appeal, Young challenged the admission of the statements, arguing that the proponent of excited utterance evidence must produce independent corroborative proof that the startling event occurred in order to satisfy the first element of the excited utterance exception. *Id.* at 809. While the court agreed with Young’s argument, it held that the witness’s observations of the victim’s demeanor were sufficient corroborating evidence, but that it was a “close question.” *Id.* at 818-19. The court then considered evidence elicited at trial which was not

considered at the pretrial hearing, including statements made by Young and his attempts to flee the scene, as corroborating evidence. *Id.* at 819. Because of the additional evidence, the court determined that Young was not prejudiced by the trial court's admission of the statements based on the pretrial evidence. *Id.*

Defendant assigns error to the trial court's admission of the 911 tape as an excited utterance solely on the grounds that a statement alone cannot provide sufficient evidence of the startling event or that the declarant was under the stress of a startling event.⁵ *See* Appellant's Brief at 7-10. Yet defendant fails to consider the corroborating evidence supplied by the 911 tape, the testimony of the responding officers, and defendant's own testimony.

In the present case, more than the "bare words" of the statement was provided to the court in the form of a 911 tape. *See* RPII 17; Exhibit 1. The tape recorded not only the bare words, but also Ms. Edwards's demeanor through her voice. Her voice reflected that she was crying and upset throughout the contact with the 911 operator. Exhibit 1. Ms. Edwards was distracted, her statements were disjointed, and she was frightened because her children were still inside the house with the drunken, knife-wielding, defendant. Exhibit 1. In addition, it was clear

⁵ While Ms. Edwards did not testify at trial, defendant does not claim that the statements made on the tape violated his right to confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

from the tape that defendant had come outside the house to confront Ms. Edwards at least once, because he can be heard yelling at her in the background as she attempts to defuse the situation. Exhibit 1.

After reviewing the tape, the court noted Ms. Edwards's demeanor, referring to her as "frantic." RP 29. The court also observed that her inability to drive away because of the potential threat to her children caused her to remain under the stress of the event. RP 28.

As the 911 tape provided corroborating evidence of a startling event through Ms. Edwards' tone of voice, her demeanor, and the fact that a listener can hear defendant yelling at Ms. Edwards in the background, the trial court did not abuse its discretion when it admitted the tape as an excited utterance.

Moreover, additional corroborating evidence was presented at trial. Officer Smith observed Ms. Edwards shortly after the 911 call. RP 75. According to Officer Smith, Ms. Edwards was "crying hysterically and trying to talk." RP 75. It took him several minutes to calm her down. RP 75. Hysteria is more consistent with someone affected by a startling event rather than someone who was merely involved in a shouting match.

Also, defendant's own testimony presented at trial provided corroboration of a startling event. Defendant claimed he thought Ms. Edwards was on the phone with her mother or sister, which was typical when they argued, and that he had no idea that she was on the phone with the police. RP 95-96. According to defendant, he went back inside to go

to sleep when he heard sirens. RP 98. Without knowing that Ms. Edwards was on the phone with the police, defendant automatically assumed the sirens related to him, because he got up and got dressed. RP 98. If defendant had not committed some overt act toward Ms. Edwards, defendant would have had no reason to believe that the sirens had anything to do with him.

As in *Young*, even if Ms. Edwards' demeanor as she made the statements were a close question, Officer Smith's observations and defendant's testimony sufficiently corroborated that a startling event occurred. The trial court did not abuse its discretion in admitting the statements and defendant was not prejudiced.

The 911 tape also corroborates the second prong of the excited utterance admissibility test: that the declarant was under the stress of the event. During the phone call, Ms. Edwards argues, pleads, and attempts to negotiate with defendant from the confines of her locked car. Exhibit 1. Defendant can be heard shouting at Ms. Edwards from outside the car. Exhibit 1. Clearly Ms. Edwards is still under the stress of an altercation with defendant.

As there was sufficient corroborating evidence of a startling event and that Ms. Edwards was under the stress of the event when she made her statements, the court did not abuse its discretion when it admitted the statements as excited utterances.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF DEFENDANT'S GUILT FOR THE CRIME OF UNLAWFUL IMPRISONMENT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In

considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Unchallenged findings of fact are verities on appeal. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), review denied, 145 Wn.2d 1016, 41 P.3d 483 (2002).

Here, the State charged defendant with one count of unlawful imprisonment, alleging:

That [defendant], in the State of Washington, on or about the 18th day of August, 2008, did unlawfully, feloniously, and knowingly restrain another person, to-wit: Lakesha Edwards, contrary to RCW 9A.40.040[.]

CP 1-2; *see also* RCW 9A.40.040. “Restrain” means “to restrict a person’s movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is without consent if it is accomplished by (a) physical force, intimidation, or deception[.]” RCW 9A.40.010(1) (internal quotations omitted).

