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Court of Appeals
Division II
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No. 51928-3-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRANDON EUGENE DOCKTER,

Appellant.

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

The Honorable Scott Collier, Judge

Clark County Superior Court Cause No. 17-1-00524-0

APPELLANT'S OPENING BRIEF

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ISSUES AND ASSIGNMENTS OF ERROR

Assignment of Error Number 1. The prosecutor committed prejudicial misconduct by misstating the law regarding consent and capacity and, thereby shifting the burden of proof to the Defendant.

Assignment of Error Number 2. The Court erred by giving the jury an instruction on the definition of consent, WPIC 45.04.

Assignment of Error Number 3. Defense counsel rendered ineffective assistance of counsel when he proposed and argued the jury instruction on the definition of consent, WPIC 45.04.

Assignment of Error Number 4. There was not sufficient evidence to establish the element of mental incapacity as to the charge of rape in the second degree, nor as to the charge of indecent liberties.

Issues

A Whether the prosecutor committed prejudicial misconduct by misstating the law regarding consent and capacity, thereby shifting the burden of proof to the Defendant.

B Whether the Court erred by giving the jury an instruction on the definition of consent, WPIC 45.04.

C Whether defense counsel rendered ineffective assistance when he proposed and argued the jury instruction on the definition of consent, WPIC 45.04.

D Whether there was sufficient evidence to establish the element of mental incapacity as to the charge of rape in the second degree as well as to the charge of indecent liberties.

STATEMENT OF THE CASE

On March 7, 2017, Defendant, Brandon E. Dockter, was invited to the Main Street Bar in Battle Ground, Washington by a former high school friend, Emily Cavagna. RP 170-71. At the bar was also Cavagna's roommate of six months, Abby Cornell¹, who had traveled to the bar with Cavagna to drink and play pool. RP 67, 167, 169. Also joining them at the bar was a man named Sam Harper. RP 169. After spending time at the bar, the four went to an "after party" at the nearby home of an employee of the bar. RP 173.

After spending time at the after party, Mr. Harper and Ms. Cornell left early together to go Cavagna's home and Mr. Dockter and Ms. Cavagna stayed for awhile. RP 140-41, 174-75. The Cavagna home was a small travel trailer. RP 68. Mr. Dockter later gave Ms. Cavagna a ride to her home and stayed for the night. RP 177. There is no indication that Ms. Cornell, or any of the four, had more than a moderate amount of alcohol to drink or marijuana to smoke during the evening. RP 72, 140, 143, 154. Throughout the evening, there was little contact between Ms. Cornell and Mr. Dockter. RP 72. At the Cavagna home, all four slept in the same, large king-sized bed. RP 137, 178. From left to right it

¹ Abby Cornell was sworn in at trial as Abby Sanchez Bonifacio as she had changed her name following her divorce which took place after the date of the crimes charged herein. The name Cornell is maintained in this Brief as that is the name used in the charging documents and throughout the trial as well as the jury instructions.

was Ms. Cornell against the far wall, Mr. Harper, Ms. Cavagna and Mr. Dockter. RP 147, 178. Ms. Cornell and Mr. Harper were already asleep when Ms. Cavagna and Mr. Dockter arrived. RP 178.

At some time during the night, Ms. Cavagna woke up cold as the blanket had been pulled from her, at which time she saw Mr. Dockter pulling his pants down and begin a thrusting motion toward Ms. Cornell's location. RP 179-80. Ms. Cavagna noted that Mr. Harper had left and that Mr. Dockter had taken his place in the bed between her and Ms. Cornell. RP 180. Mr. Harper had left early to go to work and did not wake anyone up on his way out of the home. RP 147,47. Ms. Cavagna re-covered herself with the blanket, rolled over and pretended to be asleep. RP 180-81. As the thrusting began, Ms. Cavagna heard only a single sigh and then silence. RP 181. Approximately one half hour later, Ms. Cavagna heard Ms. Cornell say her name, "Emily", in a questioning tone, followed, after Ms. Cavagna and Mr. Dockter had both got out of the bed, by Ms. Cornell saying to Mr. Dockter, "who the fuck are you, and what are you doing?". RP 181-84. In anger, Ms. Cavagna then hit Mr. Dockter in the back of the head with a table leg and told him to leave. RP 276.

At trial, Ms. Cornell recalled that she awoke to being touched on her chest. RP 75-76. She recalled being touched on her nipples and that her pants and underwear were down around her knees. RP 76. Her first thought was that "maybe it was Sam (Mr. Harper)" touching her. RP 77. Ms. Cornell had romantic feelings for Mr. Harper. RP192. She had the evening before asked Ms.

