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COURT OF APPEALS
DIVISION II

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No. 41585-2-II

STATE OF WASHINGTON
BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD DUANE BUNCH,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 08-1-01759-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Did the information charge Bunch with both alternative means of committing robbery such that the jury was properly instructed for both alternatives?

2. Did the State provide evidence such that Bunch would be convicted under either alternative means of committing robbery, rendering any possible error necessarily harmless?

3. Did the performance of Bunch's defense counsel provide Bunch with effective representation at trial so as to satisfy his Sixth and Fourteenth Amendment rights?

4. Did the sentencing court properly exercise its discretion when it ordered Bunch to have no contact with minors?

5. Did Bunch waive his objection to the award of jury costs during sentencing such that this Court should decline to consider his challenge in this appeal?

B. STATEMENT OF THE CASE.

The State accepts Bunch's statement of the case. Brief of Appellant at 2-5.

C. ARGUMENT.

1. The information charging Bunch includes language sufficient to provide notice that he was alleged to have taken property "in the presence" of his victim.

When an offense may be committed by alternative means, the information may allege one or both of the alternatives, so long as they are not repugnant to one another. State v. Nicholas, 55 Wn. App. 261, 272, 776 P.2d 1385 (1989). When the information

alleges only one means of committing the offense, however, “it is error to instruct the jury on an uncharged alternative, regardless of the strength of the evidence presented at trial.” Id. at 272-73; see State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (emphasizing that such a rule protects the right of the accused to notice of the charges he will face at trial). Such an error is assumed to be prejudicial “unless it affirmatively appears that it was harmless.” State v. Chino, 117 Wn. App. 531, 540, 72 P.3d 256 (2003).

A person commits robbery when he unlawfully takes personal property (1) *from the person of* his victim; or (2) in his victim’s presence. See RCW 9A.56.190 (emphasis added) (provided that, in either case, the taking must be against the victim’s will by the use or threatened use of immediate force, violence, or fear of injury); State v. Roche, 75 Wn. App. 500, 511, 878 P.2d 497 (1994); State v. Nam, 136 Wn. App. 698, 704-06, 150 P.3d 617 (2007) (holding that a defendant steals “from the person of” his victim when the defendant removes personal property that is “on or directly attached” to a person’s physical body or clothing). Bunch is correct that, because the trial court instructed the jury as to both means of committing robbery, those instructions were

correct only if Bunch was *charged* with both of those alternative means.¹ Brief of Appellant at 7, 9; [Court's Instruction 13, 17, CP 216, 220]; see Nicholas, 55 Wn. App. at 273.

A charging document that is challenged for the first time on appeal will be construed liberally in favor of its validity and will be found sufficient if the element of the offense appears in any form, or by fair construction may be found, on the face of the document. See State v. Kjorsvik, 117 Wn.2d 93, 102, 105, 812 P.2d 86 (1991). In determining this, the words of the charging document must be read as a whole and construed in accordance with common sense and practicality. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). The charging document need not use the exact words of the statute, but is sufficient if words are used that convey the same meaning and import so as to reasonably apprise the defendant of the accusation charged. Kjorsvik, 117 Wn.2d at 108-09; see State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (noting that an element of the offense, while missing entirely, might be implied by the language of the charging document).

¹ Bunch is also correct that a jury instruction as to an uncharged alternative would constitute "manifest error affecting a constitutional right," and is therefore entitled to raise this issue for the first time on appeal. RAP 2.5(a)(3); Chino, 117 Wn. App. at 538.

Bunch misinterprets the information by arguing that it alleges only that he took property that was on or directly attached to the physical body of his victim. Brief of Appellant at 7. In accusing Bunch of taking personal property “*from* C.E.M.,” as opposed to “*from the person of* C.E.M.,” the information does not actually specify the means with which Bunch was accused of committing the offense.² [CP 142-43]. An accusation that a defendant has stolen “*from*” his victim, construed in accordance with common sense and practicality, does not, as Bunch suggests, exclusively convey that the defendant has taken property that was *physically attached* to the body of that victim. On the contrary, the information charging Bunch with taking property “*from*” C.E.M. just as easily implies that he stole that property while “*in [her] presence.*”³ [CP 142-43]; RCW 9A.56.190.

