

63737-1

63737-1

NO. 63737-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LINDY DEER,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the State must concede, in accordance with settled law, that this case should be reversed and remanded because the trial court allowed the State to amend the information after the State had rested its case.

2. Whether the trial court's instruction on the defendant's claimed defenses, i.e., that the defendant was asleep and was sexually assaulted by the child victim, properly placed the burden on the defendant to establish a lack of knowledge or consent by a preponderance of the evidence because the crime of rape of a child is a strict liability offense.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State initially charged the defendant, Lindy Deer (dob 6/7/54), with one count of rape of a child in the third degree for having sexual intercourse on multiple occasions with R.R. (dob 6/11/91) between September 2006 and June 2007. CP 1-5.

Deer's jury trial took place in February 2009 before the Honorable Laura Gene Middaugh. The State amended the information to add two additional counts of third-degree child rape shortly after trial began, and amended the information again

immediately after R.R. testified in order to conform the charging period for count I to R.R.'s testimony as to when the incident in question occurred. CP 6-7; RP (2/5/09) 2-3; RP (2/11/09-II) 58-59. As will be discussed further below, both the first amended information and the second amended information contained erroneous charging language, alleging that Deer had "sexual contact" with R.R. rather than "sexual intercourse."¹ Over defense counsel's objection, the trial court allowed the State to amend the information again after resting its case to rectify the error. RP (2/11/09-II) 65-76; Supp. CP ____ (Sub no. 100), pg. 2-3 (3rd amended information).²

Deer's defense to the charges was that she was asleep during some of the incidents of sexual intercourse with R.R., and that during the other incidents, R.R. had forced her to have sexual intercourse without her consent. Accordingly, defense counsel

¹ As Deer notes in her brief, the second amended information was not included in the court file, and thus, it was not made part of the record on appeal. Brief of Appellant, at 6 n.4. However, the record is sufficient to determine that the second amended information contained the same erroneous charging language as the first amended information. See RP (2/11/09-II) 60-67.

² As Deer also notes in her brief, the third amended information also was not filed in the court file for some reason, and also was not made a part of the record on appeal. Brief of Appellant, at 6 n.4. However, a copy of the third amended information is contained in the standard presentence packet filed by the prosecutor's office, so that packet has been designated as clerk's papers on appeal. Supp. CP ____ (Sub no. 100).

initially proposed inserting the word "willfully" into the elements of the crime as set forth in the "to-convict" instructions. The trial court rejected this suggestion because child rape does not require proof of any mental state on the part of the defendant. Instead, the court told defense counsel to draft a separate instruction. RP (2/5/09) 29-33. Defense counsel then proposed an instruction stating that the State had the burden of proving that the defendant's acts were "volitional" beyond a reasonable doubt.³ The trial court rejected Deer's proposed instruction, and crafted its own instruction stating that the defendant had the burden of proving by a preponderance of the evidence that she lacked knowledge or did not consent to acts of sexual intercourse with R.R. CP 24.

At the conclusion of the evidence, the jury convicted Deer of three counts of third-degree rape of a child as charged. CP 29-31. The trial court imposed 46 months on each count – the low end of the standard range – to be served concurrently. CP 42-51. Deer now appeals. CP 52-62.

³ Again, the defendant's proposed instruction did not make its way into the record for some reason. The verbatim report of proceedings, however, contains sufficient information from which to determine what the issues were. See RP (2/11/09-II) 76-84.

2. SUBSTANTIVE FACTS

R.R. moved from Iowa to the greater Seattle area shortly before his 15th birthday. He rode across the country with an uncle, who worked as a long-haul trucker, and he initially stayed with his great-grandmother in Federal Way. RP (2/10/09-II) 4-7. Not long after arriving in the area, R.R. went to a meeting of Seventh Day Adventists with his great-grandmother, and he met a student who attended the Auburn Adventist Academy, a private religious boarding school. R.R. decided that he wanted to attend the school in the fall. RP (2/10/09-II) 8-9.

