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FEB 04 2010

King County Superior Court
Appellate Division

NO. 64127-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD HUMPHREY,

Appellant.

FILED
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
2010 FEB 22 PM 3:45

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

The Honorable Regina Cahan, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying a defense motion to suppress an audio recording of appellant's arrest.

2. The trial court erred by entering Conclusions of Law 1 and 4 in its order finding the recording admissible.¹

Issue Pertaining to Assignments of Error

Police arrested Donald Humphrey at his girlfriend Crystal Chatman's home on suspicion of domestic violence assault. As police led Humphrey out, he spoke briefly with Chatman. An officer recorded this conversation, but did not inform Humphrey that a recording was being made. The State charged Humphrey with two counts of felony violation of a No Contact Order (NCO). Chatman refused to testify at trial, so the State used the audio recording to show that Humphrey had been in the same location as Chatman. The recording was also used for voice identification purposes to show that Humphrey called Chatman from jail. Did the trial court err in denying the defense motion to suppress the recording where police failed to inform Humphrey they were recording his conversation with Chatman in her home?

¹ The trial court's written findings and conclusions are attached to this brief as an appendix.

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged Donald Humphrey with two counts of Domestic Violence Felony Violation of a Court Order. CP 5-6. The information alleged that Humphrey contacted Crystal Chatman twice in May 2008 in violation of a valid protection order. CP 5-6. The case proceeded to jury trial in King County Superior Court before Judge Regina Cahan in July 2009. The jury returned guilty verdicts on both counts. CP 71-72. Based on an offender score of eight, the court sentenced Humphrey to the maximum term of 60 months of confinement and prohibited contact with Chatman. CP 76. Humphrey filed a timely Notice of Appeal. CP 88.

2. Trial Testimony

a. *The alleged crimes*

On May 25, 2008, a 911 hang-up call originated from Crystal Chatman's phone number. RP 183-84. An operator immediately dialed Chatman's number and when no one answered, the operator dispatched police to Chatman's residence. RP 184. Officer James Yorio arrived at Chatman's residence around 7 a.m. RP 207-08.

Officer Yorio, along with Officer Nolting, knocked on the apartment door and Chatman answered. RP 208. It appeared Chatman had been crying and had a blackened left eye. RP 209. Chatman stated, "He punched me," nodded affirmatively when asked if the aggressor was still there, and let the officers into her apartment. RP 210.

Both officers searched the small apartment and found Humphrey hiding behind the bathroom door. RP 211-12. The officers immediately arrested Humphrey on suspicion of domestic violence assault. RP 212. Humphrey complied with the officers. RP 227. As the officers led Humphrey in handcuffs out of the apartment, they encountered Chatman in the living room. RP 212, 214. Humphrey and Chatman had a brief conversation as he was leaving the apartment. RP 213. Officer Yorio recorded this conversation using a remote microphone attached to his uniform. RP 214. The State introduced the audio recording into evidence at trial. RP 214, 217-18.

The State also introduced evidence that Humphrey violated the NCO a second time by calling Chatman on the telephone while he was in jail. RP 192. Sergeant Barclay Pierson testified that Humphrey was incarcerated at the King County Jail from May 25,

2008 until June 12, 2008. RP 192. On May 29, 2008 an inmate housed in Humphrey's location called Crystal Chatman's phone number and had a conversation. RP 192. The State introduced this recorded phone conversation into evidence. RP 193-94.

b. *Pretrial rulings*

During pretrial motions in limine, Humphrey argued that the court must suppress the audio recording of his conversation with Chatman in her home because police had not told him that he was being recorded. RP 25-27; CP 41-43. Humphrey claimed that the surreptitious recording amounted to a violation of RCW 9.73.090(1)(c) in Washington's privacy act. RP 25-27. The trial court reserved ruling on the admissibility of the audio recording until hearing testimony from Officer Yorio at the 3.5 hearing. RP 54.

