

09765-0

09765-0

NO. 69765-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RANDY ROYAL,

Appellant.

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

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

2010 MAR 29 PM 4:54  
STATE OF WASHINGTON  
COURT OF APPEALS DIV 1

WASHINGTON APPELLATE PROJECT  
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A. INTRODUCTION.

An undercover police officer believed Randy Royal would sell him crack for \$30. The officer gave Mr. Royal \$30 and Mr. Royal gave him drugs. Then Mr. Royal took back the drugs and requested more money, but once he received an additional \$30, Mr. Royal handed drugs to the officer. The prosecution charged Mr. Royal with first degree theft for momentarily taking drugs out of the officer's hand. Mr. Royal's temporary taking of drugs from the buyer in the course of a drug sale negotiation does not satisfy the essential elements of theft in the first degree and requires reversal of this conviction.

Mr. Royal asked to represent himself before his trial began. The court denied the request solely because Mr. Royal asked for two days to prepare, even though there was no evidence or any court finding that Mr. Royal was trying to delay the proceedings or impair the administration of justice. Absent a sufficient legal basis for denying Mr. Royal's pretrial request to represent himself, the court impermissibly denied Mr. Royal his constitutional right to waive counsel.

B. ASSIGNMENTS OF ERROR.

1. The prosecution failed to prove the essential elements of first degree theft as charged.

2. The court erroneously denied Mr. Royal's request to represent himself in violation of the Sixth Amendment and article I, section 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Theft requires proof that the accused person wrongfully obtained property owned by another with the intent to deprive the owner of the property for a period of time. The prosecution based its allegation of theft on Mr. Royal's temporary taking of a drug out of the hand of a person seeking to buy an illegal drug. Was there legally insufficient evidence that Mr. Royal committed first degree theft?

2. The right to self-representation is constitutionally guaranteed and, when requested, the court may not deny it without undertaking the necessary inquiry on the record. Mr. Royal unambiguously asked to represent himself, but the court denied the request solely on the basis that Mr. Royal asked for two days of time to prepare. Did the court's disregard of Mr. Royal's clearly expressed request to represent himself,

without any finding his request would unduly delay the trial, violate his right to represent himself?

D. STATEMENT OF THE CASE.

Undercover officer Kevin Jones approached several people standing on the street and asked “if anybody had any.” 2RP 139. Randy Royal asked what he was looking for and Officer Jones replied “crack.” 2RP 140. Mr. Royal said “he was the only one that had any soup in the area.” 2RP 140. Mr. Royal asked how much the officer was looking for and Officer Jones replied, “\$30.” 2RP 140. Mr. Royal, Officer Jones, and two other people walked together to the next corner and turned at Mr. Royal’s instruction. 2RP 140.

They stopped near Buckley’s Tavern, at 2<sup>nd</sup> Avenue and Battery Street in Seattle. 2RP 141. Mr. Royal handed the undercover officer a package wrapped in prescription paper and the officer handed Mr. Royal the money. 2RP 143.

Mr. Royal said, “That’s not enough, give me more.” 2RP 143. Mr. Royal “snatched the prescription paper with the narcotics out of my left hand,” Officer Jones said, and the officer “pulled out more money. I had a 10 and I also had a 20 in my hand.” 2RP 143-44. Officer Jones gave Mr. Royal the \$10 bill but Mr. Royal saw the additional money

and said “All or nothing, all or nothing.” 2RP 144. Officer Jones was “fearful” and gave Mr. Royal the \$20. 2RP 144.

Upon receiving this money, Mr. Royal gave Officer Jones the drugs. 2RP 145. Officer Jones motioned to trailing officers that he needed help and he quickly left with the drugs. 2RP 169, 171. The backup team immediately and arrested Mr. Royal. 2RP 197, 233, 252.

The drugs that Officer Jones received were tested by the Washington State Patrol Crime Lab. 2RP 147, 234-35, 262. The lab found that the drugs was mirtazapine, a legend drug for which a person needs a prescription. 2RP 264-65. It is an antidepressant, not a controlled substance. 2RP 265. Mr. Royal had additional pills in his hand when arrested, and admitted they were his medicine. 2RP 179-80, 265; 3RP 304.