During that summer, R.R. stayed in the homes of various relatives, including his great aunt, Valerie Cox, who lived in Auburn. RP (2/10/09-II) 63-64. Cox had a business that she ran out of her home, and the defendant, Lindy Deer, worked for Cox as an administrative assistant. RP (2/10/09-II) 66-67. Deer began doing favors for R.R.; for instance, she bought him a suit, and she paid for a cellular telephone for him. Deer told Cox that she felt "motherly" towards R.R., and she enjoyed doing things for him because she did not have children of her own. RP (2/10/09-II) 70-71.

R.R. also began helping Deer with chores at her home; he helped her move into her house, and in June 2006, he helped her

get ready for a housewarming party. RP (2/10/09-II) 68-69; RP (2/11/09-I) 23. On one of these occasions when R.R. was doing yard work at Deer's house, Deer told R.R. that he should have "kissing lessons." RP (2/11/09-I) 24-25. Deer put salt on her finger and kissed it, and encouraged R.R. to do the same. R.R. tried it, but thought it was silly because he thought that the only way to learn to kiss "was to be able to try it on somebody for real." RP (2/11/09-I) 25-26. Deer then began kissing R.R. on the mouth. She used her tongue, and told R.R. how to "tease" a partner while kissing. RP (2/11/09-I) 27-28.

Later that same day, R.R. grabbed Deer and kissed her. Deer kissed him back. R.R. told Deer that this kiss seemed to have "more depth or meaning to it" than the kissing lessons, and Deer told R.R. that she felt the same way. RP (2/11/09-I) 31-32. After that, R.R. called Cox and asked if he could spend the night at Deer's house, and Cox agreed. RP (2/11/09-I) 33. Nothing else happened that night, and R.R. left Deer's house the next day when the housewarming party began. RP (2/11/09-I) 33.

The first time that R.R. and Deer progressed beyond kissing was in September 2006, shortly after R.R. had started attending the Auburn Adventist Academy. RP (2/11/09-I) 37. Deer had brought

R.R. to her house to spend the night. R.R. was going to sleep on the couch, but when he became sexually aroused, he went into Deer's room and got into bed with her. RP (2/11/09-I) 38-40. Deer had previously told R.R. that "if it wasn't wrong in the eyes of society," that she would have no problem having sex with R.R. RP (2/11/09-I) 39. After R.R. got into Deer's bed, he pulled his underwear down and put Deer's hand on his penis. Deer grabbed R.R.'s penis and pulled him closer to her. Deer inserted R.R.'s penis into her vagina and started moving up and down and moaning. Intercourse continued until R.R. ejaculated. RP (2/11/09-I) 40-42. Afterwards, both Deer and R.R. pretended to be asleep. RP (2/11/09-I) 43-45. In fact, Deer succeeded in making R.R. believe that she actually was asleep when they had sex on several occasions. R.R. referred to these encounters as "sleep sex." RP (2/11/09-I) 92-95; RP (2/11/09-II) 23, 34.

Deer and R.R. had another sexual encounter at Deer's house in November 2006, when Deer was comforting R.R. because his peer-aged girlfriend had broken up with him. RP (2/11/09-I) 46-50, 69. Deer and R.R. were lying on the couch, talking about the breakup and kissing, and then Deer performed fellatio on R.R. This was R.R.'s first experience with oral sex. RP (2/11/09-I) 50-51.

That night, R.R. again got into bed with Deer and had vaginal sex with her. RP (2/11/09-I) 51-52.

Later, Deer and R.R. talked about having oral sex, and Deer told R.R. that he "should do that with teenagers [his] own age." RP (2/11/09-I) 53. R.R. told Deer that he had told his girlfriend about his encounters with Deer prior to their breakup, and Deer told R.R. that he "should not have done that." RP (2/11/09-I) 54-55.

Another sexual encounter occurred at Deer's house when Deer went into the bathroom to change her clothes. R.R. walked into the bathroom and began kissing and fondling Deer. They both took off their clothes and went into Deer's bedroom. Deer helped R.R. insert his penis into her vagina and they had intercourse until R.R. ejaculated. R.R. was upset after this incident because he was interested in a peer-aged coworker at the time. RP (2/11/09-I) 58-60.

