Court of Appeals No. 43358-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

COREY DUAWAYN YOUNG,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 08-1-03121-9
The Honorable Ronald E. Culpepper, Presiding Judge

Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 683-1124

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I. ASSIGNMENTS OF ERROR

1. The Court abused its discretion in finding that the robbery and kidnapping did not constitute the same criminal conduct.

2. Based upon the incidental restraint doctrine, there was insufficient evidence to support a kidnapping conviction.

3. The trial court incorrectly calculated Mr. Young's sentence.

II. ISSUES PRESENTED

1. The trial court erred in finding that Mr. Young had a different criminal intent regarding the restraint and movement of Mr. Yang during the robbery. (Assignment of Error No. 1 and 2)

2. The trial court erred in finding that the robbery was complete when Mr. Young pointed a gun at Mr. Yang and took his wallet. (Assignments of Error Nos. 1 and 2)

3. The State presented insufficient evidence to support a finding that Mr. Young was guilty of kidnapping where the restraint of Mr. Yang was incidental to the robbery. (Assignment of Error No. 2)

4. The trial court erred in calculating Mr. Young's sentence by counting kidnapping as a separate crime from robbery. (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

A. Factual Background

On November 19, 2011, Mua Yang was sitting in his car in the parking lot of his apartment when he saw Corey Young and co-defendant Jerro Dagraca jump over the fence and approach his car. 3/27/12 -

3/28/12 RP 114.[1] Mr. Yang stepped outside his car, then Mr. Young pointed a gun at him (RP 114, lines 20-25) and said, "Give me all your money; give me anything you got." RP 115, lines 13-14. Mr. Yang testified that he handed $117 to Mr. Young, and then Mr. DaGraca asked Mr. Young to search Mr. Yang's pockets for credit cards. RP 116, lines 2-25; RP 117, lines 1-4. Mr. Yang had no credit cards, but Mr. Young found an "EBT" card for food stamps in Mr. Yang's pocket. RP 117, lines 5-13. Mr. Yang explained at trial that the EBT card looks like a credit card but is "just like a debit card." RP 117, lines 14-24. Both men then searched Mr. Yang's pockets, finding and returning his military I.D. card. RP 118, lines 4-14.

Mr. Yang testified that the two men told him "that the card must have money, and I said it don't have money; it's a food stamp card." RP 118, lines 19-22. The defendants than asked Mr. Yang for the "PIN number," so he made up a PIN number, and one of the defendants "punch[ed] that number into his phone," then told Mr. Yang, "It's not working; you're lying." RP 119, lines 1-9. At that point, one of the defendants said, "Let's go to 7-Eleven to get food and money. If you don't get money for us, you're dead." RP 119, lines 18-19.

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[1] The transcript of the proceedings is not numbered continuously between the volumes containing trial and sentencing. Reference to the sentencing hearing will be made by giving the date of the proceedings, followed by the page numbers.

Mr. Yang testified that the defendants "pulled [him] back in the car," and Mr. Young kept the gun pointed at him while he drove for "about five, seven minutes" (RP 121, lines 4-5) to a 7-Eleven as directed by the defendants. RP 119, lines 21-25; RP 120, lines 1-3.

Shortly before 2:00 a.m. on November 19, 2012, several police officers were gathered in the parking lot of the 7-Eleven store located in the 9900 block of Gravelly Lake Drive in Lakewood. CP 5. As they stood there, Mr. Yang pulled into the parking lot "so quickly that one of the officers thought the victim was going to strike one of the patrol vehicles." *Id.* Mr. Yang rolled down his window and yelled that "the two passengers in the vehicle were robbing him and that they had guns." *Id.* "As the victim was reporting that he was being robbed, the two passengers, Defendant Dagraca and Defendant Young exited the vehicle and fled." *Id.*

Police gave chase on foot, and took both defendants into custody. *Id.*

B. Procedural Background

Mr. Young was charged with kidnapping in the first degree while armed with a firearm, robbery in the first degree while armed with a firearm, and unlawful possession of a firearm in the first degree. CP 3-4. He was found guilty of all crimes, and the jury found that he had been

armed with a firearm during the kidnapping and the robbery. CP 70-74.

Mr. Young argued that the merger doctrine applied to the kidnapping and robbery and that the two crimes constituted the same criminal conduct for scoring purposes. CP 102-106; 4/17/12 RP, page 10, lines 13-25; page 11, line 1 - page 18, line 8.