While the information did not specify which of the two means of committing robbery the State believed Bunch to have committed, this does not undermine the sufficiency of the allegation. See State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991) (holding that

² As noted above, the term “person” in the context of a robbery charge has been interpreted by the courts to refer to the *physical body* of the victim. Chamroeum Nam, 136 Wn. App. at 706.

³ To illustrate, Bunch took property “*from* C.E.M.” when he stole the iPod lying a few feet next to her, whether or not he removed the iPod *from her person*.

an information charging “sexual intercourse” with a minor provided sufficient notice of the charge despite that there existed three statutory means of committing the act); State v. Elliott, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (holding that an information need not elect the specific means, out of several possible, that a defendant might have violated the statute). While the “exact words of the statute” do not appear in the information charging Bunch, the common sense implications of the language used were such that Bunch must have been reasonably apprised of the charges he was to face at trial. Kjorsvik, 117 Wn.2d at 108-09.

The sufficiency of the language charging Bunch with robbery is strengthened by consideration of the charging document as a whole. In State v. Nonog, 169 Wn.2d 220, 237 P.3d 250 (2010), the Washington Supreme Court held that, while a necessary element of the charged offense was missing from the count at issue, the allegation could be inferred from the other counts brought within the same charging document. Nonog, 169 Wn.2d at 228-29. In this case, Bunch was charged not only with committing first-degree robbery against the victim C.E.M., but also with committing first-degree rape and first-degree kidnapping. [CP 142-43]. In each of these three charges, Bunch was accused of having acted

with deliberate cruelty toward C.E.M. and out of sexual motivation, as well as afterward displaying an extreme lack of remorse. Id. Considering that all of these offenses were alleged to have been committed on the same date, in the same manner, and against the same victim, it seems unlikely that Bunch could have been surprised by the allegation that he had committed robbery “in the presence of” his victim.⁴ Id.; RCW 9A.56.190.

The information charging Bunch with first-degree robbery, read as a whole and liberally construed in accordance with common sense and practicality, includes language such that Bunch was reasonably apprised of the charges for which the jury was instructed. His conviction for robbery should therefore be affirmed.

2. Any possible error committed by the trial court in instructing the jury was harmless error beyond a reasonable doubt and is not grounds for reversing Bunch’s robbery conviction.

Assuming that the information charging Bunch with first-degree robbery can be read to charge only one means of committing the offense, the common sense interpretation is that Bunch was properly charged with taking personal property “in the

⁴ The fact that Bunch is charged with having used or threatened to use “*immediate force, violence, or fear of injury to [C.E.M.’s] person*” in order to steal her property also suggests that he was *present* to deliver upon these immediate threats. [CP 142-43].

presence of” C.E.M. As stated above, such an interpretation is consistent with the allegation that Bunch stole “from C.E.M.” and is supported by the State’s other allegations that Bunch had committed kidnapping and rape. [CP 142-43]. This conclusion is also reasonable on the grounds that commission of a robbery by taking property “from the person of” another defines a much narrower course of conduct than doing so “in the presence of” another and would likely be charged in more specific language. RCW 9A.56.190; see Nam, 136 Wn. App. at 704-06. While Bunch suggests that the phrase “from C.E.M.” best conveys an allegation that Bunch took personal property that had been directly attached to C.E.M.’s physical body, such a reading seems less intuitive than the more general implication that C.E.M. was *present* when Bunch took the property. Compare id. with Brief of Respondent at 7. Contrary to Bunch’s suggestion, any error in instructing the jury as to both means of committing robbery would actually have been to include the more specific “from the person of” alternative. [Court’s Instruction 13, 17, CP 216, 220].