The prosecution charged Mr. Royal with one count of delivery of an uncontrolled substance in lieu of a controlled substance, and one count of theft in the first degree. CP 1-2. The State alleged that Mr. Royal committed theft when he took the drugs out of Officer Jones’s hand while requesting additional money for the transaction, even though he returned the drugs to Officer Jones shortly thereafter. 3RP 314. Mr. Royal was convicted of both charged offenses. CP 57-58.

The day before the pretrial proceedings were scheduled to begin, defense counsel informed the court that Mr. Royal wanted to represent himself. 1RP 21. Mr. Royal had previously complained that he and his lawyer had been “arguing and yelling and screaming” but the court had denied his request for a new attorney. 1RP 4-5.

When asked to explain his request for self-representation, Mr. Royal said, “I’ll have a better chance defending myself.” 1RP 21-22. He offered that he knew the statutes and the court rules. 1RP 22. The court asked no questions of Mr. Royal other than whether he would be ready to start trial tomorrow. 1RP 22. Mr. Royal responded that he would need “a couple days” to review discovery, review some documents, and get a witness, Dr. Julian. 1RP 22. The court asked defense counsel if he was ready for trial and counsel responded that there were still some “last minute details” but thought he could be ready. 1RP 22. The court denied the request to proceed pro se, ruling it is “not an unequivocal request” because “[i]t’s conditioned upon a continuance and I’m not going to grant it.” 1RP 23.

E. ARGUMENT.

1. **The prosecution failed to prove that Mr. Royal's momentary retention of his own property in the course of a negotiated sale constituted theft in the first degree**

a. The prosecution must prove that the accused person committed all essential elements of a crime.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. Winship, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010).

The prosecution charged Mr. Royal with one count of first degree theft which required the prosecution to prove beyond a reasonable doubt that Mr. Royal wrongfully obtained property belonging to another person with the intent to deprive the owner of the property. CP 1-2; CP 82. The prosecution expressly elected that the “property” underlying the theft charge was the drugs that Mr. Royal gave to an undercover police officer, took back from the officer when requesting more money, then returned to the officer in the course of a one minute long transaction. 3RP 314-15.

- b. To prove Mr. Royal committed theft, the State needed to prove Mr. Royal intended to wrongfully deprive the owner of his property.

Theft in Washington requires the specific intent to deprive another of property or services, combined with a wrongful taking. State v. Walker, 75 Wn.App. 101, 106, 897 P.2d 957 (1994); RCW 9A.56.020 (1). “Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services.” RCW 9A.56.020(1)(a).

The deprivation must be of some duration: “the theft statute proscribes the continued or permanent unauthorized use” of property.

Walker, 75 Wn.App. at 108; see also State v. Walters, 162 Wn.App. 74, 86, 255 P.3d 835 (2011). In Walker, the court compared the essential elements of theft with taking a motor vehicle without the owner's permission. Walker held that the two statutes were not concurrent because taking a motor vehicle involved taking a car "for a spin around the block," where theft requires the person must intend to deprive the owner of its use "for a substantial period of time." 75 Wn.App. at 106. Theft requires not merely an initial taking, but rather an intent to maintain the "continued or permanent" deprivation of property belonging to another. Id. at 107.

Additionally, "a person cannot steal his or her own property." State v. Pike, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). The owner of the property is a person with a lawful, superior possessory interest. Id. at 590-91.

It does not satisfy the required intent to wrongfully deprive the owner of property by taking property "openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2)(a). This limitation on the definition of theft means that when the defendant believes he is taking his own property, the

taking may be lawful. State v. Kjorsvik, 117 Wn.2d 93, 110, 812 P.2d 86 (1991) (citing State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984)).

During the drug sale at issue, the undercover officer Jones said that Mr. Royal put drugs in his hand and took the \$30 the officer offered, but then demanded more money. Officer Jones said Mr. Royal complained, “that’s not enough” and removed the drugs from Officer Jones’s hand. 2RP 164. In response to Mr. Royal’s statement “that’s not enough,” Officer Jones handed Mr. Royal another \$10, but Mr. Royal saw that Officer Jones had more money in his pocket and said, “all or nothing, all or nothing.” 2RP 164-65. Officer Jones handed Mr. Royal his last \$20. 2RP 165. At that point, Mr. Royal handed the drugs to Officer Jones and Officer Jones left with the drugs, which he gave to another officer after the incident. 2RP 167.

