No. 90277-1
COA No. 69308-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANTHONY DIGEROLAMO,

Petitioner.

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

The Honorable Lori K. Smith

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Joseph Digerolamo asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Joseph Anthony Digerolamo*, No. 69308-5 (March 10, 2014). A copy of the decision is in the Appendix at pages A-1 to A-9.

C. ISSUE PRESENTED FOR REVIEW

Due process requires the State prove every element of the offense beyond a reasonable doubt. Based upon the subsection of the rape statute charged, the State was required to prove S.B. was incapable of consenting because she was physically helpless or mentally incapacitated. S.B. was conscious prior to, and during the incident and was able to describe the room in which the incident occurred, and the fact the person had hair on their head and stubble on their chin. She also was able to swat at the person to go away, and able to turn away from the person, thus showing an understanding of the act of sexual intercourse and of being physically capable of responding. Is a

significant question of law under the United States and Washington Constitutions presented entitling Mr. Digerolamo to reversal of his conviction as the State failed to prove an essential element of the offense beyond a reasonable doubt?

D. STATEMENT OF THE CASE

Joseph Digerolamo lived in the city of SeaTac with his wife of 10 years, Glennis Johnny. RP 125-26. Ms. Johnny had a large extended family which included S.B., her niece, who lived in Victoria, British Columbia. RP 128, 274-77. In late May early June 2009, S.B. came to SeaTac to celebrate her grandmother's 83rd birthday. RP 293. Although S.B. usually stayed with her other aunt, Crystal, when she visited the Puget Sound area, on this occasion she was staying with Ms. Johnny and Mr. Digerolamo. RP 295.

The birthday party was the following day and lasted until approximately 6:00 p.m., when people began leaving. RP 295-96. Around 8:00 p.m., Ms. Johnny, S.B., and a few others began conversing and drinking straight shots of Crown Royal Whiskey. RP 299.

S.B. left the group after the second bottle of whiskey was opened after the first one had been emptied. RP 301-05. S.B.

remembered getting into bed, falling asleep, then rushing to the bathroom to vomit. RP 305. S.B. remembered Mr. Digerolamo coming into the bathroom to check on S.B. and helping her clean up. RP 305. S.B. remembered lying in bed in the dark, then feeling a person's tongue "around inside [her] vagina." RP 305.

> I remember turning with my hands to try to get him off, but after that it's a complete blank. That's all I remember is just my hand just trying to get the head away, and that's all I remember until I woke up the next morning.

RP 305.

After vomiting, S.B. remembered a number of details. When she returned to her room, she remembered turning out the lights and closing the door. RP 306. She remembered lying in bed in the total darkness. RP 306.

> Just when I was trying to push the head that the person – had head on their – hair on their head, and I just remember – I just woke up and I was like frozen, like I couldn't move. Just like, you know, supposed to somewhere supposed to be safe (inaudible) wake up and there's (inaudible) have their tongue in your vagina. The last thing I remember is trying to push (inaudible) and that was it, that's all I remember. I just felt (inaudible) hair on the person's head and (inaudible) but not that (inaudible) like facial hair too, like a little roughness, like the tongue was going around, I could feel it in between my legs, kind of that – that's all I remember after that is after I pushed that was the last thing I remember, is trying to get him away from down there.

RP 308.

S.B. awoke the next morning and stated she realized what had happened during the night. RP 309. S.B. disclosed to Ms. Johnny that someone had entered her room that night and had engaged in a sexual act. RP 309. Ms. Johnny contacted the police. RP 310-11.

The State charged Mr. Digerolamo with one count of rape in the second degree. CP 1. Following a jury trial Mr. Digerolamo was convicted as charged. CP 48.

The Court of Appeals affirmed the conviction, ruling that the State had presented sufficient evidence to support the verdict. Decision at 4-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

S.B. WAS NOT PHYSICALLY HELPLESS OR MENTALLY INCAPACITATED, THUS THE STATE FAILED TO PROVE MR. DIGEROLAMO WAS GUILTY OF RAPE

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of

insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Contrary to the Court of Appeals' opinion, S.B.'s testimony established she was neither physically helpless nor mentally incapacitated, thus the State failed to prove all of the elements of second degree rape.