In *State v. Allen*, 116 Wn. App. 454, 66 P.3d 653 (2003), the defendant was convicted of assault in the second degree and unlawful imprisonment. On appeal, the court overturned the assault conviction, but held that the victim’s testimony that she screamed and tried to leave a room but the defendant stood in the door and would not let her leave was sufficient evidence to prove unlawful imprisonment. *Id.* at 466.

In the present case, defendant has not assigned error to any of the trial court’s findings of fact, so they are verities on appeal. The court found Ms. Edwards’s call for help to the 911 operator credible. CP 33-36 (Finding of fact 5). Ms. Edwards informed the 911 operator that defendant had beaten her and prevented her from leaving the house. Exhibit 1. When asked if defendant had made any threats, Ms. Edwards replied that he had, and added that defendant told her he was not afraid of the police. Exhibit 1. She also informed the 911 operator that defendant had a knife and was drunk. Exhibit 1. Ms. Edwards escaped defendant only when she surreptitiously acquired her keys and broke through her screen door. Exhibit 1; CP 33-36 (Finding of fact 7). Defendant had no

lawful authority to hold Ms. Edwards without her consent. The fact that Ms. Edwards had to break through her front door to escape showed that he substantially interfered with her liberty.

Defendant claims that Ms. Edwards' statements were too vague to support an unlawful imprisonment charge because defendant may have "simply asked her not to leave in the middle of their argument." *See* Appellant's Brief at 13. Yet defendant ignores the fact that Ms. Edwards said defendant would not let her leave, that she had to sneak to get her keys and that she had to break through her screen door to get outside. Exhibit 1. If the restraint involved nothing more than a request not to leave, Ms. Edwards would not have to have hidden her keys, nor would she have had to break down her own door. Defendant claimed that none of these events took place, yet the court as fact finder was free to find his version not credible.

Drawing all reasonable inferences for the State, there was sufficient evidence to support defendant's conviction for unlawful imprisonment when he prevented Ms. Edwards from leaving her house and she had to break through a screen door in order to escape.

3. THIS COURT SHOULD DECLINE DEFENDANT'S INVITATION TO CREATE A RULE THAT UNCORROBORATED HEARSAY STATEMENTS BE INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION BECAUSE WASHINGTON LAW ALREADY PROHIBITS THE ADMISSION OF UNCORROBORATED HEARSAY STATEMENTS.

The confrontation clause of the United States Constitution precludes the admission of hearsay testimony offered against a criminal defendant unless that statement falls within one of the "firmly rooted" exceptions to the hearsay rule. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). An excited utterance is a firmly rooted exception to the rule against hearsay. *Id.* An excited utterance is admissible as substantive evidence of a crime, regardless of the availability of the declarant. ER 803(a)(2); *State v. Davis*, 141 Wn.2d 798, 843, 10 P.3d 977 (2000).

Excited utterances are considered reliable because circumstances produce a condition of excitement that temporarily stills the capacity for reflection and produces utterances free of conscious fabrication. *Young*, 160 Wn.2d at 816. An excited utterance may provide the sole evidence to support a conviction. *See Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (911 tape was the only substantive evidence of the crime where the victim did not appear for trial and responding officers could not determine how the victim received her injuries); *Young*, 160 Wn.2d 799 (the victim's statements to third parties

was the only substantive evidence presented at trial that the defendant touched her).

Here, Ms. Edwards' statements to the 911 operator were the only substantive evidence of the charges presented at trial. As argued above, there was sufficient circumstantial corroborating evidence to admit the statements as excited utterances. Ms. Edwards' statements provided the fact finder with sufficient evidence to find that defendant assaulted Ms. Edwards and held her against her will.

Defendant asks this court to establish a rule that an uncorroborated hearsay statement could not be sufficient to convict a defendant as a matter of law. Yet this court does not have to determine that uncorroborated hearsay is insufficient as a matter of law to support a conviction as uncorroborated hearsay statements are inadmissible at trial. *See e.g.*, ER 804(b)(3) (statements against the declarant's interest is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement); *Young* at 812 (the existence of a startling event to admit a statement under ER 803(a)(2) must be corroborated through circumstantial evidence such as the declarant's behavior and the statement's context); RCW 9A.44.120 (under the child hearsay exception, a statement may be admitted only if there is corroborating evidence of the act). Washington law already protects a defendant from conviction based solely on uncorroborated hearsay statements by precluding the fact finder from considering the statements at

all. Here, defendant was convicted based on an excited utterance, corroborated by Ms. Edwards' demeanor and appearance, as well as defendant's own testimony.

D. CONCLUSION.

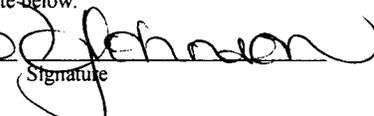
For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions for unlawful imprisonment and assault in the fourth degree.

DATED: FEBRUARY 16, 2010

MARK LINDQUIST
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Prosecuting Attorney


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WSB # 39218

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/16/10 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
10 FEB 16 PM 3:58
STATE OF WASHINGTON
BY _____
DEPUTY