Mr. Young also argued that three of his prior juvenile convictions (burglary in the second degree, theft in the first degree, and malicious mischief in the first degree (4/17/12 RP, page 16, line 2-25; page 17, lines 1-17; page 18, lines 1-8), encompassed the same course of conduct. CP 107-109. The trial court agreed that the three juvenile crimes were the same criminal conduct. 4/23/12 RP, page 5, lines 15-25.

The trial court ruled:

> With respect to merger and same criminal conduct under 9.94A.589, as I said in my brief e-mail, merge[r] just simply doesn't apply here. What we have here, unfortunately, is two separate -- related, but separate independent crimes.
>
> The Robbery in the First Degree was committed [when] the people stuck the gun in Mr. Yang's face and took his wallet. They then formed the intent to try to get some more money from him and formed the intent to abduct him at gunpoint in his car. That is a separate crime, a separate harm, a separate harm for Mr. Yang. The harm being the fear of the removal during the kidnapping. They threatened to shoot him and dump his body in a lake, as I recall. Whether that was serious or not, I don't know. Whether this was just idiotic behavior by two young men who lack some internal controls and impulse control, I don't know.

It resulted in some serious charges here.

Merger, I think, doesn't apply. It's not the same criminal conduct. It is two separate crimes. They have to be scored separately. That's my decision on that.

4/23/12 RP, page 4, lines 17-25; page 5, lines 1-13.

IV. ARGUMENT

A. There was insufficient evidence to convict Mr. Young of kidnapping because the incidental restraint doctrine applies in this case.

1. The robbery was not complete until Mr. Young attempted to escape the police at the 7-Eleven.

The trial court erroneously found that the robbery of Mr. Yang was completed at the time the defendants "stuck the gun in Mr. Yang's face and took his wallet." 4/23/12 RP, page 4, lines 22-24. As a matter of law, the robbery was ongoing until the defendants attempted to escape from the 7-Eleven lot.

Mr. Yang's testimony establishes that the defendants abducted him for the sole purpose of continuing the robbery that was initiated by taking Mr. Yang's cash and "EBT" food stamp card. When the defendants "found the victim's Quest Card" as they searched his pockets in his apartment parking lot, they "told the victim that they wanted money that was in his Quest account." CP 6. The robbery was not complete when the defendants took Mr. Yang's cash and Quest card, but continued as they

forced Mr. Yang to drive at gunpoint to the 7-Eleven to obtain money by use of the Quest card. *State v. Manchester,* 57 Wn. App. 765, 770, 790 P.2d 217 (1990) ("robbery is not complete until the assailant has effected his escape"), *review denied,* 115 Wn.2d 1019, 802 P.2d 126 (1990); *State v. Handburgh,* 119 Wn.2d 284, 288-293, 830 P.2d 641 (1992) (force or fear used either to obtain or retain possession of property constitutes robbery); *State v. Truong,* 168 Wn. App. 529, ___, 277 P.3d 74, 77 (2012) ("The taking is ongoing until the assailant has effected an escape.").

2. The kidnapping was incidental to the robbery.

In *State v. Elmore,* 154 Wn. App. 885, 901, 228 P.3d 760 (2010), *review denied*, 169 Wn.2d 1018, 238 P.3d 502 (2010), this Court acknowledged the "incidental restraint doctrine," which is a rule "rooted in merger doctrine," under which "[e]vidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction." *See also State v. Green,* 94 Wn.2d 216, 227, 616 P.2d 628 (1980) ("the mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not, standing alone, indicia of a true kidnapping").

In this case, the restraint and movement of Mr. Yang from his apartment parking lot to the 7-Eleven lot occurred during the course of the robbery and was merely incidental thereto.

3. The restraint of Mr. Yang was incidental to the ongoing armed robbery.

Mr. Yang was under no greater danger during the five-minute drive to the 7-Eleven than he had been when Mr. Young first approached him in the apartment parking lot and pointed a gun at him, demanding money. At the sentencing hearing, the court stated that it did not believe the threat made to kill Mr. Yang and dump him in a lake was a serious threat. Instead, noted the court, Mr. Young was "just trying to scare him so [he] could get some more money from the ATM machine." 4/13/12 RP at page 25. The restraint was for the sole purpose of facilitating the robbery, and the restraint did not create any danger independent of the danger posed by the armed robbery itself. As noted by the *Elmore* Court, "forcible restraint is inherent in armed robberies." *Elmore,* 154 Wn. App. at 902, 228 P.3d 760.

In this case, Mr. Yang was not injured in any "separate and distinct manner" while he drove from one location where Mr. Young took property from him to another location where Mr. Young's intent was to take more property from him. Movement from the parking lot of Mr. Yang's apartment to the 7-Eleven was merely incidental to the robbery. The force used to take Mr. Yang's cash and EBT card continued unchanged as he drove to the 7-Eleven.