Another incident took place at Valerie Cox's house in the spring of 2007. R.R. and Deer had vaginal intercourse in Cox's laundry room while Deer was sitting on a stool. RP (2/11/09-I) 61-66. On another occasion when R.R. was at Cox's house, Deer masturbated R.R. until he ejaculated. RP (2/11/09-I) 64-66.

R.R. finally disclosed these incidents to his student adviser at the Auburn Adventist Academy in the fall of 2007, when R.R. was studying to be baptized. RP (2/10/09-II) 42-43. The student advisor told R.R. to tell Nathan Klingstrand, the boys' dean at the Academy. RP (2/11/09-I) 73-76. Klingstrand told R.R. to tell Valerie Cox about it, and Klingstrand informed the school principal. RP (2/10/09-II) 62. As a result, a CPS referral was made, and the Auburn Police became involved. RP (2/10/09-I) 26. According to the Academy's records, Deer had signed forms to take R.R. off campus on at least 10 occasions. RP (2/10/09-II) 45-47, 50-51, 61.

Auburn Police Detectives Anna Weller and Rob Jones went to Deer's house on November 7, 2007 to arrest her. RP (2/10/09-I) 6-7. After advising Deer of her rights, Detective Weller told Deer that she knew that Deer had a sexual relationship with R.R. Deer responded, "It was on his part." RP (2/10/09-II) 10.

Deer testified at trial. Deer denied giving R.R. kissing lessons, and said that when R.R. started kissing her, she pushed him away. RP (2/12/09-I) 15-16. Deer said that on the occasions when she was awake when R.R. tried to climb into bed with her, that she rebuffed his advances. RP (2/12/09-I) 18-26. Deer claimed that on one occasion, she woke up in her bed and had

ejaculate on her nightgown. Deer said she asked R.R. if they had had sex, and that R.R. said nothing. RP (2/12/09-I) 40-42.

Deer testified that the incident that had started in the bathroom when she was changing her clothes was forced by R.R. Deer claimed that R.R. had broken the bathroom door down and pushed her against the wall, and that she had asked him to stop. RP (2/12/09) 27-29. Deer said that she eventually stopped resisting, and that R.R. then pushed her down on the bed and had sex with her. RP (2/12/09-I) 30-31. Deer also admitted that she had performed oral sex on R.R., but that she did so because she was "scared." RP (2/12/09-I) 39.

Additional facts of this case will be discussed further below as necessary for argument.

C. **ARGUMENT**

1. **THE STATE CONCEDES THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION AFTER THE STATE HAD RESTED ITS CASE.**

Deer first claims that the trial court erred in allowing the State to amend the information after the State had rested its case to correct an obvious error in the charging language in each of the three counts of third-degree rape of a child. Accordingly, she

argues that the appropriate remedy is dismissal without prejudice.

Brief of Appellant, at 8-13. Deer is correct.

Under CrR 2.1(d), a trial court has the discretion to allow the State to amend the information "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Under Washington case law, however, the information cannot be amended after the State has rested its case, unless the information is amended to a lesser degree or 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." State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). The defendant is not required to make any showing of prejudice in these circumstances. Rather, "any amendment from one crime to a different crime after the State has rested its case is per se prejudicial error[.]" State v. Vangerpen, 125 Wn.2d 783, 791, 888 P.2d 1177 (1995).

The omission of any of the essential elements of the crime from the charging document cannot be characterized as a "scrivener's error." Vangerpen, 125 Wn.2d at 790. Also, even if the defendant does not make the correct arguments in the trial court regarding this issue, the trial court errs if it takes any action

other than dismissing the information without prejudice. State v. Quismundo, 164 Wn.2d 499, 505, 192 P.3d 342 (2008). Dismissal "without prejudice to the right of the State to re-charge and retry the offense for which the defendant was convicted" is the only remedy available in these circumstances. Vangerpen, 125 Wn.2d at 791; see also Quismundo, 164 Wn.2d at 505 n.3 (noting that there are no double jeopardy issues when a defective charging document is dismissed without prejudice, quoting Vangerpen). These bright-line rules apply in this case.