"A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(l)(b). Physically helpless refers to "a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). Mentally incapacitated refers to a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or

from some other cause." RCW 9A.44.010(4). Mental incapacity and physical helplessness are elements of rape that must be proven beyond a reasonable doubt. *State v. Strauss,* 119 Wn.2d 401, 410-11, 832 P.2d 78 (1992).

1. S.B. was not physically helpless. A person who is able to communicate orally, despite being bedridden and unable to move from her chest down due to symptoms of ALS ("amyotrophic lateral sclerosis" or "Lou Gehrig's Disease"), has been held not to be "physically helpless" as contemplated in RCW 9A.44.050 (1)(b). *State v. Bucknell,* 144 Wn.App. 524, 530, 183 P.3d 1078 (2008).

Despite the Court of Appeals' conclusion to the contrary, the facts here do not rise to the level of those found sufficient to support a conviction for second degree rape based upon physical helplessness. Opinion at 6. In *Al-Hamdani*, the victim had a blood alcohol level estimated between .1375 and .21, was stumbling, vomiting, and passing in and out of consciousness prior to intercourse. *State v. Al-Hamdani,* 109 Wn.App. 599, 609, 36 P.3d 1103 (2001), *review denied*, 148 Wn.2d 1004 (2003). The Court there described the victim as "debilitatingly intoxicated." *Id.* Here, S.B., although arguably intoxicated, was not observed stumbling and she was able to remember

a great amount of detail about that night, including pushing the person away. S.B. was able to describe how she felt the tongue in and around her vagina and her ability to push the person away. RP 308.

"Physically helpless" is defined as the state of being unconscious or *physically* unable to communicate an unwillingness to an act. RCW 9A.44.030(5). S.B.'s testimony established that she was not unconscious and was able to communicate her wishes by pushing the person away and turning away. RP 305. The evidence clearly established S.B. was not physically helpless.

2. Neither was S.B. mentally incapacitated at the time of the event. "Mental incapacity" is an inability to understand the nature and consequences of sexual intercourse. RCW 9A.44.010 (4).

> A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.

State v. Ortega-Martinez, 1124 Wn.2d 702, 711, 881 P.2d 231 (1994) (emphasis added).

S.B.'s testimony established she had a meaningful understanding of the nature and consequences of the sexual act. S.B. was able to describe in detail precisely what was happening and to

respond accordingly. S.B. was not unconscious, was able to detail what she was doing prior to the incident, and could describe in detail the circumstances surrounding the incident, including the lack of any lighting in the room, the hair on the person's head and stubble on their face, and her attempts at pushing the person away.

> In assessing whether the State has met its burden of showing that a victim had a condition which prevented him or her from understanding the nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation.

Id., 124 Wn.2d at 714.

S.B.'s ability to recall the incident in great detail and to understand just what was happening, differed markedly from *Ortega-Martinez*, where the victim had an IQ of 40, had an eating disorder which prevented her from knowing when to stop eating, could not live independently, and was unable to resist the instructions from others. *Ortega-Martinez,* 124 Wn.2d at 705. Here, S.B. was able to not only describe the incident and the circumstances surrounding it, but also her

appropriate response. S.B. may have had too much alcohol to drink that night, but she was not mentally incapacitated. The State failed to prove beyond a reasonable doubt that she was.