An error in instructing on an uncharged means of committing a crime is subject to harmless error analysis. Nicholas, 55 Wn. App. at 273. Such an error is harmless where the appellate court is

able to conclude beyond a reasonable doubt that the instructional error did not contribute to the jury's ultimate verdict. In re Pers. Restraint of Smith, 117 Wn. App. 846, 859, 73 P.3d 386 (2003).

There is no reasonable possibility that the instructional error described above would have affected the jury's verdict that Bunch was guilty of first-degree robbery. "While personal property may be taken from the victim's presence without being taken from his person, *it cannot be taken from his person without being taken in his presence.*" State v. Graham, 77 Wn.2d 47, 50, 459 P.2d 639 (1969) (emphasis added); Nam, 136 Wn. App. at 706. In the event that the jury found Bunch guilty of robbery by taking property *from the person of C.E.M.*, the charged means, it necessarily found that Bunch committed robbery by taking C.E.M.'s property *in her presence*, the uncharged means. Graham, 77 Wn.2d at 50. Bunch is therefore guilty of robbery under either alternative, rendering any error necessarily harmless.⁵

The instructions to the jury, even if found to have incorrectly defined robbery as taking property *in the presence* of another,

⁵ Bunch concedes that the evidence presented at trial "demonstrated that he took C.E.M.'s iPod and cell phone in her presence" and that the jury convicted based upon that evidence. Brief of Appellant at 9. Any instructional error would therefore be harmless even without the overlap between the alternative means of committing robbery.

would still be harmless error beyond a reasonable doubt. In Nam, this Court held that property is taken “from the person of” another where the defendant has “[taken] personal property that was on or attached to [the victim]’s person.” Nam, 136 Wn. App. at 707. As the language suggests, this inquiry focused not on the *means by which* the defendant had taken the property from his victim but rather *the location* of the property before the theft, concluding that the purse at issue had not been attached to the victim “*at any point* during the encounter” and therefore could not have been taken from the victim’s person. Id.

In this case, the evidence presented at trial clearly established that the iPod and cell phone taken from C.E.M. were located in her pockets and therefore attached to her physical person when Bunch attacked her. [RP 141, 194, 196]. The fact that C.E.M. was forced to set aside this property by Bunch is irrelevant, particularly in light of the repeated punches to the head and consistent application of the taser that Bunch employed in *forcing* C.E.M. to part with these items. [RP 116-18, 121]. Indeed, it seems impossible to conclude that this property was not taken “from the person of” C.E.M. simply because she had been beaten into relinquishing it moments before it was stolen. [RP 116-18,

121]. A reasonable jury having heard all of this information and instructed to determine only whether the property had been taken “from the person of” C.E.M. would undoubtedly reach the same conclusion.

The evidence presented at trial was such that Bunch would be found guilty under either alternative means of committing robbery. For this reason, any error in instructing the jury on an uncharged alternative would have no effect on the verdict and is necessarily harmless beyond a reasonable doubt.

3. Bunch received effective assistance of counsel at trial such that his Sixth and Fourteenth Amendment rights were satisfied.

An appellant claiming ineffective assistance of counsel must demonstrate (1) that his “counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances”; and (2) that the “deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” State v. McDonald, 138 Wn.2d 680, 697-98, 981 P.2d 443 (1999) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). In determining whether an appellant has met this burden,

an appellate court will entertain a “strong presumption [that] counsel’s representation was effective.” State v. Townsend, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

An appellant cannot establish deficient representation on the grounds that defense counsel did not object to a jury instruction that correctly stated the law. McDonald, 138 Wn.2d at 697. In this case, the jury instructions issued by the trial court correctly defined the two alternative means of committing robbery. RCW 9A.56.190; [Court’s Instruction 13, 17, CP 216, 220]. Assuming for the reasons listed in the first section of this argument that the charging document at issue was sufficient to apprise Bunch of the charges he was to face at trial, Bunch cannot establish that defense counsel’s failure to object to these proper jury instructions fell below an objective standard of reasonableness. See McDonald, 138 Wn.2d at 697.