Officer Jones momentarily lost possession of the drugs. A videotape from a nearby bar documents the interaction between Mr. Royal and Officer Jones. Ex. 3. The videotape is quite blurry and the camera’s view is partly blocked by someone’s head, but it shows that the entire exchange took less than one minute. Ex. 3 (entire incident lasts from 6:50 to 7:33 on videotape). In that time, Mr. Royal gave something to Officer Jones, took it back, then returned it to Officer

Jones. It is this brief loss of possession that the State charged as theft in the first degree. 2RP 314.

Moreover, the drug that Mr. Royal gave, took back, then sold to Officer Jones was prescription medication. 2RP 264-65. The prescription medication belonged to Mr. Royal. 3RP 304 (describing Mr. Royal's admission that what he sold "was my medicine"). The prescription never applied to Officer Jones and therefore he never obtained superior legal title to Mr. Royal's pill by offering him money to buy it. See RCW 69.41.030 (unlawful to "possess any legend drug except upon the order or prescription of a physician").

In Pike, the court discussed whether a person commits theft when he takes back his own car from a mechanic without paying for the repairs. 118 Wn.2d at 588. The Supreme Court ruled that "a general contractual debt cannot support a theft conviction." Id. at 595. The failure to pay for repairs does not make the repaired property "the property of another" as required for theft, because the repair shop "has no possessory interest in the car, only a right to recover damages from Pike in a civil lawsuit. Id. at 593-94. Second, mere breach of a contractual obligation to pay does not create criminal liability absent a specific statute, or contractual fraud." Id. at 595.

Similarly, Officer Jones did not obtain a superior possessory interest in the prescription medication of another person by offering him money to for it, even if Officer Jones thought he was illegally buying cocaine rather than illegally buying mirtazapine. Furthermore, the officer's momentary, temporary loss of possession of the drugs occurred in the course of a negotiation over the price of the drugs. An oral agreement to buy drugs does not create criminal liability based on failure to adhere to the initially quoted price. See e.g., Pike, 118 Wn.2d at 925. When Mr. Royal received what he thought was sufficient payment, he gave the drugs to Officer Jones and Jones took them. 2RP 169. This exchange satisfies neither the wrongful obtaining of property of another element of theft, nor the intent to deprive that owner thereof.

The prosecution specified that the property it alleged was wrongfully taken was "the purported drugs." 3RP 306. The prosecution told the jury, "We are not charging theft for the money. We're charging theft for the drugs that he took back . . ." 3RP 314. When the jury asked a question about the theft charge, the prosecutor told the court "we elected" that the theft charge would be based on "drugs and drugs only," and not based on whether Mr. Royal took wrongfully took money from Officer Jones. 3RP 315.

Under this scenario and based on the prosecution's explicit election that the theft charge was based on momentarily taking the drugs, the alleged acts did not constitute theft. The prosecution did not prove Mr. Royal wrongfully obtained or intended to deprive Officer Jones of Officer Jones's drugs by temporarily retaining his own prescription medication in the course of an attempted drug sale.

c. The prosecution's election precludes the State from attempting to defend its charge based on other acts.

When several acts could constitute the charged offense, the prosecution must either elect the act on which the prosecution relies or have the court instruct the jury that it must unanimously agree on a specific act or incident that constitutes the crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "[A] defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Here, the jury was not instructed that it must unanimously agree on the act constituting the theft, but the prosecution expressly elected. It told the jury, "We are not charging theft for the money. We're charging

theft for the drugs that he took back” and expressly told the court this was a purposeful election as to the act constituting theft. 3RP 314, 315.

While deliberating, the jury asked what conduct they should consider in deciding whether Mr. Royal committed theft. CP 59. The prosecution first asked that the court tell the jury that the theft allegation was premised solely on the temporary taking of drugs from the officer, but the court was hesitant to comment on the facts for the jury. 3RP 315-16. The court answered the question by directing the jury to rely on the instructions, evidence, and closing arguments. CP 60.

