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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID NORMAN POLK,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the court properly deny the Defendant's motion to dismiss multiple counts of possession of child pornography where a factual analysis demonstrates the different counts regard different incidents of possession?
2. Is there sufficient evidence the Defendant duplicated, disseminated, published, or printed child pornography where he copied the images to digital format, gave copies of the images to Mr. Bennett, DRE, TJH, and CCM, and held a slide show for SLM's husband?
3. Where the possession of images of the same victim and the dealing of those images occurred at different times and places and with different criminal intents, is there any basis to support the

Defendant's claim that the dealing and possession comprised the same criminal conduct for scoring purposes under RCW 9.94A.589(1)(a)?

4. Did the court abuse its discretion in imposing a no-contact order against a victim-witness on the State's witness list who had been investigated and interviewed for trial of this case?

IV. STATEMENT OF THE CASE

The Defendant David Polk has been convicted of four counts of dealing child pornography and four counts of possessing child pornography. CP 53-56, 86-88, 227-44.

The Defendant's offenses first came to light when, under the pseudonym of "D-Man," he friended Brian Bennett on facebook and then sent him nude pictures of DRE. RP 31-34. D-Man said he had "a whole set" of pictures of Mr. Bennett's acquaintance DRE. RP 34. Mr. Bennett was shocked that D-Man would be circulating someone else's nude photographs. RP 34. He set about figuring out D-Man's identity and DRE's contact information. RP 34-35. He learned that D-Man was David Polk, someone he knew as having been fired from Sunbridge (Care and Rehabilitation) for sexual harassment. RP 36, 129. Mr. Bennett then

contacted police and gave them access to his computer and provided DRE's information. RP 35.

DRE grew up in Walla Walla and move away shortly before her 18th birthday. RP 56. When DRE was 16 and out swimming at the river with her girlfriends, the Defendant approached the girls and began taking their pictures. RP 57-58. He represented himself to be a professional photographer, said he would like to do a photo shoot, and he gave her his phone number. RP 58. The Defendant took topless pictures of DRE on more than one occasion, and then told her he wanted to do some fully nude photo shoots to submit to Playboy. RP 58-60. They did the fully nude photo shoot, after which the Defendant told her that she would have to wait until she was 18 to sign the contract. RP 61-62. At the time, she did not tell anyone about the photo shoots. RP 66. She moved away before she turned 18 and never posed for him again. RP 62.

In 1991, after DRE married, she asked the Defendant for the negatives. RP 62. At first he claimed they "hardly even turned out." RP 63. Eventually, he gave her nine slides (date stamped July 1987), claiming the others "didn't turn out." RP 63.

When DRE learned from Mr. Bennett that the Defendant was disseminating her photos, she contacted the Defendant. RP 67-68. He

called her back and immediately said, "you were 18." RP 68. She responded that he was a liar. RP 68. He then said, he heard she had seen the pictures he had "posted" of her on the internet, and he wanted to know which postings she had seen. RP 68. DRE has never been able to find these postings. RP 69-70.

After police ascertained DRE's age at the time of the photos, they served a warrant on the Defendant's home. RP 71-72. Police found two cell phones, seven computers in the living room and in the office, 28 hard drives, three media cards, and a tablet. RP 72-73, 127-132. Some of the drives had one or two terabytes (1000-2000 gigabytes) of memory. RP 131, 148. One computer served as a network server for the others in the house, a global access network. RP 130-31. Police found a bag of slides on a chair and three to four boxes of slides, representing possibly thousands of images. RP 130. They found hundreds of loose photographs. RP 133. There was a slide and negative digitizer, to transfer images to computer files. RP 146-47.

Detective Mike Boettcher reviewed 7-8 terabytes of data for identifiable victims among dozens and dozens of images of apparent underage, nude females and some males. RP 134, 177. Some of the boxes were labeled with the victim's name. RP 134. He identified half a dozen

underage females, four of whom testified at trial. RP 135. There are images of a dozen more females who appear to be underage, but that the detective has not yet been able to identify. RP 185-86.

