

63227-2

63227-2

NO. 63227-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

LYNNELL GOUDEAU,

Appellant.

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King County Prosecutor
Appellate Unit

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

The Honorable Cheryl Carey, Judge
The Honorable Sharon Armstrong, Judge
The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was unconstitutionally deprived of his right to counsel.

2. The trial court erred by failing to enter written findings of fact and conclusions of law following a bench trial.

3. The trial court erred in calculating appellant's offender score.

Issues Pertaining to Assignments of Error

1. Did the trial court fail to establish appellant was making a knowing, voluntary and intelligent waiver of his constitutional right to be represented by counsel at trial because the court failed to accurately advise appellant of the standard range sentence he faced if convicted and therefore failed to ensure appellant understood the risks and dangers of self-representation?

2. Did the trial court err following a bench trial by failing to enter written findings of fact and conclusion of law as required by CrR 6.1(d)?

3. Whether this Court should remand for resentencing where the sentencing court failed to consider whether appellant's prior felony assault convictions -- charged under the same Pierce County cause number -- constituted the same criminal conduct for offender score purposes?

B. STATEMENT OF THE CASE

On September 29, 2006, the King County Prosecutor charged appellant Lynnell Goudeau with one count of first degree assault while armed with a deadly weapon. CP 1-4; RCW 9A.36.011(1)(a); RCW 9.94A.533(4) & .602. The State alleged that on the evening of September 6, 2006, Goudeau stabbed Thomas Lagerfeld with a knife. CP 1-2. The information was amended on April 30, 2008, adding one additional count of first degree assault while armed with a deadly weapon, allegedly committed by Goudeau on May 21, 2006 against Soon Park, a clerk at a grocery store. CP 2-3, 5-6.

A hearing was held August 26, 2008, before the Honorable Cheryl Carey, to appoint Goudeau new counsel due to a conflict, and to hear Goudeau's motion to proceed pro se. CP 7;1RP 3.¹ Goudeau said he wanted to represent himself in order to avoid any further delay in his trial. 1RP 4, 8-10. The court engaged Goudeau in a colloquy to determine whether he had the capacity to represent himself. 1RP 4-11. During that colloquy, the following exchange occurred regarding the potential penalties Goudeau faced if convicted:

¹ There are seven volumes of verbatim report of proceedings referenced as follows: 1RP - August 26, 2008 (before Judge Carey) & January 22, 2009 (before the Honorable Sharon Armstrong); 2RP - February 19, 2009 (before the Honorable Michael C. Hayden); 3RP - February 23, 2009 (Hayden); 4RP - February 25, 2009 (Hayden); 5RP - February 26, 2009 (Hayden); 6RP - March 2, 2009 (Hayden); and 7RP - March 20, 2009 (Sentencing - Hayden).

[PROSECUTOR]: Your Honor, at this time the defendant is charged with two counts of assault one with a deadly weapon. He does have two prior felony points from two assaults twos from Pierce County. The assault ones in this case would double [sic].^[2] He is facing at least 24 months on each deadly weapon enhancement consecutive to any standard range. And unfortunately your Honor, at this point my standard range is -- my file is still a part of his file (sic) and so he is facing a substantial amount of jail time [sic] at this point.

THE COURT: [Defense counsel³], do you have any information? I want to make sure he understands.

[PROSECUTOR⁴]: Your Honor, I've got the sentencing brief here and for six points on [INAUDIBLE] is 77 to 102 --

THE COURT: I'm sorry, one hundred --

[PROSECUTOR]: 102 months, your Honor.

[DEFENSE COUNSEL]: And then the enhancements?

[PROSECUTOR]: Plus the enhancements. I'm sorry, 162 months to 216 months.

THE COURT: Plus?

[PROSECUTOR]: 48 months for the deadly weapon enhancements.

² Although not entirely clear, it appears the prosecutor said or meant to say 'The assault ones in this case would *double*.' As in, the sentences would be served consecutively as contemplated under RCW 9.94A.589.

³ This question by the court is addressed to the defense attorney who was intending to conflict out of the case. IRP 3-4.

⁴ It appears the prosecutor responded before defense counsel had an opportunity to respond.

