

637371

637371

NO. 63737-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LINDY DEER,

Appellant.

2010 MAR 31 PM 4:56  
FILED  
DIVISION ONE

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

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated article I, section 22 by allowing the State to amend a constitutionally deficient information after resting its case.

2. The trial court violated Ms. Deer's right to due process by denying her request to instruct the jury that the State must prove beyond a reasonable doubt that she committed a volitional act, and instead instructing the jury that Ms. Deer bore the burden of proving the contrary by a preponderance of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article I, section 22 of the Washington Constitution and State v. Pelkey,<sup>1</sup> the prosecution may not amend a constitutionally defective information after resting its case. In this case, the first and second amended informations alleged "Rape of a Child in the Third Degree," and cited the statute for that crime, but listed the elements of child molestation instead of the elements of rape of a child. Did the trial court violate Pelkey's bright-line rule by allowing the State to amend the information after resting its case to delete the elements of child molestation and insert the elements of rape of a child?

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<sup>1</sup> State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987).

2. A defendant may not be held liable for an act that was not volitional. Although the State is entitled to a permissive inference that acts are performed voluntarily, where some evidence is presented showing the act in question was not volitional, the jury must be instructed on the State's burden to prove a volitional act beyond a reasonable doubt. Here, both the complainant and Ms. Deer testified that Ms. Deer was asleep while the complainant had sex with her. Did the trial court violate Ms. Deer's right to due process by denying the parties' joint request to instruct the jury that the State must prove a volitional act beyond a reasonable doubt, and instead instructing the jury that Ms. Deer had to prove lack of knowledge or consent by a preponderance of the evidence?

### C. STATEMENT OF THE CASE

Lindy Deer is an administrative assistant from Auburn, Washington. 5 RP 6, 67.<sup>2</sup> In the spring of 2006, she was employed by Valerie Cox and worked out of Ms. Cox's home. 5 RP 66. In May of that year, Ms. Cox's nephew, R.R., came to Washington to visit Ms. Cox and other relatives. 5 RP 64. R.R. enjoyed his time here and, with the consent of his parents, stayed in Washington

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<sup>2</sup> There are 11 volumes of transcripts in this case: 1RP (2/4/09), 2 RP (2/5/09), 3 RP (2/9/09), 4 RP (2/10/09 a.m.), 5 RP (2/10/09 p.m.), 6 RP (2/11/09 a.m.), 7 RP (2/11/09 p.m.), 8 RP (2/12/09 a.m.), 9 RP (2/12/09 p.m.), 10 RP (2/13/09), and 11 RP (5/29/09).

and enrolled in high school at the Auburn Adventist Academy, a boarding school. 5 RP 39, 65.

Ms. Cox and Ms. Deer both acted as parental figures for R.R. For example, Ms. Deer took R.R. shopping for clothes, toiletries, and other essentials. 5 RP 70; 6 RP 57. R.R. also helped Ms. Deer by doing yard work and helping her move into a new home. 6 RP 23.

Although R.R.'s school was a boarding school, he was allowed to leave for overnight stays with family and friends. Ms. Deer was one of the people approved to check R.R. out of school for overnight visits. 5 RP 45. When R.R. stayed with Ms. Deer, he slept on the couch in the living room while Ms. Deer slept in her bedroom. 6 RP 33, 38.

On at least two occasions during the fall of 2006 and spring of 2007, R.R. left the living room couch on which he had been sleeping and went to Ms. Deer's bedroom, where she was sleeping. 6 RP 40, 47-49. Without waking Ms. Deer, R.R. removed his underwear, took Ms. Deer's hand, and placed it on his penis. 6 RP 41. Ms. Deer grabbed it and the two had sex. 6 RP 41, 49. A few minutes later, Ms. Deer arose and said "I think we just had sex." 6 RP 43. She said she had been having a dream that she was

having sex with a friend of hers. 6 RP 45. R.R. described these incidents as "sleep sex." 6 RP 59, 92; 7 RP 14.

In the fall of 2007, R.R. told a friend of his that he had had sex with Ms. Deer. 6 RP 75. Auburn police detectives eventually interviewed R.R., who told them that he and Ms. Deer had had sex but that Ms. Deer appeared to be asleep during the incidents. 5 RP 25.