Police located the digitized slides of DRE, four of them pornographic but repeatedly copied such that there were 170 child porn images of DRE on the Defendant's various machines. RP 135, 150, 154-56. A slide that the Defendant gave DRE some twenty years ago was digitized on the Defendant's computer in 2011. RP 161. Over the years, the files had been copied into different computer hard drives such that the dates represented copy dates, not the date the image was taken. RP 144, 147, 149. Det. Boettcher could determine when date stamps on actual photos were externally placed on later so as not to represent the actual date that the original image was created. RP 152-53. The dates a the slide "absolutely [did] not" represent the date a picture was taken. RP 154.

SLM moved to Walla Walla when she was 15. RP 76. She was a vulnerable teen, moving to a new town and meeting her mother for the first time. RP 80-81. Her mother brought men around and had pot parties and gave her permission to pose nude while underage. RP 80-81, 87. At 17, SLM got pregnant and then married her older boyfriend. RP 80-81, 83, 87.

SLM met the Defendant a few months after she arrived in Walla Walla, shortly after she had turned 16. RP 76. She wanted a portfolio to become a model, so she posed for the Defendant four times, but she never received any of the pictures. RP 77-78, 89. She remembers she was 16 at the last shoot, a nude shoot. RP 78-79. SLM remembers her age, because it was before she became pregnant with her first child at 17. RP 80, 87. Because she was a minor, the Defendant made SLM and her mother sign a consent form. RP 80-82. SLM remembers feeling disturbed and gross to be asked to pose naked with another girl in front of the older, sweaty Defendant. RP 79. SLM did not agree to any more photographs after her discomfort with the nude shoot. RP 89-90. Police recovered 87 slides of SLM at the Defendant's house and 323 images on four different hard drives and two different computers. RP 135, 164. The embossed dates are from before SLM turned 18. RP 164.

After SLM's baby was born, the Defendant brought a slide projector to SLM's home and showed the underage photos to SLM's husband. RP 82-83.

The Defendant photographed TJH "undressed" with her friend when TJH was 16. RP 93. She returned to see the Defendant alone, still 16, in order to take nude photos for her boyfriend. RP 94. She returned

for the photos and the Defendant told her that he was providing her "all" the photos and negatives. RP 95. She eventually destroyed the nude photos. RP 95. But police found five slides of TJH in the Defendant's home. RP 135, 168.

CCM was only 13 or 14 when she met the Defendant at a teenage dance club for customers who were too young to consume alcohol. RP 107, 247. He told her she was "modeling material." RP 107. He took nude pictures of her at 13 or 14, purportedly to put in a portfolio for her modeling career. RP 107-09. The photo shoots occurred at the country club, the Marcus Whitman ballroom, and the Defendant's home over the course of a year. RP 112-13. CCM knows that the photography took place before her 18th birthday, because she left for Job Corps when she was 16, got pregnant at 17, gave birth to her baby days after her 18th birthday, and was pregnant with five children in six years. RP 108, 112. Also the Defendant told her he needed her parents' signature on her modeling contract, because she was underage. RP 108-09. He had to pick her up for the shoots, because she was not old enough to drive. RP 110. The Defendant gave CCM some of the photographs. RP 110. When CCM's father asked the Defendant for all the photos, the Defendant told him that he had burnt them. RP 110-11. But police recovered 49 slides of

CCM from the Defendant's home. RP 135, 170.

RER: Alleged victim, RER, did not testify. Two months before trial, the defense made motions to compel witness interviews and depositions. CP 24-34. Counsel's declaration refers to "six women, the alleged victims herein [who] purportedly made statements to police that they were underage at the time the photographs were taken." CP 26. A few days before trial, the defense made a motion to exclude RER's testimony and related motions in limine. CP 40-41, 49-52. RER was on the State's witness list, and, in the preparation of the case, she had been interviewed and had made statements to police regarding the Defendant's interactions with her when she was underage. CP 50. The defense argued that the Defendant was not charged with "encounters or interactions," but with pornography, and the police had not yet found images of RER as they attempted to review 28 hard drives of images. *Id.* The day before trial, the prosecutor informed the court that RER would not be testifying. RP 14-15. The day after trial began, the information was amended to eliminate one count. CP 11-15, 53-56.