THE COURT: All right. Sir, do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Can you tell me how many years that is?

THE DEFENDANT: That's 15 years nine months [sic].⁵

THE COURT: Okay. I want to make sure -- what is the maximum penalty?

[THE PROSECUTOR]: The maximum penalty for this offense is life and/or \$50,000.

THE COURT: Do you have any question about what you just heard?

THE DEFENDANT: No.

1RP 6-7

With regard to Goudeau's knowledge of the rules and procedures that would apply during trial, Goudeau admitted his only formal study of the law occurred in high school in his U.S. History class, that he had never represented himself in the past, and that he was unfamiliar with the rules of evidence or procedure. 1RP 4-5, 8-10. Ultimately, the court convinced Goudeau not to waive his right to counsel, if for no other reason than that

⁵ 15 year and nine months constitutes a sentence of only 189 months, which is 21 to 75 months less than the prosecutor claimed at the hearing (210 to 275 months), and 81 to 153 months less than the sentencing range applied at sentencing (270 to 342 months), and 153 months (12 years, eight months), less than actually imposed (342 months or 28.5 years). CP 40, 42.

he was "looking at way too much [jail] time[.]" 1RP 11. The court assured Goudeau, however, that if he decided he wanted to proceed on his own in the future, all he had to do was have his attorney note the issue for a hearing. 1RP 11.

On January 22, 2009, Goudeau once again expressed his desire to represent himself in order to avoid further delay of the trial. 1RP 17, 23. This time Judge Sharon Armstrong engaged Goudeau in the following colloquy:

THE COURT: All right. Do you understand -- we need to talk about going pro se. Have you ever done that before?

THE DEFENDANT: No, but I understand that no judge can stop me from going pro se.

THE COURT: You do have a constitutional right to go to pro se, but I want you to understand what it means. You understand that the court rules of procedure will apply to you, the judge will not cut you any breaks because you are not an attorney. . . . The rules of evidence will apply to you. When you decide to give testimony, you will have to take the stand, you'll be sworn in, you'll have to ask yourself a question, give yourself an answer. I assume this is a jury trial. You're going to have to address the jury. You're going to have to participate in preparation of jury instructions and you're going to have to be aware of the law that applies to your case. Do you understand all of that?

THE DEFENDANT: Yes, I do, ma'am.

THE COURT: Why are you taking this risk of going pro se?

THE DEFENDANT: Because I'm willing to represent myself. I'm tired of having continuances when I don't want continuances and I want to represent myself.

THE COURT: Well, if the only reason you're deciding to go pro se is because you think you will start trial [earlier, that may not happen.] . . . I can't guarantee you the date that our case will begin.

...

THE DEFENDANT: Understood.

THE COURT: [Defense counsel], anything you wish to add? Do you think that I have inquired adequately of the defendant?

[DEFENSE COUNSEL]: I would say that you have. My position is that I think Mr. Goudeau needs a lawyer.

THE COURT: Sir, assault one is the charge. That is a strike offense.

THE DEFENDANT: I understand.

THE COURT: And I don't know if you have other strikes,^[6] but consequences of being convicted of a strike offense is enormous. And, understand, if you accumulate three strikes you will go to prison for the rest of your life without the possibility of release.

THE DEFENDANT: Understood.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: [Prosecutor], is there anything in the file that you want to bring to my attention?

⁶ Second degree assault constitutes a "strike" for purposes of the "Persistent Offender" sentencing provisions. RCW 9.94A.030(29)(b) & (34)(a)(i).

1RP 17-20.

The prosecutor expressed concerns about Goudeau's mental competency in light of his admissions to Western State Hospital and the recent evaluation indicating he suffers from schizophrenia and antisocial personality features. 1RP 20. Goudeau admitted he is on the medication "Risperdal," but denied suffering from any mental illness. 1RP 21.

After some further discussion about why Goudeau wanted to proceed pro se (i.e., to prevent any further delay of trial), and the trial court's warning again that going pro se would not necessarily speed up the trial process, the court asked Goudeau:

Do you want to stay with the attorney?

THE DEFENDANT: Yeah. I want to go pro se.

THE COURT: You want to go pro se. All right.