Cavagna to invite him to the bar and had slept in the same bed with him before that night. RP 70, 74. At the after party, Ms. Cornell sat behind Mr. Harper while braiding his hair. RP 142. She was observed hanging on him all evening long and was known to have a crush on him. RP 192.

In the bed, Ms. Cornell also felt hands touching her vagina and what may have been fingers or a penis penetrating her vagina. RP 77-78. She was confused and did not know which it may have been. RP 78. Upon more prompting from the State, she also recalled feeling a penis inside vagina. RP 78.

After a time, Ms. Cornell “reached back to see who it was”. RP 78. The hair was not long like Mr. Harper’s as she had expected. RP 79. A man’s voice behind her then asked her “where did [she] want him to finish”. The voice was also not Mr. Harper’s, as she had expected. Id. After feeling the shorter-than-expected hair, Ms. Cornell recalled then asking the man “who the fuck he was”, and woke Ms. Cavagna saying, “Emily, who is this?” RP 79-80. Ms. Cornell did not have any concern or object to the physical contact until she realized it was not Mr. Harper. RP, 78-79, 88.

Sexual Assault Nurse Examiner (“SANE”) Justina Sharp testified that during her examination of Ms. Cornell, she said that she had been spooning, presumably with Mr. Harper, and that the man kissed her on what nurse Sharp interpreted at the time to mean her “mouth”. RP 248.

Mr. Dockter testified that he woke up with his arm unintentionally around Ms. Cornell. RP 271-272. Ms. Cornell then interlaced her fingers with his and

guided his hand between her legs. RP 272. Taking the cue, Mr. Dockter began to rub her vagina over her pants and she backed into him and loosened her legs, allowing him to continue rubbing, Id. Ms. Cornell reached back and touched his penis and then each pulled down their respective pants and underwear and engaged in penile - vaginal intercourse in a spooning position for approximately one half hour. Id, RP 289. Mr. Dockter ejaculated, touched her breasts and the two shared a kiss on the lips. RP 274. Ms. Cornell then got out of bed and said to him, “who are you?” RP 275.

Approximately 10 minutes after being hit in the head with the table leg and leaving the home, Mr. Dockter sent a text message to Ms. Cavagna, saying, “Long story short just to let you know I don't think either one of us knew what was going on until that moment. So thanks for hitting me with the pole. I really appreciated it whether you believe it or not”. RP 185, 86, Exh. 1.

JURY INSTRUCTIONS

Jury Instruction Number 10, the to-convict elements of rape in the second degree, WPIC 41.02, and Number 15, the to-convict element of indecent liberties, WPIC 49.02 were given to the jury. The relevant portions are as follows:

To convict the defendant of the crime of rape in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 8, 2017, the defendant engaged in sexual intercourse with Abby Cornell;

(2) That the sexual intercourse occurred when Abby Cornell was incapable of consent by reason of being physically helpless or mentally incapacitated; ...

CP 95, page 13; and

To convict the defendant of the crime of indecent liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 8, 2017, the defendant knowingly caused Abby Cornell to have sexual contact with the defendant;

(2) That this sexual contact occurred when Abby Cornell was incapable of consent by reason of being mentally incapacitated or physically helpless; ...

CP 95, page 19.

The State proposed, and was allowed pattern jury instruction WPIC 45.05, the definition of mental incapacity which read,

Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.

CP 95, page 12.

Partway through trial, Mr. Dockter's attorney proposed as a jury instruction WPIC 45.04, the definition of consent. RP 231, CP 68-3. The instruction reads,

Consent means that at the time of the act of sexual intercourse or contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse or contact.

CP 95, page 9. The prosecuting attorney indicated to the court that she did not feel that the consent instruction was appropriate for the charges involved. RP 231.

Mr. Dockter also properly proposed and was allowed WPIC 19.03, the instruction telling the jury that Mr. Dockter's reasonable belief that Ms. Cornell was able to consent at the time of the sexual contact, in the case of indecent liberties, or sexual intercourse, in the case of second degree rape, were complete defenses to both charges. CP 95, page 12.

The Court's Instructions to the Jury did not include either of the unanimity instructions, WPIC 4.25 or WPIC 4.26.

CLOSING ARGUMENT

In closing, the prosecutor focused on Ms. Cornell's claim that Mr. Dockter had touched her breasts and vagina — "[t]hat is indecent liberties". RP 333, 334.

With regard to Mr. Dockter's version of events, the prosecutor told the jury that he should not be believed saying,

[t]he defendant is presumed innocent. He is not presumed credible. And so when he testified, when he took the stand, his credibility was put at issue just like everyone else's. And so when you look at the story the defendant gave, you have to ask yourselves if it makes sense with all the other evidence and if that is reasonable.