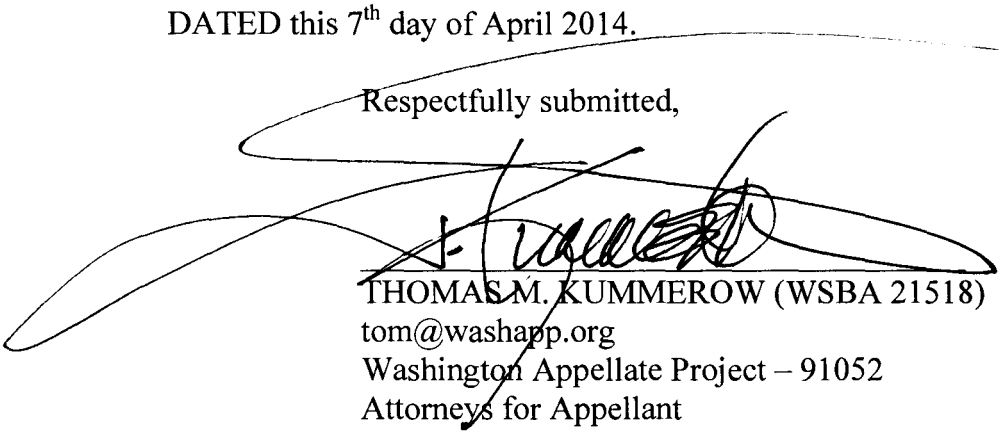
This Court should accept review to determine whether the evidence proffered by the State established the necessary elements that the victim was incapable of consenting because she was physically helpless or mentally incapacitated. In concluding it had not, Mr. Digerolamo's convictions must be reversed.

F. CONCLUSION

For the reasons stated, Mr. Digerolamo asks this Court to grant review and reverse his conviction

DATED this 7th day of April 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 69308-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOSEPH ANTHONY DIGERLAMO a/k/a JOSEPH DI'GEROLAMO,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: March 10, 2014
	)	

LAU, J. — Joseph Digerolamo appeals his conviction of rape in the second degree, challenging the sufficiency of the evidence.[1] He raises additional claims of error in a pro se statement of additional grounds. We affirm.

FACTS

The evidence presented at trial established the following facts. In May 2009, 29-year-old SB traveled to the Seattle area from her home in Victoria, British Columbia with her 6-year-old daughter. The purpose of SB's trip was to visit relatives and

[1] The record contains several different spellings of the appellant's name. We use the spelling "Digerolamo" adopted by both parties in the briefing.

celebrate her grandmother's 83rd birthday. SB and her daughter stayed with SB's aunt, Glennis Johnny, and her aunt's husband, Joseph Digerolamo.

The day after SB arrived from Canada, there was a party at her aunt's house. Around 8 p.m., after most of the guests left the party, SB, her aunt, and a few other adult friends and relatives stayed up drinking whisky. According to SB, she did not usually drink, and "nursed" the first drink for a long time. Report of Proceedings (7/30/2012) (RP) at 299. Digerolamo, who was not drinking, made several "teasing" remarks to SB, telling her to "quit being a sissy drinker and to drink up." RP at 300. SB could not say how many drinks she had. SB was visibly intoxicated and remembered "pretty much nothing" after her aunt brought out a second bottle. RP at 304. When the party broke up and everyone went to bed, there were only four people left in the house—SB, her daughter, her aunt, and Digerolamo.

SB remembered climbing in bed with her daughter and, sometime later, rushing to the bathroom and vomiting repeatedly in the sink. While she was still in the bathroom sitting on the lid of the toilet seat, Digerolamo came in and asked if she was okay. The next thing she remembered was waking up in the dark and feeling a tongue inside her vagina. She moved her hand to push the person's head away, and then passed out again.

When she woke up in the morning, SB cried when she realized what had happened during the night. SB's aunt came in and after talking to SB, left the room and asked Digerolamo, "What did you do?" RP at 309. He denied doing anything. When SB's aunt went into the kitchen, she noticed a broken bottle of vodka on the counter that

had not been there the night before and an open window with the screen pushed out. Digerolamo called 911.

Digerolamo greeted the police officer who responded to the call and told her he believed the house had been burglarized. He showed the officer the broken bottle, then directed her to the open window, stating that it was the likely point of entry. The officer noted that the window screen was intact, and Digerolamo admitted he had replaced the screen. The officer asked whether anything was missing, Digerolamo said he did not know but reported that his niece had been assaulted.

