

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 31, 2011, 2:49 pm
BY RONALD R. CARPENTER
CLERK

No. 85511-1

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LINDY DEER,

Respondent.

FILED
MAY 31 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF RESPONDENT

LILA J. SILVERSTEIN
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 2

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

1. The Court of Appeals properly followed this Court’s decision in *Eaton*, which held that Due Process requires the State to bear the burden of proving a voluntary act beyond a reasonable doubt. 6

 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..... 6

 b. Where evidence is presented that the act in question is involuntary, the trial court must grant a request to instruct the jury on the State’s burden to prove a voluntary act beyond a reasonable doubt..... 8

 c. The State confuses the *mens rea* and *actus reus*, and urges improper burden-shifting 11

2. This Court should dismiss the petition for review as improvidently granted, because the State agrees that Ms. Deer’s convictions must be reversed 17

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>Hart v. Department of Social and Health Services</u> , 111 Wn.2d 445, 759 P.2d 1206 (1988).....	18
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	15
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996)	9
<u>State v. Eaton</u> , 168 Wn.2d 476, 229 P.3d 704 (2010).....	passim
<u>State v. Fry</u> , 168 Wn.2d 1, 228 P.3d 1 (2010)	14, 15, 16
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1054 (1983).....	9
<u>To-Ro Trade Shows v. Collins</u> , 144 Wn.2d 403, 27 P.3d 1149 (2001)....	18

Washington Court of Appeals Decisions

<u>State v. Thomson</u> , 70 Wn. App. 200, 852 P.2d 1104 (1993), <u>aff'd</u> 123 Wn.2d 877, 872 P.2d 1097 (1994).....	16
<u>State v. Utter</u> , 4 Wn. App. 137, 479 P.2d 946 (1971).....	7, 12

United States Supreme Court Decisions

<u>Carter v. United States</u> , 530 U.S. 255, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000).....	8
<u>In re Winship</u> , 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	6

Decisions of Other Jurisdictions

<u>Brown v. State</u> , 955 S.W.2d 276 (Tex. Crim. App. 1997).....	9, 10, 15, 17
<u>Seymore v. State</u> , 152 P.3d 401 (Wyo. 2007).....	8
<u>State v. Baird</u> , 604 N.E.2d 1170, 1176 (Ind. 1992)	11, 15, 17

<u>State v. Lara</u> , 902 P.2d 1337 (Ariz. 1995)	11, 15, 17
<u>United States v. Sandoval-Gonzalez</u> , ___ F.3d ___, 2011 WL 1533516 (No. 09-50446, 9 th Cir., 4/25/11)	14

Constitutional Provisions

U.S. Const. amend. XIV	6, 13
------------------------------	-------

Statutes

RCW 9A.44.079.....	16
--------------------	----

Other Authorities

R. Anderson, 1 Wharton’s Criminal Law and Procedure (1957)	8
Wayne R. LaFave, <u>Criminal Law</u> (4 th ed. 2003).....	15
William Blackstone, 5 Commentaries 21	7

A. INTRODUCTION

This Court in Eaton¹ held that all crimes, including strict liability crimes, have a voluntariness component to the *actus reus* which the State must prove beyond a reasonable doubt. This holding is mandated by the Due Process Clause and is consistent with the common law and the majority view in other jurisdictions. The Court of Appeals properly followed this precedent, holding the trial court violated Lindy Deer's right to due process by refusing to instruct the jury that the State had to prove a voluntary act, and instead shifting the burden to her to disprove a voluntary act.

The State asks this Court to abandon this constitutionally mandated rule. It proposes placing the burden on defendants to disprove the *actus reus*, thereby allowing criminal liability for involuntary acts. This proposal not only violates due process, it is "at odds with the deepest presuppositions of the criminal law."² This Court should affirm.

¹ State v. Eaton, 168 Wn.2d 476, 481, 229 P.3d 704 (2010).

² Id. at 482.

B. ISSUES PRESENTED

1. The State prosecuted 52-year-old Lindy Deer for rape of a child in the third degree, alleging she had sexual intercourse with a 15-year-old male. At trial, both the teenage male and Ms. Deer testified that the teenager, who was supposed to be sleeping on the couch, went into Ms. Deer's bedroom in the middle of the night and had sex with her while she was asleep. Did the Court of Appeals properly hold the trial court violated Ms. Deer's right to due process by refusing to instruct the jury on the State's burden to prove a voluntary act beyond a reasonable doubt?