Police had investigated the Defendant on suspicion of this type of activity long ago, in the mid-80's, but had been unable to find cooperating witnesses. RP 190-91. After the passage of twenty years, circumstances

were different. Police spoke with victims "that are here today and have gone through court and testified, [and] there are ones that [the judge had] not heard from and that [police] have talked and [police] haven't talked to." RP 337. Some victims spoke with police about their own similar experiences with the Defendant but "are in positions of employment to where they weren't willing to come to trial." RP 338-39. Other victims are still coming forward. RP 310, 338-39.

After the jury convicted him, the Defendant asked for a presentencing investigation. RP 316. The report describes other uncharged offenses related to the same victims. CP 132-33

Unit of Prosecution: The defense made a motion to dismiss several counts as improper under the unit of prosecution. CP 42-44; RP 7. The motion was renewed at sentencing. CP 124-30.

The State acknowledged that the unit of prosecution was not per image. RP 9-11 ("I am not saying that each picture found on the computer in one little file constitutes for each picture a separate possession"). In fact, there were many images of each of the four testifying victims. Among the admitted exhibits, there were eight photos of DRE, three of SLM, four of TJH, and five of CCM. CP 33, 40, 59, 85, 105, 106, 110. The State explained that, under RCW 9.68A.050(2)(c) and RCW

9.68A.070(2)(c), the unit of prosecution is per incident of dealing or possession. RP 8-9, 340. The prosecutor argued that each different victim constituted a separate incident of possession. RP 9-11, 340.

The court denied the Defendant's motion. CP 229; RP 343.

At sentencing, the Defendant asked for a 60 month sentence, arguing that to punish the Defendant for each count violated the prohibition against double jeopardy. CP 139-46. The standard sentencing range was 72-96 months for each of the dealing counts and 63-84 months for each possession count. RCW 9.94A.510; RCW 9.94A.515. However, each offense is a class C felony with a maximum penalty of five years or 60 months. CP 229; RP 341. Therefore, the court was prevented from even imposing as much as the low end of the range and could not impose any community custody time. RP 341.

The court sentenced the Defendant to 60 months on each count, running counts 1-4 consecutive to counts 5-8, for a total of 120 months. CP 229, 231. The exceptional sentence is based on his offender score of 21 points. CP 229; RP 309. The Defendant objected to the calculation of his offender score and to the no contact order against RER. CP 229, 232.

V. ARGUMENT

A. THE COURT CORRECTLY DETERMINED THE UNIT OF PROSECUTION FOR POSSESSING CHILD PORNOGRAPHY.

The Defendant argues that the superior court erred in determining the unit of prosecution and that such error violates the double jeopardy clause. Brief of Appellant at 6-7. Because the unit of prosecution is per incident and each count represents a separate incident, there is no error.

The standard of review for resolving unit of prosecution issues on appeal is de novo. *State v. O'Brien*, 164 Wn. App. 924, 929, 267 P.3d 422 (2011). The court reviews the statute and its history and then performs a *factual* analysis, because "the facts in a particular case may reveal more than one 'unit of prosecution' is present." *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007) (citing *State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610(2000)).

After the decision in *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009), the legislature amended the statute as to the unit of prosecution for second degree offenses:

> For the purposes of determining the unit of prosecution under this subsection, ***each incident*** of possession of one or more depictions or images of visual or printed matter constitutes a separate offense.

RCW 9.68A.070(2)(c) (emphasis added); Laws of 2010, ch. 227, sec. 6.