Even if the trial court erred by instructing the jury on both alternative means of committing robbery, Bunch cannot establish a reasonable probability that, but for defense counsel’s failure to object to these instructions, he would not have been convicted of first-degree robbery. See McDonald, 138 Wn.2d at 698. As explained in the previous section, had the trial court committed

error by defining a robbery as a taking from the person of another, and had the jury convicted Bunch on that uncharged alternative, such an error would necessarily have been harmless since Bunch could not possibly have been found to have taken property “from the person of” C.E.M. unless he had *also* taken it in her presence. Graham, 77 Wn.2d at 50. There is therefore no reasonable probability that Bunch would not have been convicted under these circumstances.

There is also no reasonable probability that Bunch would not have been convicted even if the trial court incorrectly defined robbery as taking property “in the presence of” the victim. As explained in the previous section, the evidence presented at trial firmly established that Bunch had taken property “from the person of” C.E.M. when he repeatedly inflicted serious injuries and made additional threats of violence in order to force his victim to relinquish her property. [RP 116-18, 121]. Regardless of the instructions issued by the trial court, there is no reasonable probability that the jury would have found that Bunch did not take property that had been on the person of C.E.M, and therefore no possibility that Bunch might have been found not guilty.

Bunch has failed to demonstrate that his counsel's representation was deficient and cannot establish that any possible deficiency resulted in prejudice. This court should therefore affirm his conviction.

4. The sentencing court properly exercised its discretion when it ordered Bunch to have no contact with minor children.

A sentencing court may impose as a condition of community custody a "crime-related prohibition," such as a no-contact order, that directly relates to the circumstances of the crime for which the offender has been convicted. Former RCW 9.94A.700(5)(e), recodified as RCW 9.94B.050(5)(e); RCW 9.94A.030(10); State v. Armendariz, 160 Wn.2d 106, 120, 156 P.3d 201 (2007). A "causal link" between the condition and the crime is not required to support such a prohibition, so long as the condition somehow "relates to the circumstances" of the offense. State v. Llamas-Villa, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). An appellate court will review a crime-related prohibition for an "abuse of discretion" and will strike the condition only where the sentencing court's decision is "manifestly unreasonable or exercised on untenable grounds or for untenable reasons." State v. Corbett, 158 Wn. App. 576, 597, 242 P.3d 52 (2010).

The crime-related prohibition mandating that Bunch have no contact with minors and not frequent places where minors congregate is reasonably related to the circumstances of his conviction and therefore a proper exercise of the court's discretion. [RP 11/17/10 41-42]. Preventing harm to children is a compelling state interest that will support restrictions on a defendant's fundamental rights where reasonably necessary to accomplish the essential needs of the State. State v. Ancira, 107 Wn. App. 650, 653-654, 27 P.3d 1246 (2001). Contrary to Bunch's suggestion, the Washington Supreme Court in State v. Riles did not categorically exempt sex offenders whose victims are adults from no-contact orders with minors. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998) (holding that there must be "some relationship" between the class of individuals specified by the order and the commission of the offense). Indeed, in rejecting the sentencing court's reasoning that the "youthful appearance" of the victim might have motivated the defendant, the Court in Riles held not that this reasoning was insufficient to warrant a no-contact order with minors, but simply that there was "nothing in the record" to support such a conclusion. Riles, 135 Wn.2d at 349. Indeed, the Court noted simply that in that particular case there had been "no

showing that children are at risk and thus require special protection” so as to justify the prohibition. Id. at 350.