RP 338.

The prosecutor went on further to attack his credibility saying,

[h]e went with option one before because it was convenient ... [a]nd he went with option two here because it's more convenient now in light of everything else. But does that really make sense?

RP 340.

In purporting to state the law in the State of Washington with regard to consensual sex, the prosecutor said,

[Mr. Dockter's] Version is he does not check at all to see if this woman is awake, conscious, and consenting.

The law in this state does impose that obligation on people when they have sex with another person, they have to make sure that that person is awake and conscious and able to consent.

RP 340.

The defense attorney attempted to object, with the following exchange taking place:

Defense Attorney²: Objection, you Honor. The instruction says that he has to have a reasonable belief. It doesn't say that he has to go through –

² The defense counsel was incorrectly identified in the Verbatim Report of Proceedings with the name of the appellate attorney rather than the trial attorney.

The Court: You may continue. I'll let you take the instructions as provided to you and apply them to the facts as you decide them. Go ahead.

Prosecutor: That is an obligation on people when they have sex, which is why there is a law that someone – it is a crime to have sex with someone who is incapable of consent.

After cutting the defense attorney off mid-objection, no curative instruction, other than the comment from the court set forth above, was directed to the jury. RP 340, 41.

In closing, the defense attorney conceded that Ms. Cornell was asleep and incapable of consent.

Now, It's possible she may not have known what was going on, and honestly all of the testimony is that she was probably asleep at the time.
RP 345.

The prosecutor did not miss this argument and responded to it in her rebuttal.

Now, Defense just conceded, really as the defendant did, that Abby was not able to give consent during this interaction so think about that. She was asleep. She was not able to give consent.

RP 348.

ARGUMENT

A. *The prosecutor committed prejudicial misconduct by misstating the law regarding consent and capacity thereby shifting the burden of proof to the Defendant.*

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's argument was improper and prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). The alleged improper statements are viewed in the context of the entire argument, the issues of the case, the evidence and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." *State v. Lindsay*, 180 Wn.2d 423 (2014) at 434, citing, *State v. Gregory*, 158 Wn.2d 759, 859-61, 147 P.3d 1201 (2006). See also *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011) and *State v. Osman*, 192 Wn.App. 355 (Wash.App.Div 1 2016).

Due Process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In Re: Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *State v. Cantu*, 156 Wash.2d 819, 825, 132 P.3d 725 (2006).

Under Washington State law, and pursuant to the jury instructions, the State was required to prove that the intercourse for rape, and the sexual contact for indecent liberties “occurred when Abby Cornell was incapable of consent by reason of being physically helpless or mentally incapacitated”. In her closing argument, however, the prosecutor incorrectly argued that Mr. Dockter had an “obligation [to] make sure that that [Ms. Cornell was] awake and conscious and able to consent” before they had sex. While in hind sight that is certainly good advice and may have obviated criminal charges and the need for a trial in this case, it is not a correct statement of the law. Moreover, the argument was in conflict with the jury instructions. It is, at the very least, misleading as to the Constitutional guarantee of proof beyond a reasonable doubt to which Mr. Dockter was entitled. The argument shifted the burden from the State to prove that Ms. Cornell was incapacitated, to Mr. Dockter to prove that he had either affirmatively checked to see that Ms. Cornell was awake or to prove that she was in fact, awake. That is not the law. The law makes it a crime to have sex with a person who is in fact incapacitated, but does not under any circumstances impose a requirement that a person initiating sex perform a routine capacity check on the other person. This should have not been required of Mr. Dockter. Moreover, he had just testified that he had not checked, but reasonably believed that she consented to sex — a defense to the charge. However, due to his admission that he had not checked, according to the prosecutor’s argument, a directed verdict of guilt was required.

The attorney timely and appropriately objected to this incorrect statement of law, but was cut off by the judge who simply said to the prosecutor, “You may continue”; then to the jury, “I’ll let you take the instructions as provided to you and apply them to the facts as you decide them”; and finally, to prosecutor, “Go ahead.” The prosecutor then went on to repeat the same incorrect statement of the law.

In *State v. Warren*, in closing argument, the prosecutor made an incorrect statement regarding the State’s burden by saying to the jury that a criminal defendant is not entitled to the “benefit of the doubt”. After a third defense objection to the prosecutor repeating this incorrect statement, the judge interrupted the prosecutor and gave a lengthy curative instruction as follows:

Counsel, just a second. There has been an objection to the statements made by the State as to the definition of reasonable doubt. The definition of reasonable doubt is provided in your jury instructions. I don't have the number in front of me, but I think it's the third instruction. I want you to read that instruction very carefully, particularly the last paragraph of the instruction. The second sentence that reads, "it is such a doubt as would exist in the

mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence.”