2. The State agrees that the Court of Appeals properly reversed Ms. Deer's convictions because the trial court allowed the prosecution to amend a constitutionally defective information after resting its case. Although the charges will be dismissed without prejudice and the prosecutor would be permitted to refile charges, retrial is speculative given Ms. Deer has nearly completed her term of incarceration. Should the State's petition for review be dismissed as improvidently granted?

C. STATEMENT OF THE CASE³

In 2006 and 2007, 15-year-old R.R. frequently spent the night on Lindy Deer's couch, because he had moved to Washington State without his parents. On at least two occasions during that period, R.R. left the

³ Additional facts are set forth in the Brief of Appellant filed in the Court of Appeals, at pages 2-8.

living room sofa on which he had been sleeping and went to Ms. Deer's bedroom, where she was sleeping. 6 RP 40, 47-49.⁴ R.R. had sex with Ms. Deer, after which Ms. Deer awoke and 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 had sex with Ms. Deer but that Ms. Deer appeared to be asleep during the incidents. 5 RP 25.

The State did not charge R.R. with third-degree rape and instead charged Lindy Deer with three counts of third-degree rape of a child. 5 RP 11; CP 1, 6-7.

During trial, both R.R. and Ms. Deer testified that R.R. had sex with Ms. Deer while she was asleep. 5 RP 25, 6 RP 40-43, 92-95, 7 RP 14, 25-35; 8 RP 40. After the State rested its case, the parties and the court 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 objections, the State was allowed to amend the information to

⁴ 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).

add the elements for child rape and delete the elements for child molestation. 7 RP 66-72.

Given the evidence that R.R. had sex with Ms. Deer while she was asleep, 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, instead instructing the jury that Ms. Deer had to prove lack of knowledge or consent by a preponderance of the evidence. 7 RP 81; 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 appealed and argued the trial court erred in allowing the State to amend a constitutionally defective information after resting its case, and in denying the parties’ joint motion with respect to the jury instruction on a voluntary act.

The State conceded error, acknowledging that it should not have been allowed to amend the information after resting its case. The State

agreed that Ms. Deer's convictions should be reversed, and the charges dismissed without prejudice to the State's ability to refile.

The Court of Appeals accepted the State's concession of error, reversed Ms. Deer's convictions, and remanded for dismissal of the charges without prejudice to the State's ability to refile. Slip Op. at 4-6. In dicta, the court addressed the due process issue because it might arise again if the State elects to refile charges against Ms. Deer. The Court of Appeals held the trial court violated Ms. Deer's right to due process by refusing to instruct the jury that the State must prove a voluntary act beyond a reasonable doubt. Slip Op. at 9. The court recognized that even strict liability crimes have a volitional element as part of the *actus reus*. Slip Op. at 6-8. Thus, the State bears the burden of proving beyond a reasonable doubt that the defendant committed a volitional act, and the trial court erred in relieving the State of that burden here. Slip Op. at 8-9.

The State filed a petition for review on the instructional issue only. It continues to agree that Ms. Deer's convictions must be reversed and the charges dismissed without prejudice.

D. ARGUMENT

1. **The Court of Appeals properly followed this Court's decision in Eaton, which held that Due Process requires the State to bear the burden of proving a voluntary act beyond a reasonable doubt.**

Both R.R. and Ms. Deer testified that Ms. Deer was asleep when R.R. entered her bedroom and had sex with her. Accordingly, both parties asked the Court to instruct the jury that in order to convict Ms. Deer of rape of a child, it must find the State proved beyond a reasonable doubt that Ms. Deer engaged in a volitional act when R.R. had sex with her. The court denied the motion, instead requiring Ms. Deer to prove lack of "knowledge or consent" by a preponderance of the evidence. As the Court of Appeals recognized, 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. Due Process requires the State to prove every element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Each element of a crime goes to either the *mens rea* or the *actus reus*. State v. Eaton, 168 Wn.2d 476,80, 229 P.3d 704 (2010). Although some crimes, like rape of a child, do not have a *mens rea*, every crime includes a

volitional element as part of the *actus reus*. State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). Thus, the State must prove beyond a reasonable doubt that the defendant committed a voluntary act. Eaton, 168 Wn.2d at 485.