This is not the same as the holding in *Sutherby* (165 Wn.2d at 882) that the unit of prosecution is per possession. The Defendant continues to focus on the language in *Sutherby*, although the amendment post-dates the case and clarifies legislative intent and although the focus under the standard of review is on the statute, not the case.

The statute looks to incidents. Second degree offenses, which these are, "have a ***per incident*** unit of prosecution." Laws of 2010, ch. 227, sec. 1; RCW 9.68A.001. The Legislature declined to change the unit of prosecution for first degree offenses, which remains ***per image***. Laws of 2010, ch. 227, sec. 1; RCW 9.68A.001; RCW 9.68A.050(1)(c); RCW 9.68A.070(1)(c). The legislative response also sets a ***per view*** unit of prosecution for the new offense of viewing child pornography. Laws of 2010, ch. 227, sec. 1; RCW 9.68A.001. From these amendments, it is clear that the Legislature did not adopt the decision in *Sutherby* wholesale but only responded to it.

In denying the Defendant's motion, the judge quoted public policy from *State v. Ehli*, 115 Wn. App. 556, 62 P.3d 929 (2003), which is also repeated in RCW 9.68A.001 and relevant to the statute's history. RP 343. The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. RP 343; *State v. Ehli*,

115 Wn. App. at 560. The care of children is a sacred trust, not to be abused by those who seek commercial gain or personal gratification. RP 343; *Ehli*, 115 Wn. App. at 560. The victim's knowledge that the images are in circulation increases the emotional and psychic harm suffered. RP 343; *Ehli*, 115 Wn. App. at 560. The courts must give sufficient weight to the importance of protecting children from repeat exploitation in child pornography. RCW 9.68A.001. Every instance of viewing child pornography images represents a renewed violation of the privacy of the victims and a repetition of their abuse. *Id.*

A factual analysis under the "per incident" rule demonstrates that the Defendant's possession of the pornographic images of each separate victim represent separate incidents. In the *Sutherby* case, there is no information to suggest that the defendant was the photographer who created the pornography discovered on his computer. *State v Sutherby*, 165 Wn.2d at 876. Indeed, the children could not be identified at all. *Id.* (the trial judge used a per child unit of prosecution but could not clearly identify different minors). Sutherby described his use of the porn as sexual fantasies that he did never acted on. *Id.* In that case, there was no way to distinguish the possessions. But in this case, the Defendant Polk did not download a cache of images from a single website or email. He

created the images himself in four different photo shoots. He met and photographed DRE, SLM, TJH and CCM all separately from each other. His separate acquisitions or possessions began at distinctly separate creation points demonstrating separate incidents. The court made no error in ruling the incidents or occurrences of the Defendant's possession of each set of images are distinct, permitting four counts.

B. THERE IS SUFFICIENT EVIDENCE OF DEALING IN CHILD PORNOGRAPHY.

The Defendant challenges the sufficiency of the evidence for the dealing convictions. Brief of Appellant at 10. Dealing is defined as duplicating, publishing, printing, disseminating, exchanging, financing, attempting to finance, or selling prohibited images. RCW 9.68A.050(2)(a)(i). He argues that the State did not sufficiently prove that he was the person who duplicated the images which were transferred to his hard drives in digital format. Brief of Appellant at 12. The challenge fails under the standard of review.

After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State*

v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The Defendant argues that his wife or daughter may have been responsible for digitizing the photographs. Brief of Appellant at 12. The challenge disregards the standard of review which interprets all inferences in favor of the State and most strongly against the Defendant. The computers were in the Defendant's home. He was logged in as D-Man at the time the search warrant was served. RP 129. As his wife testified, the photography was the Defendant's work, and no one else's. RP 219-54. There was no evidence to suggest that his wife or daughter assisted the Defendant in the duplication or organization of his photography generally or his child pornography in particular. Under the standard of review, there is sufficient evidence.