Police subsequently arrested Ms. Deer. 5 RP 11. On November 13, 2007, the State filed an information charging Ms. Deer with one count of Rape of a Child in the Third Degree:

That the defendant Lindy E. Deer in King County, Washington, during a period of time intervening between September 1, 2006 through June 10, 2007, being at least 48 months older than R.R. (dob 06/11/1991), had sexual intercourse with R.R. (dob 06/11/1991), who was 15 years old and was not married to the defendant, contrary to RCW 9A.44.079.

CP 1.

During pretrial hearings, the State amended the information to add two counts. CP 6-7. The First Amended Information also changed R.R.'s birth date to 6/11/89 (but kept an age that matched the previous birth date), and listed the elements of child molestation instead of rape of a child, even though it described the crimes as

“Rape of a Child in the Third Degree” and cited the statute for that crime. The First Amended Information for Count I provided:

I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse Lindy Deer, of the crime of Rape of a Child in the Third Degree, committed as follows:

That the defendant Lindy Deer in King County, Washington, during a period intervening June 6, 2006 and October 15, 2006, being at least 48 months older than R.R. (dob 6/11/89), had sexual contact for the purpose of sexual gratification with R.R. (6/11/89) who was 15 years old and was not married to the defendant;

Contrary to RCW 9A.44.079 and against the peace and dignity of the State of Washington.

CP 6. Counts II and III had the same wording as Count I except for the date range of the alleged crimes. CP 6-7.

During trial, both R.R. and Ms. Deer testified that they had had “sleep sex.” 5 RP 25, 6 RP 92, 7 RP 14. R.R.’s aunt, Ms. Cox, testified that R.R. was 19 years old at the time of trial, consistent with the birth date on the amended information and consistent with R.R.’s having been 17 years old during the alleged incidents. 5 RP 63. However, R.R. testified that he was 15 years old during the alleged incidents. 6 RP 19.

Before the State rested its case, it moved to amend the information again to change the date range for count I. The court granted the motion. 7 RP 58. The Second Amended Information was otherwise exactly the same as the First Amended information – it alleged three counts of rape of a child contrary to RCW 9A.44.079, listed a birth date for R.R. that would have made him 17 years old at the time of the alleged crimes, and listed the elements of child molestation instead of rape of a child. 7 RP 60-64.<sup>3</sup>

The State then rested its case. 7 RP 60. Ms. Deer made a halftime motion to dismiss for insufficient evidence. 7 RP 60. The parties and the court then realized that the information omitted the elements of rape of a child and instead listed the elements of child molestation. 7 RP 62-64. Over Ms. Deer's repeated objections, the State was allowed to amend the information again to add the elements for child rape and delete the elements for child

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<sup>3</sup> There are three documents relevant to this appeal that were discussed in the trial court but not filed: the second amended information, the third amended information, and the jointly proposed jury instruction on a volitional act. Undersigned counsel contacted trial defense counsel, who apparently does not have copies of these documents. Counsel then contacted appellate prosecutor Jim Whisman, who is in the process of tracking them down. Once the documents are filed in the trial court, undersigned counsel will file a supplemental designation of clerk's papers. If the prosecutor's office cannot find the documents, the verbatim reports of proceedings provide an adequate description of the documents to enable this Court to review the issues on appeal.

molestation. 7 RP 66-72. The third amended information still listed R.R.'s birth date as 6/11/89.

Given the "sleep sex" testimony, both the State and Ms. Deer proposed a jury instruction that would have required the State to prove beyond a reasonable doubt that Ms. Deer committed a "volitional" act. 7 RP 77-80. The trial court denied the joint motion. 7 RP 81. It ruled that the word "volitional" was too difficult for a jury to understand, and that the State was not required to prove a volitional act beyond a reasonable doubt. 7 RP 82-84. The court instead gave the jury an instruction stating:

It is a defense to the charge of Rape of a Child in the Third Degree that the child had intercourse with the defendant without the knowledge or consent of the defendant. The defendant has the burden of proving this defense by a preponderance of the evidence. ...

CP 24 (Instruction 11). The "to convict" instructions stated that the prosecution was required to prove beyond a reasonable doubt that "the defendant had sexual intercourse with R.R.," but did not state that the prosecution had to prove the act of sexual intercourse was voluntary or conscious. CP 20-22.

The jury found Ms. Deer guilty of three counts of rape of a child in the third degree. CP 29-31. Ms. Deer appeals. CP 52-62.