In *Elmore,* the crimes committed were kidnapping, burglary, and felony murder predicated on burglary. Elmore argued that the kidnapping restraint was incidental to the burglary, but the Court noted that the burglary was completed upon entry into the victim's residence with intent to commit a crime therein. *Elmore,* 154 Wn. App. at 902, 228 P.3d 760. In contrast, a robbery is an ongoing crime that is not complete until the perpetrator escapes. The robbery of Mr. Yang was ongoing until Mr. Young attempted to escape from the police at the 7-Eleven parking lot, and the restraint and movement of Mr. Yang was merely incidental to the robbery. The distance of the movement "is but one factor to be considered" when evaluating the nature of the restraint." *State v. Saunders,* 120 Wn. App. 800, 817, 86 P.3d 242 (2004), *review denied,* 156 Wn.2d 1034, 137 P.3d 864 (2006) (quoting *State v. Green,* 94 Wn.2d 216, 227, 616 P.2d 628 (1980)).

This Court should find that because the incidental restraint doctrine applies, there is insufficient evidence to support a kidnapping conviction. *See Elmore,* 154 Wn. App. at 901, 228 P.3d 760 ("[e]vidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction") (citing *Saunders,* 120 Wn. App. at 817-818, 86 P.3d 232). The kidnapping conviction should be vacated.

B. The trial court abused its discretion in not finding the kidnapping was part of the same criminal conduct as the robbery.

"'Same criminal conduct' means the crimes require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

In deciding whether two crimes encompassed the same criminal conduct, "trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next." *State v. Dunaway,* 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). "[P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same." *Id.* The trial court's determination of what constitutes the same criminal conduct is reviewed for abuse of discretion. *State v. French,* 157 Wn. 2d 593, 613, 141 P.3d 54 (2006).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the

facts do not meet the requirements of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

In this case, the trial court erroneously described the robbery as being complete when the defendants "stuck the gun in Mr. Yang's face and took his wallet." 4/23/12 RP, page 4, lines 22-24. The court found that following the robbery, Mr. Young formed a new intent "to try to get more money from him" and another separate "intent to abduct" Mr. Yang "at gunpoint in his car." 4/23/12 RP at page 4, lines 24-25; page 5, line 1.

In *Dunaway,* the defendant was charged with two counts of first degree kidnapping and two counts of first degree robbery, and stated in his plea of guilty:

> On March 3, 1986, I went to the Alderwood Mall. I got into a car where Ora Buck and Grace Johnson were present. I showed them the gun and, under threat, asked them to drive toward Seattle. I told them to give me the cash that they had on them. I took some money from each. When we got to Seattle, I told one of the women to go inside the Rainier bank in the University District and to get some more money for me. When she did not return for some time, I told the other Lady to move over and let me drive. We drove to somewhere in Seattle and I got out of the car.

Dunaway, 109 Wn.2d at 211-212, 743 P.2d 1237.

The sentencing judge found that all four crimes encompassed the same criminal conduct, and the State appealed. The Supreme Court first clarified that convictions for crimes involving multiple victims must be

treated separately, overruling one portion of *State v. Edwards,* 45 Wn. App. 378, 725 P.2d 442 (1986). *Dunaway,* 109 Wn.2d at 215-216, 743 P.2d 1237.

The Court then turned to whether "Dunaway's kidnapping and robbery of a single victim encompassed the same criminal conduct," and found that it did. *Dunaway,* 109 Wn.2d at 217, 743 P.2d 1237. The Court found: first, that "it was Dunaway's very intent to commit robbery that enabled the prosecutor to raise the charge from second degree to first degree kidnapping," so "robbery was the objective intent behind both crimes"; second, "the kidnapping furthered the robbery"; and third, "the crimes were committed at the same time and place." *Id. See also State v. Lessley,* 118 Wn.2d 773, 777, 827 P.2d 996 (1992) ("if one crime furthered another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct.").

This case is like *Dunaway*. The intent of Mr. Young, from the moment he came into contact with Mr. Yang until he fled from the police, was to rob Mr. Yang. That intent did not change merely because Mr. Young forced Mr. Yang to move during the robbery to a different location where Mr. Young anticipated he would take more of Mr. Young's property. The kidnapping was committed during the ongoing robbery, and

merely furthered the robbery. The kidnapping and the robbery took place at the same time and place.

The trial court's finding that the kidnapping and robbery were not the same criminal conduct was an abuse of discretion because the finding was outside the range of acceptable choices, given the facts and the applicable legal standard. The robbery and the kidnapping had the same criminal intent, were committed at the same time and place, and involved the same victim. The trial court's finding that the crimes were not the same criminal conduct was contrary to the legal standard set forth in RCW 9.94A.589(1)(a).