A state may not hold an individual liable for an act that was unconscious or otherwise involuntary. Id. at 481 (reversing conviction for drug-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. (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.

Id. at 481-82.

Thus, even for crimes like rape of a child which do not include a *mens rea*, there is “a certain minimal mental element required in order to establish the *actus reus* itself.” Utter, 4 Wn. App. at 139. “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)).

The U.S. Supreme Court agrees that individuals may not be held liable for acts they allegedly committed while asleep or otherwise

unconscious:

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”).

b. Where evidence is presented that the act in question is involuntary, the trial court must grant a request to instruct the jury on the State's burden to prove a voluntary act beyond a reasonable doubt. Ms. Deer does not argue, and the Court of Appeals did not hold, that every criminal case requires a jury instruction explaining the State must prove a voluntary act beyond a reasonable doubt. In Washington, the jury may

presume acts are volitional. Eaton, 168 Wn.2d at 486-87. 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. Cf. State v. McCullum, 98 Wn.2d 484, 500, 656 P.2d 1054 (1983) (once evidence of self-defense is presented, trial court must grant request to instruct jury on State's burden to disprove self-defense 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”).⁵

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

⁵ In addition to shifting the burden, the trial court refused to use language typically associated with the *actus reus*, and instead used the *mens rea* terms “knowledge” and “consent”.

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, it refused the defendant's request to provide "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 Texas 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

burden 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 grant a request to instruct the jury on the State’s burden to prove a voluntary 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 relieving the State of its burden to prove the acts were voluntary. The Court of Appeals’ decision should therefore be affirmed.

c. The State confuses the *mens rea* and *actus reus*, and urges improper burden-shifting. The State first attacks a straw man, arguing that rape of a child is a strict liability crime with no *mens rea*. Petition for Review at 1-2, 6-9; Brief of Respondent at 14-20. But Ms. Deer never argued, and the Court of Appeals did not hold, that rape of a child has a *mens rea*. As explained in Ms. Deer’s briefing and in the Court of Appeals’ opinion, voluntariness is part of the *actus reus*, and is required

even for strict liability crimes. Slip Op. at 8; see also Utter, 4 Wn. App. at 142-43; Brief of Appellant at 14-19.

This Court in Eaton explained why even strict-liability crimes require a voluntary act:

Although most criminal laws since codified still adhere to this general principle [that there must be a “vicious will”], we now recognize that the legislature has the authority to create a crime without a mens rea element. Though they are disfavored, these “strict liability” crimes criminalize unlawful conduct regardless of whether the actor possesses a culpable mental state.

...

As these principles suggest, although an individual need not possess a culpable mental state in order to commit a crime, there is ‘a certain minimal mental element required in order to establish the actus reus itself. ... To punish an individual for an involuntary act would run counter to the principle that a person cannot be morally responsible for an outcome unless the outcome is a consequence of that person’s action. Unless there is a requirement of voluntariness, situational offenses are at odds with the deepest presuppositions of the criminal law.

Eaton, 168 Wn.2d at 481-82 (internal citations omitted).

The Eaton Court noted that the State was confusing the *mens rea* and *actus reus*:

The State appears to be under the misapprehension that requiring volition is the same as requiring intent. But nothing in our opinion should be read as requiring that the State prove a defendant intended to be in the enhancement zone or even that she knew she was in the enhancement zone. The State must simply demonstrate that the defendant took some voluntary action that placed him in the zone.

Id. at 485 n. 5. Similarly here, the State is under the misapprehension that requiring volition is the same as requiring intent. But that is not Ms. Deer's argument, nor is it the Court of Appeals' holding. Consistent with Eaton, the Court of Appeals held that "[t]he State must simply demonstrate that the defendant took some voluntary action" when R.R. had sex with her. Eaton, 168 Wn.2d at 485 n.5; Slip Op. at 6-9.⁶

The State alternatively argues that even if there is a volitional component to the *actus reus*, involuntariness is an affirmative defense the accused must prove. Petition for Review at 10-12. The State's position is inconsistent with due process and this Court's precedents. Contrary to the prosecution's argument, the voluntary nature of the act is an element the State must prove beyond a reasonable doubt. Eaton, 168 Wn.2d at 485 ("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 486-87.