#### D. ARGUMENT

1. THE TRIAL COURT VIOLATED ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION BY ALLOWING THE STATE TO AMEND A CONSTITUTIONALLY DEFECTIVE INFORMATION AFTER RESTING ITS CASE.

a. Where an information lists the wrong elements of the crime, the State must cure the error before resting its case and may not amend the information after resting. Article I, section 22 of our state constitution<sup>4</sup> and the Sixth Amendment to the federal constitution<sup>5</sup> prohibit the State from trying an accused person for an offense not charged. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). An offense is not properly charged unless the information sets forth every essential element of the crime, both statutory and nonstatutory. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The charging document must contain: (1) the elements of the crime charged, and (2) a description of the specific conduct of the defendant which allegedly constituted that crime. Auburn v. Brooke, 119 Wn.2d 623, 630, 836 P.2d 212 (1992).

“This doctrine is elementary and of universal application, and is founded on the plainest principle of justice.” Pelkey, 109 Wn.2d at

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<sup>4</sup> “In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ....”

<sup>5</sup> “In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation ....”

488 (quoting State v. Ackles, 8 Wash. 462, 464-65, 36 P. 597 (1894)).

If the State fails to meet this “essential elements” rule, it may move to amend the information to correct the error at any time prior to resting its case-in-chief. Pelkey, 109 Wn.2d at 490; State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993). Timely motions to amend are liberally granted. See Pelkey, 109 Wn.2d at 490; CrR 2.1 (d).

Once the State rests its case, however, it may not amend the information to correct its failure to charge a crime. State v. Vangerpen, 125 Wn.2d 782, 790-91, 888 P.2d 1177 (1995). This is a per se prohibition:

A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant’s article 1, section 22 right to demand the nature and cause of the accusation against him or her.

Pelkey, 109 Wn.2d at 491. The proper course of action is “dismissal of charges without prejudice to the State’s ability to refile charges, not midtrial amendment and refiling.” State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Contrary to the trial court's conclusion, this rule applies regardless of whether the omission of an element was simply a clerical error. Vangerpen, 125 Wn.2d at 790. Nor does it matter if the defendant was aware of the proper element despite its absence from the charging document. Id. Because the defect is constitutional, CrR 2.1's prejudice analysis does not apply. Pelkey, 109 Wn.2d at 490. Allowing the prosecutor to amend the information to meet the essential elements rule after the State has rested its case constitutes "reversible error per se even without a defense showing of prejudice." State v. Markle, 118 Wn.2d 424, 437, 823 P.2d 1101 (1992).

b. The trial court violated Pelkey's bright-line rule by allowing the State to amend the information after resting its case. As explained in the Statement of the Case, the first and second amended informations named the crime of "Rape of a Child in the Third Degree" and cited the statute for that crime, but listed the elements of child molestation. Thus, the information did not properly charge either crime, and was constitutionally deficient. See Vangerpen, 125 Wn.2d at 792 (information alleging "First Degree Attempted Murder" but listing only elements of second degree attempted murder did not properly charge either crime and

was constitutionally deficient).<sup>6</sup> The trial court erred in allowing the State, after resting its case, to amend the information to delete the elements of child molestation and replace them with the elements of rape of a child. See id. at 787.

The trial court improperly ruled that the State could amend the information after resting to list the elements of rape of a child because Ms. Deer could not show prejudice. While CrR 2.1(d) requires a showing of prejudice, this is true only before the State rests its case. After that point, the Constitution trumps the court rule in all cases and no showing of prejudice is required. Pelkey, 109 Wn.2d at 490; Markle, 118 Wn.2d at 437.

Furthermore, it is of no moment that both the prosecuting attorney and Ms. Deer's attorney were apparently under the same misapprehension that Ms. Deer had to show prejudice. In Quismundo, the supreme court explained:

A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it. Although Quismundo erroneously requested the wrong remedy for the insufficient

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<sup>6</sup> The first and second amended informations also listed a birth date for the alleged victim that would have made him 17 years old at the time of the alleged incidents, rendering the incidents non-criminal. However, contrary to the birth date, the informations stated that R.R. was 15 years old at the time. This conflict between the birth date and age further rendered what was already a constitutionally defective information "gobbledygook." See State v. Termain, 124 Wn. App. 798, 806, 103 P.3d 209 (2004).

charging document, under Pelkey and Vangerpen the trial court was precluded from allowing a midtrial amendment of the charges and was required to dismiss the charges without prejudice.