This Court should rule that the kidnapping and the robbery constituted the same criminal conduct, bearing in mind that the robbery was not completed until Mr. Young fled from the police. *Truong,* 168 Wn. App., 529, ___, 277 P.3d 74, 77 ("The taking is ongoing until the assailant has effected an escape.").

This Court should rule that the kidnapping and the robbery constituted the same criminal conduct, and vacate the kidnapping conviction.

C. The State relied upon misstatements of fact and law in *State v. Larry* to support its sentencing arguments.

It is anticipated that the State will once again rely upon language in *State v. Larry,* 108 Wn. App. 894, 34 P.2d 365 (1999), *review denied,* 146 Wn.2d 1022, 52 P.3d 521 (2002) to argue that the trial court had "discretion to punish kidnapping separately from robbery for sentencing purposes because . . . 'to do other wise would allow a serious crime to go unpunished.'" CP 134. Should the State make such an argument it would be as incorrect on appeal as it was in the trial court.

In *Larry,* the defendants were charged with kidnapping, robbery, and attempted murder. They argued that "the multiple offenses of robbery and kidnapping should count as one crime for sentencing purposes because they 'require the same criminal intent, are committed at the same time and place, and involve the same victim.' RCW 9.94A.400(1)(a)." *Larry,* 108 Wn. App. at 915, 34 P.3d 241.

The *Larry* Court relied upon language in *State v. Lessley,* 118 Wn.2d 773, 781, 827 P.2d 996 (1992) to rule that, "Similarly here, the trial court has discretion to punish the kidnapping separately from **robbery** for sentencing purposes because, as in *Lessley,* to do otherwise would allow a serious crime to go unpunished. RCW 9A.52.050; *Lessley,* 118 Wn.2d at 781, 827 P.2d 996." *Larry,* 108 Wn. App. at 917, 34 P.3d 241 (emphasis added). The *Larry* Court continued, "Here, the record does not show that the trial court abused that discretion in treating the

kidnapping and **burglary** as separate offenses and punishing Varnes and Larry for both crimes." *Id.* Emphasis added. This was a misstatement of the facts of the *Larry* case: the *Larry* defendants were **not** charged with nor were they sentenced for burglary.

The *Lessley* Court, considering the crimes of kidnapping and **burglary**, wrote:

> We believe the better approach is to hold the antimerger statute gives the sentencing judge discretion to punish for **burglary, even where it and an additional crime encompass the same criminal conduct.** As the lead Court of Appeals opinion stated:
>
> > When two statutes appear to conflict, every effort should be made to harmonize their respective provisions. **Here, that is easily done by recognizing that application of the burglary antimerger statute is discretionary with the sentencing judge and permits punishment for burglary and other crimes simultaneously committed. This result accords with the well-established rules that the more specific statute controls over a conflicting, more general statute, and that the Legislature is presumed to be familiar with its prior legislation. In this case, then, the antimerger statute controls over the general language as to "same criminal conduct" when the sentencing judge imposes punishment pursuant to RCW 9A.52.050.** Repeals by implication are not favored. If repeal is appropriate, it should be done by the Legislature, not by the courts.

> Allowing a sentencing judge discretion to apply the burglary antimerger statute serves the SRA's proportionality function. A defendant who commits multiple crimes after breaking into a home should not be able to escape a more serious offender score. This approach recognizes burglaries involve a breach of privacy and security often deserving of separate consideration for punishment.

Lessley, 118 Wn.2d at 781-782, 827 P.2d 996 (quoting *State v. Lessley,* 59 Wn.App. 461, 464–65, 798 P.2d 302 (1990) (emphasis added).

The burglary antimerger statute does **not** apply to robbery, but applies exclusively to burglary. RCW 9A.52.050 ("Every person who, in the commission of a **burglary** shall commit any other crime, may be punished therefor as well as for the **burglary**, and may be prosecuted for each crime separately.") (emphasis added).

The burglary antimerger does **not** invest trial courts with "discretion" to ignore RCW 9.94A.589(1)(a), which mandates that "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses **shall** be counted as one crime." Emphasis added. "'Shall' imposes a mandatory duty." *State v. Claypool,* 111 Wn. App. 473, 476, 45 P.3d 609 (2002) (citing *State v. A.M.,* 109 Wn.App. 325, 328, 36 P.3d 552 (2001)). The *Larry* language relied upon below by the State is a misstatement of Washington law. This

Court should disregard any argument based upon the Larry language relied upon by the State below.