The circumstances under which Bunch kidnapped, raped, and robbed C.E.M. manifested a threat to children such that his offenses were reasonably related to the no-contact order. As explained by the court at sentencing, Bunch was convicted for a random act of sexual violence against a victim whom he had never met, and whose age was completely unknown to him, while walking through trails that were accessible and open to children. [RP (09/24/10) 104-06, 108-09; (11/17/10) 41-42]. Based on Bunch’s “deliberately cruel” use of violence in forcing his victim to submit, as well as the indiscriminate, random, and reckless manner in which Bunch selected his victim, the sentencing court was perfectly reasonable in determining that the commission of Bunch’s offense had placed this particularly vulnerable class of persons at risk. [RP (09/24/10) 104-06, 108-09, 116-117; (10/04/10) 797-98; (11/17/10) 41-42]. Contrary to Bunch’s suggestion, the fact that his victim *happened* to be over eighteen detracts little from the danger to children posed by the *way in which* he committed his crimes. [RP (11/17/10) 41-42]. Confronted with this evidence, the sentencing court was well within its discretion when it held that a no-contact

order with minors was necessary to serve its compelling interest in protecting children. Id.

The sentencing court's concern for the risk Bunch poses to children seems particularly reasonable in light of the criminal history that was brought to its attention. [RP (11/17/10) 42]. As the sentencing court was aware, Bunch had recently been convicted of lewdness with a child under the age of fourteen and luring a child, both of which stemmed from acts he had committed with a thirteen year-old of diminished mental capacity. [RP (09/21/10) 6, 8]. Although the sentencing court's exercise of discretion is reasonable even without considering these prior convictions, it seems impossible that the court could have reached any other conclusion knowing that the risk of harm to children posed by Bunch's actions had indeed been realized. See Riles, 135 Wn.2d at 350 (noting that "it would be logical for a sex offender who victimizes a child to be prohibited from . . . contact with other children.").

The evidence presented at trial was sufficient to allow the sentencing court to reasonably conclude that the indiscriminate means with which Bunch selected his victim had placed children at risk and in need of special protection. See Riles, 135 Wn.2d at 350. The order that Bunch have no contact with minors was

therefore crime-related and a proper exercise of the sentencing court's discretion and, for these reasons, should be affirmed.

5. This Court should decline to consider the issue of whether the trial court improperly assessed Bunch's jury demand fee.

An appellant's challenge to a legal financial obligation ("LFO"), imposed as part of a judgment and sentence upon conviction, will normally not be considered on appeal as a matter of right. State v. Smits, 152 Wn. App. 514, 523-25, 216 P.3d 1097 (2009) (reasoning, for Division One, that an LFO is not a final judgment, that the defendant has an opportunity to petition for a waiver or modification of the obligation "at any time," and that until the government seeks payment on the LFO the appellant is not "an aggrieved party" under RAP 3.1); see RAP 3.1. A trial court's decision to impose costs might, however, be eligible for discretionary review. Smits, 152 Wn. App. at 523.

Bunch is correct that this Court in State v. Hathaway agreed to review an appellant's claim that the sentencing court had imposed jury costs in excess of its statutory authority. State v. Hathaway, 161 Wn. App. 634, 651, 251 P.3d 253 (2011) (holding that a jury demand fee cannot exceed \$125.00 for a six-person jury or \$250.00 for a twelve-person jury); see RCW 10.01.160(1);

former RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016(3)(b). This Court, while acknowledging that the issue of jury costs could not properly be considered as a matter of right under Smits, held that its authorization under RAP 1.2(c) to waive or alter the rules of appellate procedure “in order to serve the ends of justice” allowed it to consider “this purely legal question.” Hathaway, 161 Wn. App. at 651-52 (noting that doing so would “facilitate justice and likely conserve future judicial resources.”); see RAP 1.2(c).

The reasoning of Hathaway does not extend so far as to justify consideration of Bunch’s claim that the trial court erred in imposing jury costs of \$6,319.50. Brief of Appellant at 14; [RP (11/17/10) 44; CP 271]. Bunch is correct that the reasoning of Hathaway limits a sentencing court’s award of jury costs upon conviction to \$125.00 for a six-person jury or \$250.00 for a twelve-person jury. Brief of Appellant at 15; Hathaway, 161 Wn. App. at 65. Bunch concedes, however, that he failed to object to this fee during sentencing. Brief of Appellant at 15; [RP (11/17/10) 44].