In this case, the State filed an amended information on the second day of trial adding two counts of third-degree child rape for a total of three counts. RP (2/5/09) 2-3; CP 6-7. This document contained erroneous language, alleging that Deer had "sexual contact" with R.R. rather than "sexual intercourse" as required for the crime of rape of a child. Compare CP 1 (original information) with CP 6-7 (1st amended information). The State then filed a second amended information immediately following R.R.'s testimony. This information was filed in order to conform the charging period for count I to R.R.'s testimony as to when the relevant events occurred. RP (2/11/09-II) 58-59. The second

amended information also contained the erroneous "sexual contact" language.

After R.R. had finished his testimony and the jury was excused from the courtroom, defense counsel asked if the State would be resting its case so that the defense could make a halftime motion to dismiss outside the presence of the jury. RP (2/11/09-II) 59. The trial court asked the prosecutor to indicate for the record whether the State would be resting after the afternoon recess, but before the jury was brought back into the courtroom, and the prosecutor agreed to do so. RP (2/11/09-II) 59. Immediately following the recess, the trial court asked whether the State would be resting its case, and the prosecutor replied, "Yes, Your Honor." RP (2/11/09-II) 59-60.

Defense counsel then made his halftime motion, noted the erroneous language in the first and second amended informations, and argued that the State had failed to prove the element of "sexual contact" as alleged. RP (2/11/09-II) 60-61. At this point, the prosecutor realized that the charging language was erroneous, but argued that the case had been proved in any event. RP (2/11/09-II) 62-63. The trial court denied the defendant's halftime motion,

finding that the evidence was sufficient to send the case to the jury.

RP (2/11/09-II) 65-66.

The parties and the trial court then turned to the issue of what to do about the erroneous charging language. Both the prosecutor and the trial court described the problem as a "scrivener's error." RP (2/11/09-II) 66. After a brief break in the proceedings, the prosecutor moved to amend the information again to include the correct charging language for third-degree rape of a child. RP (2/11/09-II) 67-68. The prosecutor argued that there had been no prejudice to the defendant, and that the amendment should be allowed to correct the "scrivener's error." RP (2/11/09-II) 68-69. Defense counsel attempted to articulate why the defendant would be prejudiced if the information were to be amended again. RP (2/11/09-II) 69-70. After hearing from both parties, the trial court found that there was no prejudice to the defendant and allowed the State to amend the information in order to correct the "scrivener's error." RP (2/11/09-II) 70-71; Supp. CP ____ (Sub no. 100), pg. 2-3 (3rd amended information). The next time that the jury was present in the courtroom, the defense case proceeded. RP (2/12/09-I) 9.

Based on this record, the State concedes that the trial court erred in allowing the State to amend the information after the State had rested its case. Based on Pelkey and its progeny, the only available remedy in these circumstances is dismissal without prejudice. This is the case even though there has been no demonstrable prejudice to the defendant and the defense attorney has not made the correct arguments to the trial court. Moreover, an error in the essential elements of the crime cannot be characterized as a scrivener's error. Therefore, the State agrees that Deer's convictions must be dismissed without prejudice and the case remanded, whereupon the State may refile three counts of third-degree rape of a child.

2. THE TRIAL COURT'S INSTRUCTION REGARDING DEER'S DEFENSES PROPERLY PLACED THE BURDEN OF ESTABLISHING THOSE DEFENSES ON THE DEFENDANT.

Deer also claims that the trial court erred when instructing the jury that Deer had the burden of establishing her defenses, i.e., a lack of knowledge or consent, by a preponderance of the evidence. Brief of Appellant, at 13-19. This claim should be rejected.⁴ This Court has already held that the State does not have

⁴ Although the State concedes that this case must be remanded, this instructional issue is likely to recur on remand, and therefore, this Court should address it.

the burden to prove knowledge or capacity to commit the crime of rape of a child, which is a strict liability offense. Accordingly, the trial court was correct in instructing the jury that a lack of knowledge or consent on the part of the defendant is an affirmative defense that the defendant must establish by a preponderance of the evidence.