In contrast, an affirmative defense, which the defendant must prove by a preponderance of the evidence, "admits the defendant

⁶ The State argues Eaton is inapposite simply because it involved a different strict liability statute. Petition for Review at 8. But this Court discussed at length the principle that a voluntary act is required for all crimes, regardless of *mens rea*. Eaton, 168 Wn.2d at 481-82.

committed a criminal act” but offers an excuse for doing so. State v. Fry, 168 Wn.2d 1, 7, 228 P.3d 1 (2010). “An affirmative defense does not negate any elements of the charged crime.” Id. But a voluntary act is an element of the crime, and a defendant in Ms. Deer’s position does not admit to committing a criminal act. Therefore, the burden may not be shifted to the defendant to negate the element. Fry, 168 Wn.2d at 7; accord United States v. Sandoval-Gonzalez, ___ F.3d ___, 2011 WL 1533516 (No. 09-50446, 9th Cir., 4/25/11) (defendant must not bear burden to prove derivative citizenship as affirmative defense to illegal reentry because derivative citizenship negates alienage element, which government must prove beyond a reasonable doubt). This Court was correct in holding that the State must prove a voluntary act beyond a reasonable doubt. Eaton, 168 Wn.2d at 485.

Although the State notes that at least one jurisdiction, North Carolina, places the burden to prove involuntariness on the defendant, that is the minority view. A leading treatise explains:

Some authority is to be found to the effect that the defendant has the burden of proving the defense of automatism. The prevailing view, however, is that the defendant need only produce evidence raising a doubt as to his consciousness at the time of the alleged crime. *If the defense really is concerned with whether the defendant engaged in a voluntary act, an essential element of the crime, then it would seem that the burden of proof must as a constitutional matter be on the prosecution.*

Wayne R. LaFave, Criminal Law, § 9.4(b) at 468 (4th ed. 2003) (emphasis added); accord Brown, 955 S.W.2d at 279; Lara, 902 P.2d at 1339; Baird, 604 N.E.2d at 1176.

For the foregoing reasons, the State's citation to Bradshaw is unavailing. Petition for Review at 9-10 (citing State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004)). In Bradshaw, the *actus reus* was not at issue. Rather, this Court rejected the defendant's contention that possession of a controlled substance has an implied *mens rea* element of knowledge or intent. Bradshaw, 152 Wn.2d at 537. Because there is no mental element, "unwitting possession" does not negate an element and therefore is properly an affirmative defense for which the defendant bears the burden of proof. Id. at 538. But a voluntary act *is* an element; therefore the State must prove it beyond a reasonable doubt, and the defendant must not bear the burden of proving an involuntary act as an affirmative defense. Fry, 168 Wn.2d 168 Wn.2d at 7; Eaton, 168 Wn.2d at 485.⁷

Although the State argues it would be absurd to hold it to its burden of proving a voluntary act, in fact the contrary is true. The crime

⁷ To the extent the *mens rea /actus reus* distinction is "absurd," as the State argues, it is only because strict liability crimes are themselves "absurd," or at least "disfavored." See Eaton, 168 Wn.2d at 481. But we allow strict liability offenses in the criminal law in order to give the legislature its due deference in defining crimes. If prosecutors wish to petition the legislature to eradicate these "disfavored" strict liability crimes, they may certainly do so.

at issue in this case demonstrates the necessity of a volitional requirement. Rape of a child in the third degree occurs when a person between 14 and 16 years of age has sex with a person at least four years older. RCW 9A.44.079. But obviously, there are plenty of teenage males who are strong enough to forcibly rape adult females. Under the State's theory, women in that position will have committed the crime of rape of a child, because there is no *mens rea*, and the State does not believe there is a volitional component to the *actus reus*.

One could also imagine a case in which a 15-year-old boy slips a drug into the drink of a 19-year-old girl, and when she passes out he has sex with her. Under the State's theory, the 19-year-old would be guilty of rape of a child. That is not the law. A voluntary act is required for all crimes, regardless of *mens rea*. And the girl – who is the alleged perpetrator simply because of her age – should not have to prove that she is, in fact, the victim. Cf. State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), aff'd 123 Wn.2d 877, 872 P.2d 1097 (1994) (State bears burden of proving identity of perpetrator). The State must prove beyond a reasonable doubt that she is the perpetrator by proving a voluntary act.