D. This Court should vacate the kidnapping conviction and remand this case for resentencing on robbery in the first degree and unlawful possession of a firearm in the first degree.

Because the incidental restraint doctrine applies in this case, making evidence insufficient to support a kidnapping conviction, and/or because the robbery and the kidnapping constituted the same criminal conduct, the Court should vacate the kidnapping conviction and remand for proper sentencing. *Elmore,* 154 Wn. App. at 901, 228 P.3d 760 ("Evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction."); RCW 9.94A.589(1)(a) ("if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime").

Mr. Young was in community custody at the time of the robbery. RCW 9.94A.525 (19) states, in pertinent part, "[i[f the present conviction is for an offense committed while the offender was under community custody, add one point."

The trial court's erroneous ruling that the robbery and kidnapping were separate crimes (4/23/12 RP at 4-5) resulted in criminal history

points of 7.5 on the robbery and kidnapping convictions, and 5.5 on the unlawful possession of a firearm conviction. CP 140. Vacation of the kidnapping conviction would result in criminal history points of 5.5 on the unlawful possession of firearm conviction and 6.5 on the robbery conviction, as follows.

Unlawful Possession of a Firearm

RCW 9.94A.525(7) provides:

> If the present conviction is for a nonviolent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and 1/2 point for each juvenile prior nonviolent felony conviction.
> * * *

Application of this statute to Mr. Young's prior convictions yields the following result:

1 point for each adult felony (robbery, burglary)	2
1 point for each juvenile violent felony (attempted robbery)	1
1/2 point for each juvenile prior nonviolent felony (burglary, theft, malicious mischief, found to be the same criminal conduct by the trial court; escape; theft)	1.5
Community custody	1
TOTAL POINTS	5.5

Robbery

RCW 9.94A.525(8) provides:

> If the present conviction is for a violent offense and not covered in subsection (9), (10), (11), (12), or (13) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

Application of this statute to Mr. Young's prior convictions yields the following result:

2 points each for each adult and juvenile felony (attempted robbery)	2
1 point for each adult nonviolent felony (burglary, unlawful possession of a firearm)	2
1/2 point for each juvenile nonviolent felony (burglary, theft, malicious mischief, found to be the same criminal conduct by the trial court; escape; theft)	1.5
Community custody	1
TOTAL POINTS	6.5

RCW 9.94A.525 provides that "[t]he offender score is the sum of points accrued under this section rounded down to the nearest whole number." Thus, Mr. Young's offender score on the Unlawful Possession of a Firearm conviction is 5, and his offender score on the Robbery conviction is 6.

The seriousness level of Unlawful Possession of a Firearm is VII and the seriousness level of Robbery in the First Degree is IX. RCW 9.94A.515, Table 2.

The standard sentence range for the Unlawful Possession of a Firearm with an offender score of 5 is 41-54 months. RCW 9.94A.510, Table 1. The standard sentence range for the Robbery conviction with an offender score of 6 is 77-102 months. *Id.* The jury found that Mr. Young was armed with a firearm at the time he committed the robbery (CP 71), adding a 60-month enhancement to the sentence. The sentences for Unlawful Possession of a Firearm and Robbery must run concurrently. (RCW 9.94A.589(1)(a)), so if the kidnapping charge is vacated, the standard range sentence would be 137-162 months.

Counting the kidnapping as a separate crime, the Court sentenced Mr. Young to 54 months on the Unlawful Possession of a Firearm conviction, 87 months on the Robbery conviction, and 110 months on the Kidnapping conviction, to run concurrently. The Court added a 60-month enhancement to each sentence for Robbery and Kidnapping, to run consecutively, for a total confinement of 230 months.

V. CONCLUSION

Based on the application of the incidental restraint doctrine and resultant insufficiency of evidence, this court should vacate the kidnaping

conviction and remand for dismissal of that charge and appropriate resentencing without the kidnapping charge. Alternatively, because the kidnapping and the robbery constituted the same criminal conduct, this Court should vacate Mr. Young's sentence remand resentencing where the kidnapping and robbery are treated as the same criminal conduct.

DATED this 19th day of November, 2012.

Respectfully submitted,

/s/
Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on November 19, 2012, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us Tacoma, Washington 98402, and Kathryn A. Russell Selk, Russell Selk Law Office, karsdroit1@aol.com Seattle, Washington 98103, and by United States Mail to appellant, Corey D. Young, DOC # 357579, Washington State Penitentiary, Walla Walla, Washington 99362, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on November 19, 2012.

/s/
Norma Kinter

ARNOLD LAW OFFICE

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