An improper award of costs following conviction does not, by itself, rise to the level of constitutional error such that it might be considered if raised for the first time on appeal. State v. Phillips, 65 Wn. App. 239, 243, 828 P.2d 42 (1992) (holding that a court’s

award of costs without considering defendant's ability to pay, while unauthorized, could not be challenged on constitutional grounds until an attempt at enforced collection is made); see State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990); RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686 757 P.2d 492 (1988) . For this reason, an appellant who does not object to a sentencing court's award of costs at trial is held to have waived his objection until the government attempts to enforce collection of the judgment. Id. at 244; State v. Snapp, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004) (refusing to consider an appellant's challenge to costs imposed at judgment when the issue was not raised at sentencing).

A claim of ineffective assistance of counsel raises a "mixed question of law and fact" and is reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Since review of Bunch's claim would require this Court to go beyond the "purely legal question" considered in Hathaway and determine whether Bunch can demonstrate in the record his counsel's deficiency and resulting prejudice to his defense, it is unclear whether the principles discussed in Hathaway justify a broader waiver of the rules of appellate procedure. *Compare Hathaway*,

161 Wn. App. at 651-52 *and* RAP 1.2(c) *with* Smits, 152 Wn. App. at 523-25 *and* RAP 3.1.

Furthermore, it is unclear whether an appellant may challenge a *financial* judgment on the grounds that he was denied effective assistance of counsel. See State v. Long, 104 Wn.2d 285, 705 P.2d 245 (1985) (holding that the Sixth Amendment right to representation by counsel does not extend to a criminal proceeding in which the defendant is not facing imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972). In this case, the court awarded jury costs only *after* Bunch had been sentenced in a proceeding that, viewed independently, would seem to have afforded Bunch no right to representation. Long, 104 Wn.2d at 292-93; [RP (11/17/10) 44; CP 271]. Indeed, with no evidence that the government has attempted to enforce collection of the judgment, and no suggestion that Bunch has sought to have the jury fee waived or modified through the procedures that are currently available to him, there is simply insufficient justification to consider the legal issues involved in his claim of ineffective assistance of counsel. Smits, 152 Wn. App. at 523-25.

The issue of whether the sentencing court ordered the payment of jury costs in excess of its statutory authority has been

waived and can be reviewed appropriately through other procedures. This Court should therefore decline to consider the issue of jury costs and affirm Bunch's sentence.

D. CONCLUSION.

The information charging Bunch provided sufficient notice of the charges he was facing such that he was necessarily apprised of the offense for which the jury was instructed. In the event that any error was committed in instructing the jury, the evidence presented at trial was such that it was necessarily harmless. In addition, the sentencing court, after appropriately reviewing the circumstances of the offense, properly exercised its discretion in ordering that Bunch have no future contact with minors. Through all of this, Bunch was represented by effective defense counsel. For these reasons, the State respectfully asks this court to affirm both his conviction and sentence.

Respectfully submitted this 19th of July, 2011.



Carol La Verne, WSBA# 19229
Attorney for Respondent

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BY ~~their counsel of record~~
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or ~~their~~ counsel of record on the date below as follows:

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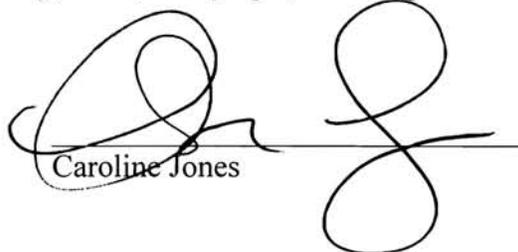
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--AND--

THOMAS E. DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE, WA 98340

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

Dated this 19 day of July, 2011, at Olympia, Washington.


Caroline Jones