After talking to SB, another officer took her to a hospital where a nurse performed a sexual assault examination and rape kit. Digerolamo's DNA (deoxyribonucleic acid) matched the profile taken from SB's vagina and underwear.

The State charged Digerolamo with rape in the second degree. Following a trial, the jury convicted him as charged. Digerolamo appeals.

ANALYSIS

Sufficiency of the Evidence

Digerolamo challenges the sufficiency of the evidence supporting his rape conviction.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We view all evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most

strongly against the defendant." Salinas, 119 Wn.2d at 201. We defer to the trier of fact to resolve conflicting testimony, evaluate the credibility of witnesses, and generally weigh the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial and direct evidence are accorded equal weight. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Digerolamo was charged with violating RCW 9A.44.050(1)(b) which provides that a person is guilty of rape in the second degree "when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." "Physically helpless" is defined as a person who "is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). Mentally incapacitated refers to a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4). The State must prove each essential element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

Mental incapacity and physical helplessness are not alternative means; they describe the ways in which a victim may be incapable of giving consent. State v. Al-Hamdani, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001). The State is not required to make an election or present sufficient evidence of both circumstances. Al-Hamdani, 109 Wn. App. at 607.

Digerolamo claims the evidence does not support the finding that SB was incapable of consent because of either physical helplessness or mental incapacity. He claims the evidence did not show that SB was severely intoxicated and, therefore, mentally incapacitated like the victim in Al-Hamdani. There, the victim estimated she had consumed at least 10 alcoholic drinks and, according to expert testimony, her estimated blood alcohol level was between .1375 and .21 at the time of the sexual assault. Al-Hamdani, 109 Wn. App. at 609. In addition, a witness described the victim's conduct prior to the assault as "stumbling, vomiting, and passing in and out of consciousness . . . ." Al-Hamdani, 109 Wn. App. at 609.

While there was no specific evidence here about SB's blood alcohol level, and she was unable to estimate how many drinks she consumed, as in Al-Hamdani, there was evidence of visible intoxication. And like the victim in Al-Hamdani, evidence established that SB was experiencing severe symptoms of intoxication on the night of the assault, including dizziness, vomiting, and passing in and out of unconsciousness.

Citing State v. Bucknell, 144 Wn. App. 524, 183 P.3d 1078 (2008), Digerolamo contends that SB was not physically helpless because she was able to communicate her unwillingness to engage in sexual intercourse. In Bucknell, the State charged the defendant with rape in the second degree, alleging that the victim "was physically helpless because she was suffering from Lou Gehrig's disease." Bucknell, 144 Wn. App. at 528. This court reversed the conviction because the victim's "ability to communicate orally, despite her physical limitations, likely did not render her 'physically helpless' as contemplated by RCW 9A.44.050(1)(b)." Bucknell, 144 Wn. App. at 530. Although the victim was unable to move from the chest down, she was fully "able to talk,

answer questions, and understand and perceive information." Bucknell, 144 Wn. App. at 529-30.

In this case, Digerolamo points out that according to SB, she used her hand to try to push the head away. SB testified that when she woke up during the assault, she felt "frozen" and unable to move. RP at 308. She said:

> I remember laying there in the dark. And somebody's tongue (inaudible) around inside my vagina. I remember turning with my hands to try to get him off, but after that it's a complete blank. That's all I remember is just my hand just trying to get the head away, and that's all I remember until I woke up the next morning.

RP at 305. In contrast to the circumstances in Bucknell, the evidence in this case does not indicate that SB was incapacitated only with respect to her physical movement. SB's testimony amply supports the inference that during the assault, she was mostly unconscious and was unable to communicate, orally or otherwise.