Consider, too, that the evidence of dealing was more than merely digitizing or "duplicating" the photos. In count one, the Defendant actually disseminated DRE's images to Mr. Bennett. RP 31-34, 281. He claimed he also posted them on the internet. RP 68. He also printed and disseminated them to DRE for a second count. RP 281-82. Count three regarded the images of SLM. RP 282. Besides digitizing those photos, he published SLM's images by projecting them on a screen for SLM's husband. RP 82-83. And count four regarded the images of CCM. RP

281. The Defendant printed and disseminated TJH's and CCM's images to the victims themselves. RP 95, 110.

The Defendant challenges whether there is sufficient evidence to show that the he digitized SLM's images on or about November 17, 2011. Brief of Appellant at 13. The Defendant had taken the photographs twenty some years earlier in 1984. RP 76-79. The testimony was that on June 15, 2012, police served a search warrant. RP 126. They found 323 pornographic images of SLM, many of them copies, on two computers and four different hard drives. RP 126, 164. There were various "create dates" including a May 4, 2012 date and a December 9, 2011 date. RP 163. The earlier date was not necessarily the earliest scan date, but may have been only a modification date. RP 163. In consideration of the time span and the number of multiple copies, November 17, 2011 is on or about December 9, 2011. There is sufficient evidence for the conviction.

On this evidence and under the proper standard, any rational trier of fact could have found the essential elements beyond a reasonable doubt.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE SEPARATE COUNTS DID NOT COMPRISE THE SAME CRIMINAL CONDUCT.

The Defendant argues that insofar as any possession count regarded the same victim as a dealing count, those two offenses comprised

the same criminal conduct under RCW 9.94A.589(1)(a). Brief of Appellant at 13. A sentencing court's same criminal conduct ruling is reviewed for abuse of discretion, because it involves a factual inquiry. *State v. Kloepper*, -- Wn. App. --, 317 P.3d 1088, 1095 (2014); *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). A court abuses its discretion if its decision is manifestly unreasonable or without any tenable grounds or reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The trial court looked to *State v. Ehli*, 115 Wn. App. 556, 62 P.3d 929 (2003) in resolving this question. There the court found that acts which occurred at different times and places could not be the same criminal conduct. *State v. Ehli*, 115 Wn. App. at 561.

Note, that the prosecutor argued that the dealing counts were not one per victim. Count one regarded the dissemination of DRE's images to Mr. Bennett; count two – the dissemination of DRE's images to DRE; count three – the dealing of SLM's images; and count four – the dealing of CCM's images. RP 281-84. Count five regarded the possession of DRE's images; count six – SLM's images; count seven – CCM's images; and count eight – TJH's images. RP 284-86. This means that under the Defendant's argument, no count of dealing could have the same criminal

conduct as count eight.

For the Defendant's challenge to be true as to count one, he would have to show that when the Defendant possessed the images of DRE by creating them, he had the same criminal intent as when he disseminated the images to Mr. Bennett and that his possession occurred at the same time and place as his dissemination to Mr. Bennett. This simply is not the case. The intent in disseminating to Mr. Bennett is a distinct criminal intent (as well as time and location.) No count of possession could have the same criminal conduct as count one.

The Defendant's possession of the images began at the time of their creation, at different points in time in the eighties and until their seizure in 2012. The Defendant published the images to DRE, TJH, and CCM at different times and locations than at the time the images were created. He published them to SLM's husband after she was married, at a different time and in a different location (SLM's home) than when they were created. The Defendant published DRE's images to Mr. Bennett at a different time and location than when they were created. He possessed the photos at the time he snapped them and in different photo shoot locations. The dealing of the images occurred at some later date and place (either disseminated to the victims themselves or duplicated twenty years later in

his various hard drives). The times and places are different.

If his intent in possession was merely to create a portfolio for the girls, this was not his intent in retaining them – when he failed to turn over the images to the girls, when he lied and said the images no longer existed. Nor was his intent the same when he repeatedly reformatted and copied the images.