1RP 23. The Court appointed stand-by counsel to assist Goudeau, and Goudeau entered a notice of pro se appearance. CP 20-21; 1RP 23-24.

On February 19, 2010, Goudeau waived his right to a jury trial, and the matter proceeded to a bench trial before Judge Michael C. Hayden. CP 34; 2RP-6RP. The first matter heard was a CrR 3.5 hearing to determine the admissibility of Goudeau's video-taped statement to police in which he claimed he was the person who committed the assaults against

Lagerfeld and Parks. CP 3; 2RP 4-6; 3RP 2-49. The court ruled Goudeau's confessions were admissible at trial. CP 101; 3RP 49.

At trial, the trial court heard from the complaining witnesses, the officers that investigated the charged offenses, some of the medical personnel who treated the complaining witnesses, and Goudeau. 4RP-6RP. The court, by oral ruling, found Goudeau guilty as charged. 6RP 66-72. Written findings of fact and conclusions of law, however, have never been entered.

Sentencing was held March 20, 2009. 7RP. The State claimed Goudeau's "offender score is a four" for count one and "zero" for count two. 7RP 2. Although there was no further discussion regarding Goudeau's offender score beyond the State's assertion, (Goudeau never agreed nor disputed his offender score), the judgment and sentence reflects the score of "four" for count one was calculated by using two points for count two, and one point each for Goudeau's two prior convictions for second degree assault from Pierce County, which were charged under the same cause number ("061042320"), but for which no other information was provided with respect to nature of the offenses or the sentence imposed, such as whether they were served concurrently or consecutively. CP 40, 45.

The Court imposed a high-end standard range sentence of 342 months (28.5 years). CP 42; 7RP 10. Goudeau appeals. CP 35.

C. ARGUMENTS

1. GOUDEAU WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL.

Both the Washington and federal constitutions guarantee a criminal defendant the right to assistance of counsel. Wash. Const. art. I, § 22 (amend.10); U.S. Const., Amend. 6, 14. A defendant also, however, has a right to self-representation both under state and federal law. Wash. Const. art. I, § 22 (amend.10); Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Because of the tension between these two rights, a defendant wishing to proceed pro se must make an unequivocal request to proceed without counsel, and the trial court must ensure that the waiver of counsel is “knowing, voluntary, and intelligent.” State v. DeWeese, 117 Wn.2d 369, 376-78, 816 P.2d 1 (1991). Self-representation is a grave undertaking, one not to be encouraged, and courts should indulge in every reasonable presumption against waiver. DeWeese, 117 Wn.2d at 379; State v. Chavis, 31 Wn. App. 784, 789, 644 P.2d 1202 (1982); Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

A trial court must assume the responsibility for assuring that decisions regarding self-representation are made with at least minimal knowledge of what is demanded in pro se representation. City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The favored way of making this finding is via a colloquy on the record that demonstrates the defendant understood the risks of self-representation. Acrey, 103 Wn.2d at 211.

Although there is no specific formula for the colloquy, it should, at minimum, inform the defendant of:

- 1) the nature and classification of charges,
- 2) the maximum penalty upon conviction, and
- 3) the existence of technical and procedural rules which would bind the defendant at trial.

DeWeese, 117 Wn.2d at 378; Acrey, 103 Wn.2d at 211; State v. Silva, 108 Wn.App. 536, 541, 31 P.3d 729 (2001). Without this critical information, a defendant cannot make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn.App. at 541.

Here, there were two colloquies between the court and Goudeau regarding self-representation. During the first one on August 26, 2008, Judge Carey established Goudeau's understanding of the law amounted to little more than what he learned in his high school U.S. History course,

and that he knew virtually nothing about the rules of evidence or criminal procedure. 1RP 5, 8-10. The colloquy with Judge Carey did inform Goudeau that if convicted as charged he was facing 48 months of deadly weapon sentence enhancement on top of a standard range sentence of 162 to 216 months, which as discussed in note 5, supra, was incorrect, as was Goudeau's expressed understanding that he faced a potential sentence of only 15 years and 9 months. 1RP 6-7. Goudeau was informed that the maximum possible penalty was "life and/or \$50,000." 1RP 7. Ultimately, however, the court talked Goudeau out of proceeding pro se. 1RP 11.