Finally, Digerolamo argues that SB was not physically helpless or mentally incapacitated because she could describe the assault with a "great amount of detail." Br. of Appellant at 6. But to the contrary, SB primarily described being unconscious, interspersed with a few flashes of memory and minimal details. The jury could have reasonably concluded that SB was unable to appreciate the nature and consequences of sexual intercourse at the time it occurred. See State v. Ortega-Martinez, 124 Wn.2d 702, 716, 881 P.2d 231 (1994) ("It is important to distinguish between a person's general ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation.").

Viewing the evidence and the inferences in the light most favorable to the State, sufficient evidence supports the conviction of rape in the second degree.

Statement of Additional Grounds

In a pro se statement of additional grounds, Digerolamo argues that when police officers responded to his call, they should have advised him of his rights under Miranda v. Arizona[2] before taking his recorded statement.

Police must provide Miranda warnings whenever a suspect is subjected to a custodial interrogation by a State agent. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Such a warning is not required if the questioning is noncustodial and part of a routine, general investigation in which the defendant voluntarily cooperated but is not yet charged. State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). "Mere suspicion, before the facts are reasonably developed, is not enough to turn the questioning into a custodial interrogation." State v. Hilliard, 89 Wd.2d 430, 436, 573 P.2d 22 (1977).

The police did not subject Digerolamo to custodial interrogation when they came to his house at his behest and recorded his statement reporting alleged crimes. Digerolamo initiated the contact with the police and agreed to give a recorded statement. Nothing in the record indicates that when they spoke to Digerolamo on June 1, 2009, months before his eventual arrest, police officers had probable cause to arrest him. The court did not err in admitting Digerolamo's recorded statement.

Digerolamo also argues that police officers violated his constitutional rights when they obtained a DNA sample without probable cause or a warrant. But here again, the

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

record indicates that Digerolamo agreed to provide a DNA sample. RP (June 26, 2012) at 223. Consent to search is valid if (1) it is voluntary, (2) it is granted by a person having authority to consent, and (3) the search does not exceed the scope of the consent. State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). Digerolamo offers no reason as to why his consent is invalid.

Digerolamo claims the evidence was insufficient to establish that he committed the crime because SB did not specifically identify him. We disagree. Substantial evidence supports the jury's determination that Digerolamo was the person who assaulted SB, including DNA evidence, circumstantial evidence, and his own statements. He also argues that SB's testimony should have been discredited due to certain discrepancies and omissions. But his attorney challenged SB's credibility based on these issues. The persuasiveness, credibility, and weight of the evidence are matters for the trier of fact and are not subject to appellate review. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In addition, Digerolamo alleges police misconduct and shoddy investigation. For instance, he claims that the officer who took the DNA sample mishandled the evidence because after collecting the cheek swab, he folded the plastic sleeve containing the Q-tip, but did not seal it with tape until he returned to the office. But the testimony Digerolamo cites does not establish that the DNA evidence was improperly handled, nor does he identify any resulting prejudice.

Digerolamo also claims that the DNA testing and crime scene investigation were inadequate. At trial, the defense claimed that the police quickly identified Digerolamo as the suspect and argued that, as a consequence, they failed to pursue any evidence

inconsistent with that theory. Accordingly, the jury was able to evaluate the State's case in light of Digerolamo's argument that the investigation was focused solely on finding evidence to implicate him. Perhaps more significantly, Digerolamo's arguments on appeal, premised on evidence additional testing might have uncovered, are entirely speculative and beyond the scope of the record on appellate review. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Finally, Digerolamo discusses Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), at length, but he does not actually identify any exculpatory evidence withheld by the State. His claim is based on the fact that in addition to his DNA, the DNA testing revealed the presence of DNA from an unidentified donor. This DNA was presumed to be from a consensual sexual partner. SB admitted to recent sexual contact with a consensual partner, but refused to provide that person's identity. There is no evidence in the record suggesting that the State withheld the identity of the donor. Moreover, nothing in the record suggests that determination of the identity of the donor would have explained the presence of Digerolamo's DNA or otherwise established his innocence.

We affirm.

WE CONCUR:

Spearman, A.C.J.

Becker, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69308-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Tuyen Lam, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 7, 2014