The Defendant published the images (negatives) as photographs and slides and eventually published them again by digitizing them for storage on his many computers. He then made multiple digital copies. His intent in creating and possessing the original images was different from his intent in repeatedly copying them (sometimes inscribing them with false dates) or in disseminating them (to Mr. Bennet, DRE, TJH, and CCM). The reformatting of an image has a new intent, whether to modify the image, view it in another format, disseminate it, or for some other purpose that could not be accomplished in its initial format. The digitization occurred some twenty years later on hard drives that had not even been manufactured at the time the images were created. Some twenty years later, his intent in digitizing cannot be said to be the same as his initial intent.

The Defendant looks to *State v. McReynolds*, 117 Wn. App. 309,

339, 71 P.3d 663 (2003) which states that the possession of stolen property cannot be divided into separate units of prosecution where the possession is continuous. Brief of Appellant at 14. In that case, the married defendants Randy and Amy Jo McReynolds rented a storage unit holding various stolen property. *State v. McReynolds*, 117 Wn. App. at 318. There was no evidence indicating how the two came into possession of the property so as to indicate whether or not the items were acquired separately. Therefore, the possession of the property could only be a single count. *State v. McReynolds*, 117 Wn. App. at 335-39.

The case is distinguishable from the facts here where there is clear evidence differentiating the possessions from the dealings. Because there are facts in the record to distinguish different intents, times, and locations, the trial judge exercised his discretion on tenable, reasonable grounds.

D. THE COURT DID NOT ERR IN THE CALCULATION OF THE OFFENDER SCORE.

The Defendant argues that the offender score should be recalculated based on challenges regarding the unit of prosecution and same criminal conduct. Because there was no error in regard to either, the offender score does not need to be recalculated.

E. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A NO-CONTACT ORDER AGAINST A VICTIM-WITNESS.

The Defendant challenges the court's order prohibiting him from having contact with RER. CP 232. As a part of any sentence, the court may impose and enforce crime-related prohibitions. RCW 9.94A.505(8). The Defendant argues that this prohibition is not crime-related. Brief of Appellant at 17. It is crime-related. There was no abuse of discretion.

RER was a witness in this case as well as a victim. The record does not explain why, at the last minute, the State chose not to call her. Based on the context, it is possible that she was unwilling to submit to a defense interview or became uncomfortable after a defense interview. But in any case, she was interviewed for this case and her allegations investigated. The State found her testimony relevant to this trial.

The defense objected to RER testifying about the Defendant's sexual misconduct which defense argued was collateral (RP 16), although such evidence would be admissible under ER 404(b) to show the Defendant's motive, intent, preparation, plan, knowledge, identity, or absence of mistake. This objection or motion to exclude was never ruled upon, because the State chose not to call RER.

Although the record is unclear, it is possible that the count omitted

in the amended information was directly related to an offense against RER. If so, the offense against her was sufficiently ***related to the other convictions*** to permit that it be charged in a single information together with the eight other counts. CrR 4.3 (a) (two or more offenses may be joined in one charging document when the offenses are of similar character or are based on the same conduct or series of acts constituting a single scheme or plan). There was no motion for severance to suggest otherwise. CrR 4.4(b).

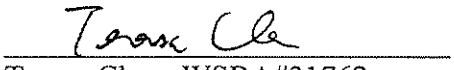
Because RER was a named victim-witness in the case, the no-contact order is certainly crime-related. It is related to the crimes in this case, for which she was a named, investigated, and interviewed witness. The court did not abuse its discretion in prohibiting the Defendant from having contact with a witness in this case.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: 6-4-14, 2014.

Respectfully submitted:



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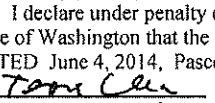
Susan Marie Gasch <gaschlaw@msn.com> David N. Polk, #288269 Coyote Ridge Corrections Center P.O. Box 769 Connell, WA 99326	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 4, 2014, Pasco, WA  **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**