Now, my statement on that is, after you have done that, after you have reviewed all of the evidence or lack of evidence, and you continue to have a reasonable doubt and you must find the defendant not guilty. And if in still having a reasonable doubt that is a benefit to the defendant, then in a sense you are giving the benefit of the doubt to the defendant. I don't want you to misconstrue the language that somehow there is no benefit here. Indeed there is, because the benefit of the doubt is if you still have a doubt after having heard all of the evidence and lack of evidence, if you still have a doubt, then the benefit of that doubt goes to the defendant, and the defendant is not guilty.

... the instruction is here in the package. I commend it to you for reading. Ultimately determine whether, at the conclusion of your

deliberations, you have a reasonable doubt or not. You may complete your argument, counsel.

State v. Warren, 165 Wn.2d 17, 26 195 P.3d 140 (2008). Here, the judge not only gave a curative instruction, but he very carefully and thoughtfully set forth a correct statement of the law.

In *Warren*, the Washington State Supreme Court found that “[b]ecause Judge Hayden interrupted the prosecutor’s argument to give a correct and thorough curative instruction, [they found] that the error was cured”. Id at 29.

In the present case, the judge cut off the objection of the defense attorney and simply said, “You may continue. I’ll let you take the instructions as provided to you and apply them to the facts as you decide them. Go ahead.” The prosecutor went on to repeat the same incorrect statement of the law, with impunity, therefore, the error was not cured. If anything, the court sanctioned the statement by glossing over the objection, making a pro forma reference to the instructions, and then inviting the prosecutor to continue instructing the jury on her incorrect version of the law, which she did. The prosecutor successfully, incorrectly, and with the court’s blessing, added a burden to Mr. Dockter which he could not disprove.

A misstatement about the law and the presumption of innocence due a defendant, ‘the bed rock upon which [our] criminal justice system stands’, constitutes *great prejudice* because it reduces the State’s burden and undermines

a defendant's due process rights. *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014)(emphasis added), quoting, *State v. Johnson*, 158 WnApp. 667, 682 243 P.3d 936, quoting, *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

The prosecutorial misconduct and resulting error here constituted great prejudice and was not cured. A new trial is required.

B. *The Court erred by giving the jury an instruction on the definition of consent, WPIC 45.04.*

Instructions are sufficient if they permit counsel to satisfactorily argue his theory of the case to the jury. *State v. Dana*, 73 Wash.2d 533, 537, 439 P.2d 403 (1968). Moreover, jury instructions must be read as a whole and a requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions. *State v. Etheridge*, 74 Wash.2d 102, 110, 443 P.2d 536 (1968)

Whether a jury instruction correctly states the applicable law is a legal question subject to de novo review. *State v. Becklin*, 163 Wn.2d 519, 182 P.3d 944 (2008). An error in jury instructions is presumed prejudicial unless it affirmatively appears that the error was harmless. *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984). In instructional error is not harmless unless it is considered "trivial, or formal, or merely academic, and was not prejudicial to the substantial

rights of the party assigning the error, and in no way affected the final outcome”.
State v. Flora, 160 Wn.App. 549, 554, 249 P.3d 188 (2011).

In a criminal trial for rape in the second degree based upon incapacity, the consent definition should not be given. *W.R.* 181 Wn.2d 757, 336 P.3d 1134 (2014). See also the comment to WPIC 45.04, Washington Practice Series, Volume 11, Pattern Jury Instructions Criminal, Fourth Ed. (2016)(hereinafter referred to as the “Jury Instruction Manual”) (An instruction on consent is generally not appropriate in prosecutions for first or second degree rape).

In a trial for second degree rape based upon incapacity, the issue is not consent, but rather whether the victim had the capacity to consent. *State v. Van Vlack*, 53 Wn.App. 86, 765 P.2d 349 (1988).

Here, the defense counsel requested the instruction on the definition of consent, WPIC 45.04. Under the facts of this case, however, consent was not an issue. Only the victim’s capacity to consent at the time of the offense was at issue. As such, the definition of consent was superfluous and did not address an element in the case. The comment in the Jury Instruction Manual in fact indicates that the instruction is not appropriate in cases involving first or second degree rape. The remainder of the comment appears to focus upon cases involving forcible compulsion, however, the comment should be read in the disjunctive; the first sentence says, “[a]n instruction on consent is generally not appropriate in prosecutions for first or second degree rape. See Comment.