During the second colloquy on January 22, 2009, Judge Armstrong merely told Goudeau that the rules of evidence and procedure would apply to him despite not being an attorney, and that first degree assault constitutes a "strike offense" such that if he accumulated three such offenses it would result in his incarceration for "life without the possibility of release." 1RP 18-19. Despite learning that Goudeau had recently been diagnosed with schizophrenia and was on medications, Judge Armstrong granted Goudeau's request to proceed pro se without ever ensuring he had been accurately advised that first degree assault is a Class A felony or that the standard range sentence he faced was 270 to 342 months, rather than the erroneous range of 210 to 275 months told to him during the first colloquy before Judge Carey. 1RP 7, 23.

Neither colloquy, either separately or combined, was adequate to allow this Court to conclude Goudeau made a knowing, voluntary and intelligent waiver of his right to counsel. Missing from both is a discussion regarding the classification of first degree assault as a Class A felony,⁷ or an accurate discussion of the standard-range sentence Goudeau faced. To the contrary, Goudeau was affirmatively misinformed that the standard range was much less than it truly was.

This Court's decision in Silva, reveals the inadequacy of the colloquies engaged in here. In Silva, the defendant was permitted to represent himself in a criminal trial. 108 Wn. App. at 538. Silva had completed a trial with the assistance of counsel, and had also completed pro se trials in both Oregon and Washington before returning to Washington for the trial on the instant matter. Id. at 538, 540-41. During the trial at issue Silva displayed “exceptional skill” during pretrial motions, examination of witnesses, and argument. Id. at 541. He left the reviewing court with an impression of “intelligence, ability, and industry.” Id.

This Court reversed Silva’s conviction, however, because the trial court failed to advise Silva of the maximum possible penalties for the crimes with which he was charged, even though he had been advised of

⁷ First degree assault is a Class A felony. RCW 9A.36.011(2).

the standard range, and had, in fact, been sentenced within that range. 108 Wn. App. at 541-42. The Court wrote: “[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision.” Id. at 541. Without the critical information of the maximum penalties, this Court held Silva had not made a knowledgeable waiver of his right to counsel. Id. at 541-42.

Similar to Silva, the trial court here failed to provide Goudeau with knowledge of all facts material to the decision of whether to waive counsel. Specifically, the court failed to accurately advise Goudeau of the standard range sentence he faced if convicted. The only mention of what standard range he faced was at the first hearing, in which Goudeau ultimately decided not to represent himself, and even then the standard range mentioned was much lower than actually applied. 1RP 7. Thus, it is reasonable to conclude Goudeau made the decision to waive his right to counsel based on an erroneous understanding of the risks he faced at trial.

Moreover, the record does not, as it did in Silva, demonstrate that Goudeau was an especially skilled litigator. To the contrary, he specifically admitted a lack of understanding of the rules of evidence and rules of criminal procedure. 1RP 8-10. There were also valid concerns expressed by the prosecutor regarding Goudeau's mental stability. 1RP 20-21. Moreover, his performance at the CrR 3.5 hearing, trial and

sentencing show Goudeau did not understand the complexity of the task he took on in trying to represent himself.

Like the defendant in Silva, the court engaged Goudeau in a colloquy that was inadequate to properly inform him of the risks of self-representation, such that he could make a knowledgeable waiver of his constitutional right to counsel. Silva, 108 Wn.App. at 541. Under these circumstances, Goudeau's waiver of counsel cannot be viewed as “knowing, voluntary, and intelligent” as required. DeWeese, 117 Wn.2d at 376-78.

If a defendant seeks to represent himself, but the trial court fails to explain the consequences of such a decision to him, a resulting conviction must be reversed. United States v. Arit, 41 F.3d 516, 521 (9th Cir. 1994). No “harmless error” analysis can salvage the convictions. Silva, 108 Wn. App. at 542. As in Silva, Goudeau's convictions must be reversed. Id.

2. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REMAND.

CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 624, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 622. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and the court

cannot review whether the findings of fact and conclusions of law are supported by the record. See, e.g., Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993) (appellate court reviews only whether findings of fact are supported by substantial evidence and whether findings of fact support conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Id. at 622. Assuming written findings are ultimately entered, reversal will be required if the delay prejudices Goudeau. Id. at 624-25. Goudeau reserves the right to offer further argument depending on the content of any written findings.

3. THE TRIAL COURT FAILED TO INDEPENDENTLY DETERMINE WHETHER GOUDEAU'S PRIOR SECOND DEGREE ASSAULT CONVICTIONS CONSTITUTE "SAME CRIMINAL CONDUCT."

The Sentencing Reform Act of 1981 establishes presumptive sentencing ranges for all felonies. RCW 9.94A.510. The ranges are based on the severity of the current offense and the defendant's offender score. RCW 9.94A.510(1), RCW 9.94A.515; RCW 9.94A.520; RCW 9.94A.525. The process for determining a defendant's offender score is set forth under RCW 9.94A.525, and involves assessing prior and other current offenses under a number of different categories, including the type, class, and date of the offense. In addition, the statute provides:

(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a),^[8] to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which

⁸ In relevant part, RCW 9.94A.589 provides:

. . . [W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purposes of the offender score: PROVIDED, 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. . . . "Same criminal conduct," as used in this subsection means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations; . . .

RCW 9.94A.525(5) (emphasis added).

The language of the statute is mandatory. State v. Wright, 76 Wn. App. 811, 829, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). More importantly, the language creates two classes of prior offenses for purposes of conducting the same criminal conduct analysis: (a) prior offenses that have previously been found to constitute the same criminal conduct; and (b) those that have not.

Under the first class of prior offenses, the statute provides that if a prior trial court has determined that two or more convictions constitute the same criminal conduct, the current trial court is bound by that determination. See Wright, 76 Wn. App. at 828-29. Under the second class of prior offenses, however, when prior adult offenses, served concurrently, were not previously found to constitute the same criminal conduct, the statute requires that the current trial court independently determine whether they constitute the same criminal conduct, or whether to count them as separate offenses.

State v. McCraw, 127 Wn.2d 281, 287, 898 P.2d 838 (1995); State v. Reinhart, 77 Wn. App. 454, 459, 892 P.2d 110, review denied, 127 Wn.2d 1014 (1995). Moreover, only if the prior offenses are from "separate counties or jurisdictions," arise from "separate complaints, indictments, or informations," or the "sentences [were] imposed on separate dates," may the current sentencing court presume that prior offenses do not constitute the same criminal conduct. RCW 9.94A.525(5)(a)(i).

Here the sentencing court knew little more about Goudeau's prior two second degree assault convictions than that they were charged in the same information. CP 45 (list of Goudeau's criminal history showing identical cause numbers for both convictions, but stating the "Sentencing Date UNK"). Given this limited information, the current trial court should not have simply presumed these offenses were not the same criminal conduct. RCW 9.94A.525(5)(a)(i).

Under the mandatory language of the statute, a prior court's failure to find that prior offenses constitute the same criminal conduct does not relieve the current sentencing court from its duty to make an independent determination. Wright, 76 Wn. App. at 828-29. Goudeau's sentencing court failed to make an independent determination as to his two prior second degree assault conviction and therefore it failed to follow the proper

procedure under the SRA for establishing Goudeau's standard range sentence.

When a trial court fails to follow the proper procedure for establishing an offender score, remand for resentencing is required. State v. Bolar, 129 Wn.2d 361, 366-67, 917 P.2d 125 (1996); Reinhart, 77 Wn. App. at 459. The sentencing court failed to follow the proper procedure in establishing Goudeau's offender score. Therefore, this Court should reverse his sentence and remand for resentencing.

D. CONCLUSION

Because Goudeau was unconstitutionally denied his right to counsel, this Court should reverse all of his convictions and remand for a new trial. In the alternative, remand is required because the trial court failed to file the required written findings of fact and conclusions of law and failed to properly calculate Goudeau's offender score.

DATED this 17th day of March, 2010.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63227-2-1
)	
LYNNELL GOUDEAU,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LYNNELL GOUDEAU
DOC NO. 316502
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVENUE
WALL WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH, 2010.

x Patrick Mayovsky

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 MAR 18 PM 4:00