As noted above, the majority view is in accord with this Court's holdings in Eaton and Fry. Other states reject the argument that

involuntariness is an affirmative defense and recognize that the State bears the burden of proving a voluntary act beyond a reasonable doubt. Brown, 955 S.W.2d at 279; Lara, 902 P.2d at 1339; Baird, 604 N.E.2d at 1176.

The Court of Appeals correctly held the same in Ms. Deer's case, and this Court should affirm.

2. This Court should dismiss the petition for review as improvidently granted, because the State agrees that Ms. Deer's convictions must be reversed.

In the Court of Appeals, the State conceded that reversal was required because the trial court improperly allowed the State to amend a constitutionally defective information after resting its case. Slip Op. at 4; Br. of Respondent at 9-14. The Court of Appeals accepted the concession, and applied the proper remedy of dismissal of charges without prejudice to the State's ability to refile. Slip Op. at 5-6.

In its petition for review, the State does not claim that the Court of Appeals erred in reversing Ms. Deer's convictions. Indeed, the State continues to agree that the convictions must be vacated. Petition for Review at 5. Although the State is permitted to refile charges, whether it will do so is completely speculative – especially given that Ms. Deer has almost finished serving her term of confinement for these convictions. Unless the State retries Ms. Deer despite her having served her time, the

instructional issue will not recur. Accordingly, this Court should dismiss the petition for review as improvidently granted.

This Court does not issue advisory opinions. To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 416-17, 27 P.3d 1149 (2001) (dismissing declaratory judgment action and stating, “we have repeatedly refused to find a justiciable controversy where the event at issue has not yet occurred or remains a matter of speculation”). The Court dismissed a moot case involving a due process issue where there was “little likelihood of these same facts recurring.” Hart v. Department of Social and Health Services, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988). It noted that even under the federal standard, there must be a “demonstrated probability that the same controversy will recur involving the same complaining party.” Id. at 452 (citations omitted). Because it would be speculative to presume that the same dispute between the parties would recur, the appeal was dismissed. Id. Similarly here, it is speculative to presume the State will refile charges given that Ms. Deer has served her time, witnesses’ perspectives may have changed, and budgetary concerns limit filings.

This Court has recently dismissed cases as improvidently granted in circumstances similar to those here. See In re the Termination of A.R. and D.R., No. 84132-2 (dismissing as improvidently granted because State agreed children had statutory right to counsel, even though State did not

agree children had constitutional right to counsel); In re the Dependency of P.P.T., No. 84458-5 (dismissing as improvidently granted because parent's rights were subsequently terminated at a second trial, even though published Court of Appeals' opinion was arguably contrary to the Constitution and statutes). The Court should similarly dismiss this case.

E. CONCLUSION

For the reasons set forth above, Ms. Deer respectfully requests that this Court affirm the Court of Appeals and hold that where some evidence is presented that the alleged act is involuntary, a trial court must grant a request to instruct the jury on the State's burden to prove a voluntary act beyond a reasonable doubt. In the alternative, this Court should dismiss the case as improvidently granted because both parties agree that the convictions must be reversed.

Respectfully submitted this 31st day of May, 2011.

/s/ Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	NO. 85511-1
v.)	
)	
LINDY DEER,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

ANDREA VITALICH, DPA
KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

U.S. MAIL
 HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF MAY, 2011.



X. _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎ (206) 587-2711

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Cc: Andrea.Vitalich@kingcounty.gov
Subject: RE: 855111.supbrf

Rec. 5-31-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [<mailto:maria@washapp.org>]
Sent: Tuesday, May 31, 2011 2:50 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Andrea.Vitalich@kingcounty.gov
Subject: 855111.supbrf

State v. Lindy Deer
No. 85511-1

Please accept the attached documents for filing in the above-subject case:

SUPPLEMENTAL BRIEF OF RESPONDENT

Lila J. Silverstein - WSBA 38394
Attorney for Respondent
Phone: (206) 587-2711
E-mail: lila@washapp.org

By

Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
www.washapp.org