Moreover, as consent is not an element of the crime of either rape in the second degree or indecent liberties — both based upon the victim’s inability to give consent, the instruction is irrelevant and likely confusing to jurors. Especially where, as here, Mr. Dockter was attempting to convince the jury that Ms. Cornell appeared to be giving consent, requiring Mr. Dockter to show that, at the time of the act of sexual intercourse or contact, there were actual words or conduct indicating freely given agreement to have sexual intercourse or contact. “The term ‘consent’ does not have a technical meaning different from the commonly understood meaning.” *VanVlack*, at 90. It can still be argued without the WPIC definition. It was also present in another instruction and available for argument, therefore, it need not have been given.

It was error to give this instruction. And the error was not trivial, or formal, or merely academic. It was prejudicial to Mr. Dockter’s substantial rights and, as will be detailed more below, likely affected the final outcome.

C Defense counsel rendered ineffective assistance of counsel when he proposed and argued the jury instruction on the definition of consent, WPIC 45.04.

A criminal defendant is guaranteed the effective assistance of counsel in defending against allegations of criminal conduct. Sixth Amendment, U.S. Constitution. In order to establish a claim of ineffective assistance of counsel, a defendant must show that 1) counsel's conduct was deficient; and that 2) the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d

126, 101 P.3d 80 (2004), *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish a deficient performance, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *Reichenbach*, at 130. In order to show prejudice, the defendant must show that, but for counsel's deficient performance, the outcome of the trial would have differed. *Id.* Ineffective assistance of counsel claims are a mixed question of fact and are therefore reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Here, defense counsel proposed an instruction which was unnecessary and did not contribute to forming the basis of a recognized defense. In fact, in the context of the balance of the instructions and the evidence and arguments presented, it appeared to place the additional burden upon Mr. Dockter to prove that Ms. Cornell in fact consented.

With this additional burden in place, defense counsel then conceded the issue of capacity completely in his closing by admitting that, honestly, all of the testimony is that she was probably asleep at the time.

This gave the prosecutor the opportunity to accept the concession, leaving Mr. Dockter with only the slim chance that the jury would believe his claim completely that Ms. Cornell's reactions to his proximity and touching of her were not actual words, but were at least conduct indicating freely given agreement to have sexual intercourse or contact with him. Mr. Dockter had the same argument available to him with just the Reasonable Belief instruction,

without the definition of consent instruction. As such, it was confusing and appeared to place an additional burden upon Mr. Dockter which served no legitimate strategic purpose. This performance was deficient and resulted in prejudice to Mr. Dockter.

D Whether there was sufficient evidence to establish the element of mental incapacity as to the charges of rape in the second degree as well as indecent liberties.

Evidence is sufficient if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). "the relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Drum*, 168 Wn.2d 23, 225 P.3d 237 (2010).

From the record, it is clear that Ms. Cornell initially thought that the man behind her, touching, kissing and having sexual intercourse with her, was Mr. Harper. It is equally clear that it was not until she felt Mr. Dockter's shorter hair, felt his beard when they kissed, and heard his voice that she was suddenly alarmed and upset. It appears from the record that, until all three events occurred, telling her that it was not in fact Mr. Harper behind her, she not only was able to consent, but did. Moreover, according to Mr. Dockter, and to Ms .Cavagna, the sexual intercourse lasted for approximately one half hour. From

this record, no rational trier of fact could find that Ms. Cornell was incapable of consent beyond a reasonable doubt as it appears that she could, and did.

In all, it appears that Ms. Cornell did not object, or lack incapacity to, consent to sexual intercourse or to sexual contact — she just objected to having sexual intercourse and sexual contact with Mr. Dockter. This does not negate consent, it merely indicates a mistake as to the identity of the person with whom she was have sexual contact and sexual intercourse with.

The text message Mr. Dockter sent to Ms. Cavagna 10 minutes after he left the trailer is merely an apology to his friend, Ms.Cavagna, not an admission that Ms. Cornell was incapable of consent.

The element of mental incapacity fails for both the count of rape in the second degree as well as indecent liberties.

CONCLUSION

For all of the reasons above, the Defendant's conviction should be reversed for a new trial.

DATED this 15 day of March, 2019

Respectfully Submitted,



BRIAN A. WALKER, WSBA # 27391
Attorney for Appellant Dockter

CERTIFICATE OF SERVICE

I certify that I have provided a copy of the Appellant's Opening Brief by first class mail on the below-named, by mailing to said individuals copies thereof, contained in sealed envelopes, with postage prepaid, addressed to said individuals at said individuals' last known addresses as set forth below, and deposited in the post office at Vancouver, Washington on said day.

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Dated this 15 day of March, 2019



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