Quismundo, 164 Wn.2d at 505-06.

The trial court also erred in describing the failure to list the correct elements of the crime as merely a “scrivener’s error” and in justifying the untimely amendment on that ground. Whether the failure to list the proper elements of the crime is a clerical error or not, the State may not amend the information to correct the elements after resting its case. Vangerpen, 125 Wn.2d at 790. As in Ms. Deer’s case, the State in Vangerpen argued that untimely amendment was proper because the omission was only a “scrivener’s error” and the defendant was not prejudiced. Id. at 790. But the Supreme Court responded, “we rejected this argument in Pelkey and again in Markle; we again do so here.” Id. As in Vangerpen and Quismundo, the trial court in Ms. Deer’s case erred in ruling that untimely amendment of the information was proper because the omission was just a clerical error and Ms. Deer could not show prejudice. The trial court’s failure to abide by Pelkey’s bright-line rule requires reversal.

c. The remedy is reversal and dismissal without prejudice.

Where, as here, the trial court erroneously allows the State to amend a constitutionally defective information after resting its case, the remedy is reversal and dismissal of the charges without prejudice to the State's ability to refile the charges. Vangerpen, 125 Wn.2d at 792-93; Simon, 120 Wn.2d at 199. Ms. Deer therefore respectfully requests that this Court reverse her convictions and remand with instructions to dismiss the charges without prejudice to the State's ability to refile.

2. THE TRIAL COURT VIOLATED MS. DEER'S RIGHT TO DUE PROCESS BY DENYING HER REQUEST TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT SHE COMMITTED A VOLITIONAL ACT.

Given the testimony of both the complainant and Ms. Deer that Ms. Deer was asleep during intercourse, both parties asked the Court to instruct the jury that in order to convict Ms. Deer, it must find the State proved beyond a reasonable doubt that Ms. Deer's act of sexual intercourse was volitional. The court denied the motion, refusing to use the word "volitional" and requiring Ms. Deer to prove lack of knowledge or consent by a preponderance of the evidence. The trial court's ruling violated Ms. Deer's right to due process.

a. As part of the *actus reus* of any crime, the State must prove beyond a reasonable doubt that a defendant voluntarily engaged in the proscribed conduct. A state may not hold an individual liable for an act that was unconscious or otherwise involuntary. State v. Eaton, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 1077891 (filed March 25, 2010) (reversing conviction for zone enhancement where State failed to prove the defendant took some voluntary action to place himself in the zone). “An involuntary act, as it has no claim to merit, so neither can it induce any guilt.” Id. at 3-4 (quoting William Blackstone, 5 Commentaries 21).

Fundamental to our notion of an ordered society is that people are punished only for their own conduct. Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law. We punish people for what they do, not for what others do to them.

Eaton at 4.

Thus, even for crimes like Rape of a Child which do not include an element of specific intent, there is “a certain minimal mental element required in order to establish the *actus reus* itself.” State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). “An ‘act’ involves an exercise of the will. It signifies something done

voluntarily.” Id. at 140. “An ‘act’ committed while one is unconscious is in reality no act at all.” Id. at 143.

If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.

Id. at 142 (quoting R. Anderson, 1 Wharton’s Criminal Law and Procedure § 50 (1957)).

Stated differently, general intent is required for all personal crimes even if specific intent is not:

Section 2113(a) certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring, as Staples did, general intent – i.e. proof of knowledge with respect to the actus reus of the crime.

Carter v. United States, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); see also Seymore v. State, 152 P.3d 401, 406 (Wyo. 2007) (“even a general intent crime requires a showing that the prohibited conduct was undertaken voluntarily”).

The voluntary nature of the act is an element the State must prove beyond a reasonable doubt. Eaton at 8 (“we hold that RCW 9.94A.533(5) encompasses a volitional element that the State must

prove beyond a reasonable doubt”); U.S. Const. amend. XIV.