It is well-settled that the crime of rape of a child (and its predecessor, statutory rape) is a strict liability offense that does not have a *mens rea* requirement. State v. Chhom, 128 Wn.2d 739, 741-43, 911 P.2d 1014 (1996); State v. Swagerty, 60 Wn. App. 830, 833, 810 P.2d 1 (1991); State v. Abbott, 45 Wn. App. 330, 331-34, 726 P.2d 988 (1986), rev. denied, 107 Wn.2d 1027 (1987). Rather, the only necessary elements of rape of a child are 1) sexual intercourse, 2) the perpetrator and victim are not married, 3) the victim's age, and 4) the age difference between the perpetrator and the victim. See Chhom, 128 Wn.2d at 743.

Accordingly, this Court has previously held that there is no requirement for the State to prove a defendant's knowledge, either with respect to the specific elements of the crime or, as is relevant here, the defendant's mental capacity to knowingly commit the act of intercourse itself:

Were we to hold that the State has the burden to prove that an accused had knowledge of which specific act or acts have been defined as "sexual intercourse," we would have to say that the State must prove that an accused has precise knowledge of the law. We cannot and do not hold that the Legislature impliedly imposed that burden upon the State. *Were we to hold that the State must prove that an accused had the mental capacity or ability to know that he was in fact performing the acts specified, we would be converting a defense burden into a prosecutorial burden.* In the absence of a statutory mandate to that effect we refuse to find such a transposition of burdens by implication.

Abbott, 45 Wn. App. at 333 (emphasis supplied); *see also* Swagerty, 60 Wn. App. at 832-35 (voluntary intoxication and diminished capacity are not defenses to child rape because these defenses negate *mens rea*, and "the defendant's mental state is not a fact of consequence" in such cases).

Furthermore, given that consent of the victim is clearly not a defense to the crime of rape of a child, and given that consent in adult rape cases is an affirmative defense that the defendant must establish by a preponderance of the evidence,⁵ it stands to reason that lack of consent of the perpetrator in a child rape case would also be an affirmative defense. To hold otherwise, i.e., that the State must prove the perpetrator's consent to have sexual

⁵ State v. Camara, 113 Wn.2d 631, 638-40, 781 P.2d 483 (1989).

intercourse with a child beyond a reasonable doubt, would require the State to prove the defendant's *mens rea* in derogation of clearly-established legislative intent. As this Court has stated,

In short, the Legislature has imposed strict criminal liability upon those persons . . . who engage in acts of sexual intercourse with persons younger than themselves[.] The legislative intent is clear. The Legislature has chosen a specific means to combat the social evil of carnal abuse or exploitation of children by persons . . . older than themselves. We will not impose any additional burdens upon the State than those mandated by statute.

Abbott, 45 Wn. App. at 333-34.

In this case, the trial court instructed the jury as follows:

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. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this act.

CP 24. This instruction allowed the defendant to argue her theory of the case to the jury (i.e., that she was either asleep or did not consent when the acts of sexual intercourse occurred), but without creating *mens rea* elements for the State to prove that clearly do

not exist in the statute. This instruction also comports with this Court's case law holding that the State need not prove the defendant's knowledge or capacity in order to prove rape of a child. See Abbott, 45 Wn. App. at 333. In sum, the instruction is correct, and Deer's arguments to the contrary should be rejected.

Nonetheless, Deer argues that the trial court erred in rejecting defense counsel's proposed instruction that would have required the State to prove that the acts of sexual intercourse were "volitional," relying primarily on State v. Eaton, 168 Wn.2d 476, 229 P.3d 704 (2010). Eaton is not on point.

In Eaton, the defendant was convicted of possession of methamphetamine with a sentencing enhancement for possessing the methamphetamine in a jail. The defendant possessed the methamphetamine in the jail because he had been arrested for DUI, and the methamphetamine was discovered in the jail during the booking process. Eaton, 168 Wn.2d at 479-80.