Because the prosecution unambiguously elected to premise the theft prosecution solely on the taking of drugs in the course of the drug sale, and not whether Mr. Royal wrongfully obtained money from Officer Jones, the conviction cannot be upheld on any act other than the taking of the drugs.

d. The theft conviction must be reversed due to legally insufficient evidence.

Mr. Royal did not wrongfully obtain property from its owner when he momentarily took prescription medicine out of Officer Jones’s hand. Officer Jones had no lawful right to own this medication and Mr. Royal did not take it with the intent to deprive Officer Jones of the

property for a substantial period of time. Absent proof of every essential element of theft, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). Additionally, because the sentence the court imposed was based in part on the court's consideration of the theft conviction, Mr. Royal is entitled to resentencing for the remaining conviction.

**2. The court impermissibly denied Mr. Royal's request to represent himself**

- a. A clear request for self-representation must be granted unless it will obstruct justice or is not knowing and voluntary.

The constitution guarantees criminal defendants the right to representation by a competent attorney at all stages of a criminal proceeding, as well as the corollary right to waive counsel and represent oneself. U.S. Const. amend. 6;<sup>1</sup> U.S. Const. amend. 14;<sup>2</sup>

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<sup>1</sup> The Sixth Amendment provides in part, In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

<sup>2</sup> The Fourteenth Amendment says in part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Wash. Const. art. I, § 22;<sup>3</sup> Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010).

The right to self-representation is implicitly guaranteed by the Sixth Amendment and explicitly guaranteed by article I, section 22. Madsen, 168 Wn.2d at 503. This right is “so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice.” Id. “The unjustified denial of this [pro se] right requires reversal.” Id. (quoting State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997) (emphasis added in Madsen)).

Anytime an accused person requests to represent himself, “the trial court must determine whether the request is unequivocal and timely.” Madsen, 168 Wn.2d at 504 (emphasis added). Then, unless the court finds the request is equivocal or untimely, “the court must determine if the request is voluntary, knowing, and intelligent, usually by colloquy.” Id. (emphasis added).

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<sup>3</sup> Article I, section 22 provides in pertinent part:

The “only bases” to deny a request for self-representation is that the court finds the request is equivocal, untimely, involuntary, or made without understanding its consequences. Id. Any such finding by the court “must be based on some identifiable fact,” not merely on speculation by the trial court or the reviewing court. Id. at 505. The court cannot “stack the deck” against the accused by failing to conduct the proper inquiry. Id. at 506. When a court fails to follow up on an unequivocal request to proceed pro se, “the only permissible conclusion is that [the accused’s] request was voluntary, knowing, and intelligent.” Id.

A request is not untimely because it is made as trial is about to commence. Before trial is underway, the timeliness of the request “depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter.” Id. at 508. Even a request to proceed pro se made during trial must be fully considered by the court, although at this late stage the trial court has more authority to deny the

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In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, . . . [and] to have a speedy public trial by an impartial jury.”

request based on its “informed discretion.” Id. (quoting State v. Barker, 75 Wn.App. 236, 241, 881 P.2d 1051 (1994)).

b. Mr. Royal’s request was explicit and would not unduly delay the proceedings.

The court claimed it was denying Mr. Royal’s request because it was “equivocal.” 1RP 23. However, Mr. Royal unambiguously asked to represent himself. Defense counsel told the court that Mr. Royal had told him he wanted to represent himself and when asked to explain, Mr. Royal said, “I’ll have a better chance defending myself,” and offered that he knew the statutes and court rules. 1RP 21-22. The court was not confused about the nature of Mr. Royal’s request and it was not equivocal.

The reason the court labeled the request equivocal was not because Mr. Royal was unclear about whether he wanted to represent himself, but rather because the court viewed the request as premised on the need for a continuance. 1RP 23. Thus, the court was focused on the timing of the request and not ambiguity in Mr. Royal’s expressed desire to represent himself.