Although the State is entitled to a permissive inference that a defendant has acted voluntarily and consciously, the State retains the ultimate burden of proving a volitional act. Id. at 10.

b. Because evidence was presented showing the acts in question were involuntary and unconscious, the court erred in denying the parties’ request to instruct the jury that the State was required to prove a volitional act beyond a reasonable doubt. Ms. Deer does not argue that every criminal case requires an instruction explaining the State must prove a “volitional” act beyond a reasonable doubt. Cf. Seymore, 152 P.3d at 407 (Wyoming Supreme Court holds that criminal juries must always be instructed on the State’s burden to prove the act in question was voluntary). In Washington, the jury may presume acts are volitional. Eaton at 10. However, this is a permissive, not mandatory, presumption. Id. Once some evidence has been introduced to rebut the presumption, the jury must be instructed on the State’s burden to prove a volitional act beyond a reasonable doubt. The trial court here improperly denied the requested instruction and created a mandatory presumption – shifting the burden to Ms. Deer to prove the act was involuntary. 7 RP 82-84; CP 24 (Instruction 11); see

State v. Deal, 128 Wn.2d 693, 700-03, 911 P.2d 996 (1996) (trial court improperly created a mandatory presumption which unconstitutionally shifted burden of persuasion to defendant by instructing jury it could infer intent in burglary prosecution “unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent”).

A Texas case provides an example of the proper procedure. See Brown v. State, 955 S.W.2d 276 (Tex. Crim. App. 1997). In that case, the defendant was charged with murder, but evidence was presented that the handgun in question accidentally fired when the defendant was bumped from behind by another man. Id. at 277. Although the trial court gave an instruction on intent and knowledge, the defendant further requested “an instruction on an involuntary act, that specifically being, you are instructed that a person commits an offense only if he voluntarily engages in conduct.” Id. at 279. The defendant’s proposed instruction would have required the jury to acquit if it had a reasonable doubt as to the voluntariness of the act. Id.

The Court of Criminal Appeals agreed with the defendant and the intermediate court of appeals, which had reversed the trial

court. Like Washington courts, Texas courts view voluntariness as part of the actus reus: “The issue of the voluntariness of one’s conduct, or bodily movements, is separate from the issue of one’s mental state.” Id. at 280. Thus, regardless of mens rea, “if the admitted evidence raises the issue of the conduct of the actor not being voluntary, then the jury shall be charged, when requested, on the issue of voluntariness.” Id. The instruction must make clear that “a defendant should be acquitted if there is a reasonable doubt as to whether he voluntarily engaged in the conduct of which he is accused.” Id. at 279.

Other state courts have similarly held that if evidence of involuntariness is presented, the jury must be instructed on the State’s requirement to prove a voluntary act beyond a reasonable doubt. E.g. State v. Lara, 902 P.2d 1337, 1339 (Ariz. 1995) (“if there is evidence to support a finding of a bodily movement performed unconsciously” then jury should be instructed “[t]he State must prove that the defendant did a voluntary act forbidden by law”); State v. Baird, 604 N.E.2d 1170, 1176 (Ind. 1992) (“once evidence in the record raises the issue of voluntariness, the state must prove the defendant acted voluntarily beyond a reasonable doubt”). This Court should follow suit, and hold that trial courts

must instruct the jury on the State's burden to prove a volitional act once evidence of involuntariness is presented. The trial court in Ms. Deer's case erred in denying the parties' request to give such an instruction, and in shifting the burden to Ms. Deer to prove the acts were involuntary.

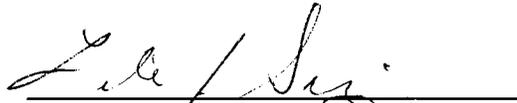
c. Reversal is required. A constitutional error requires reversal unless the State proves beyond a reasonable doubt that the same result would have been reached in the absence of the error. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Deal, 128 Wn.2d at 703. The State cannot meet this heavy burden here. As noted in Ms. Deer's closing argument, both Ms. Deer and R.R. testified that Ms. Deer was asleep when R.R. initiated the sexual contact. The State cannot prove beyond a reasonable doubt that the jury would have reached the same verdict had the trial court placed the burden on the State to prove Ms. Deer consciously and voluntarily engaged in the sex acts rather than placing the burden on Ms. Deer to prove she slept through it. The convictions should therefore be reversed and the case remanded for a new trial.

E. CONCLUSION

For the reasons above this Court should reverse Ms. Deer's convictions and remand for a new trial or for dismissal of the charges without prejudice to the State's ability to refile.

DATED this 31st day of March, 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON, )  
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 Respondent, )  
 )  
 v. )  
 )  
 LINDY DEER, )  
 )  
 Appellant. )

NO. 63737-1-I

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STATE OF WASHINGTON  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
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329862	( )	HAND DELIVERY
WASHINGTON CC FOR WOMEN	( )	_____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF MARCH, 2010.

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