The issue presented in Eaton was purely an issue of statutory construction, i.e., whether the sentencing enhancement statute should be interpreted in a manner requiring proof that the defendant placed himself in the prohibited "zone" through volitional action. Id. at 480-86. The court held that volitional action was an

implied element of the enhancement, concluding that to hold otherwise would lead to absurd results. Id.

But unlike the sentencing enhancement statute at issue in Eaton, which had not been previously interpreted in this context, the child rape statute at issue in this case has already been interpreted as a strict liability offense. Nothing in Eaton purports to change this existing and well-settled law, and this Court should reject the suggestion that it does. Moreover, unlike this case, the jury in Eaton was not instructed that a lack of volition was a defense to the enhancement. If the jury in Eaton had been so instructed, that jury almost certainly would have rejected the enhancement given the facts of the case. It is also worth noting the irony that the substantive crime Eaton was convicted of is a strict liability offense like child rape, which requires the defendant to prove by a preponderance of the evidence that he possessed a controlled substance unwittingly. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). In short, Eaton does not change the law with regard to strict liability offenses, and the defendant's reliance on Eaton is misplaced.

Finally, Deer cites case law from other jurisdictions in support of the proposition that the State should be required to prove

beyond a reasonable doubt that a criminal act is voluntary. Brief of Appellant, at 17-18. These cases are also inapposite, because none of them address a similar issue with respect to a strict liability offense.

In Brown v. State, 955 S.W.2d 276 (Tex. Crim. App. 1997), the court did, in fact, hold that the state had a burden of proving that the acts of the defendant constituting the criminal charge were voluntary acts. The crime in question, however, was murder. Id. at 277. A similar conclusion was reached in State v. Lara, 902 P.2d 1337 (Ariz. 1995). But the crimes at issue in that case were aggravated assault and attempted murder. Id. at 1339. Lastly, in State v. Baird, 604 N.E.2d 1170 (Ind. 1992), the court also held that the state must prove voluntariness beyond a reasonable doubt if there is evidence in the record sufficient to raise the issue. Again, however, the defendant was charged with murder and "feticide" for killing his pregnant wife and his parents by strangulation and stabbing. Id. at 1175. In addition, Indiana apparently has a statute that expressly requires the state to prove that all criminal acts are voluntary. See id. at 1176. In other words, all of these cases involve crimes that clearly include a *mens rea* element, and thus, they are not on point.

In sum, the trial court correctly concluded that Deer's claimed lack of knowledge or consent was an affirmative defense that she bore the burden of showing by a preponderance of the evidence in accordance with Washington law. Deer's claim to the contrary should be rejected.

D. CONCLUSION

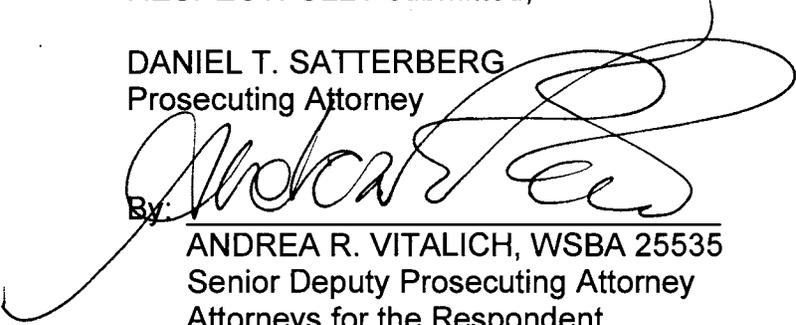
The State concedes that Deer's convictions should be dismissed without prejudice and that the case should be remanded to the trial court, where the State may refile three counts of rape of a child in the third degree. However, the trial court's instruction placing the burden on the defendant to establish a lack of knowledge or consent by a preponderance of the evidence was correct.

For all of the foregoing reasons, the State asks this Court to dismiss the defendant's convictions without prejudice, but to uphold the trial court's jury instruction regarding lack of knowledge or consent.

DATED this 17th day of June, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila J. Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LINDY DEER, Cause No. 63737-1-I, in the Court of Appeals, Division I, for the State of Washington.

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

L Brame
Name
Done in Seattle, Washington

6/17/10
Date