In the context of timeliness, the trial court’s discretion over granting a criminal defendant’s request for self-representation “lies at a

continuum.” State v. Vermillion, 112 Wn.App. 844, 855, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003). First, if a request is made “well before trial,” an accused person has the right to self-representation as a matter of law; second, a request made right before trial is about to commence “depends on the facts of the particular case with a measure of discretion reposing in the trial court in the matter”; and third, “if made during the trial ... the right to proceed pro se rests largely in the informed discretion of the trial court.” State v. Breedlove, 79 Wn.App. 101, 106-07, 900 P.2d 586 (1995) (quoting State v. Fritz, 21 Wn.App. 354, 360-61, 585 P.2d 173 (1978), rev. denied, 92 Wn.2d 1002 (1979)).

When a request is made before the trial commences, the court “must exercise its discretion by balancing the important interests implicated by the decision: the defendant’s interest in self-representation and society’s interest in the orderly administration of justice.” Breedlove, 79 Wn.App. at 107. However, as the Breedlove Court explained,

Washington case law indicates only two types of circumstances that warrant the denial of a motion to proceed pro se that is made shortly before trial or as the trial is about to begin. The trial court can deny the request if it finds either (1) that the motion is made for improper purposes, i.e., for the purpose of

unjustifiably delaying a trial or hearing, or (2) that granting the request would obstruct the orderly administration of justice.

Id. at 107-08.

In Breedlove, this Court concluded that “although Breedlove simultaneously requested a continuance, there is no evidence in the record that the motion was interposed for the purpose of delay or harassment.” Id. at 108. A request for more time does not demonstrate the intent to improperly delay proceedings, because it may show simply the “desire to prepare the defense his counsel had allegedly neglected to prepare.” Id. at 109. Similarly to Breedlove, there is no reasonable inference that Mr. Royal was trying to delay the proceedings. The extent of his continuance request was minimal; he merely he asked for “a couple days” of additional time so that he could review discovery and potentially obtain a witness with whom defense counsel had already consulted. 1RP 22. Defense counsel himself said there were a couple of last minute details that needed to be resolved before he would be ready to proceed. 1RP 22.

Like Breedlove, the record does not “reflect that granting the motion would likely have impaired the efficient judicial administration in the present case.” 79 Wn.App. at 109. By asking for a short

continuance of two days, he would not have disrupted the State's ability to try the case. The trial involved no civilian witnesses and, in fact, during trial the court repeatedly admonished the prosecutor for calling unnecessary police witnesses and eliciting repetitive testimony. 2RP 97, 172-73, 201-02.

In sum, there is no evidence that Mr. Royal's request was designed to delay his trial in an inappropriate fashion. See Breedlove, 79 Wn.App. at 109. It is unreasonable to deem a request to proceed pro se as improper simply because it is accompanied by a request for a short continuance. Id. The record offers no basis to conclude Mr. Royal's request would disrupt the orderly administration of justice.

Finally, the timeliness requirement "must not be used as a means of limiting the defendant's constitutional right to self representation." Breedlove, 79 Wn.App. at 110 (internal citation omitted; emphasis in original). The request "should be granted" when there is no evidence of improper motive or impairment of the orderly administration of justice. Id.

c. The erroneous denial of Mr. Royal's request to proceed pro se requires reversal.

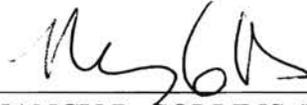
The court's improper refusal to permit self-representation is *per se* structural error. Madsen, 168 Wn.2d at 503; Breedlove, 79 Wn.App. at 111 (“Because the unjustified denial of this right [to self-representation] requires reversal, we reverse Breedlove’s conviction and order a new trial.”). The court’s unjustified refusal of Mr. Royal’s request to represent himself solely because he asked for two days of additional time to review discovery and prepare requires reversal and remand so that Mr. Royal has the opportunity to represent himself.

F. CONCLUSION.

For the reasons stated above, Mr. Royal respectfully asks this Court to reverse his conviction for theft in the first degree as it was not supported by the evidence and reverse the remaining conviction because Mr. Royal was improperly denied his right to represent himself.

DATED this 29<sup>th</sup> day of May 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69765-0-I
v.	)	
	)	
RANDY ROYAL,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF MAY, 2013, 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:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] RANDY ROYAL 712265 WASHINGTON STATE PENITENTIARY 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAY 29 PM 4:54

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF MAY, 2013.

X \_\_\_\_\_ 

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