At the 3.5 hearing, Officer Yorio explained how the audio recording had been created. RP 104. His patrol car is equipped with an audio and video recording system. RP 103-04. Officer Yorio wears a remote microphone on his uniform that records his voice and conversations in his immediate area. RP 104. The audio recording device automatically begins recording when Officer Yorio turns on the overhead emergency lights on his patrol car. RP 105.

The remote microphone will record until manually deactivated. RP 105.

Officer Yorio was aware that his audio recording device was on when he entered Chatman's home. RP 115-16. Yet, Officer Yorio acknowledged that he did not tell Humphrey that the conversation with Chatman was being recorded. RP 116. Officer Yorio testified that he did not have time to tell Humphrey that he was being recorded because officers were concerned for an ambush and were trying to hustle him to the patrol car. RP 107, 117.

The State argued that exigent circumstances prevented Officer Yorio from informing Humphrey that any statement he made would be recorded:

And the State would argue, clearly, that this – there are exigent circumstances in this occasion.

.....
And their concern, we've got to get him out of here because they don't know what's going on, they don't know if this person's going to try and flee, they don't know if this person's going to try and assault the alleged victim, because that's what they – frankly, at this point, believe has happened. They believe an assault has taken place, so their concern is getting the defendant out of that apartment, not advising him that there's a recording going on,

not Mirandizing him, not questioning him, nothing.

.....
So there's not, really, any time for the officer to stop for a moment, tell Mr. Humphrey you're being recorded

.....
The only reason they're not told immediately they're being recorded is because, frankly, there's not time to make those warnings. And there was not a situation where they can sit the person – sit Mr. Humphrey down in a quiet place and tell him, you know, these things.

RP 122-25.

Defense counsel responded by emphasizing that police officers must strictly comply with the notice requirement set forth in RCW 9.73.090(1)(c) when recording conversations. RP 126. Defense counsel also was “hotly disputing” the State’s characterization of the event as involving exigent circumstances:

When Officer Yorio and Officer Nolting arrived at the scene, there was two officers involved. They made contact with Ms. Chapman, they immediately took over the -- they -- they took control of the scene. It -- there was no testimony that there was any assault that occurred within the apartment, while they were there, there was no indication that Mr. Humphrey was armed or dangerous. There was no ongoing emergency at all.

RP 129-30.

The court concluded that the arrest situation amounted to exigent circumstances under RCW 9.73.090. RP 134. Humphrey assigns error to the following two conclusions of law:

1. ADMISSIBLE IN THE STATE'S
CASE-IN-CHIEF

Under CrR 3.5 the statement(s) of the defendant made in the patrol car video under Finding of Fact 12 are admissible in the State's case-in-chief.

4. Under RCW 9.73.090(c) the court finds the recording of the defendant's statements are admissible under the exigent circumstances exception as the police were responding to a 911 hang-up call and were immediately faced with a woman who appeared upset and had a black eye. The court further finds that the conversation between the defendant and Ms. Chatman was not a private one as it involved yelling in the presence of two police Officers. Under the circumstances reflected by the testimony the officers were responding to an ongoing emergency and potentially dangerous situation where the timing of a warning being recorded was not practicable. Further, the fact that the officers did not ask any questions to the defendant and Officer Yorio warned Ms. Chatman with regard to being recorded when he later interviewed her leads the court to conclude that Officer Yorio was acting in good faith and was not attempting to circumvent RCW 9.73.090 by failing to give such a warning.

CP 85-86.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING HUMPHREY'S MOTION TO SUPPRESS THE AUDIO RECORDING.

This case involves interpretation of the privacy act. Interpretation of a statute is a question of law that this Court reviews de novo. State v. Courtney, 137 Wn. App. 376, 382, 153 P.3d 238 (2007). Generally, it is unlawful for police officers to record private conversations:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual . . . or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

.....
(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b).

An exception to this principle is that police may make a sound and video recording during an investigation if an officer informs a detainee that a recording is being made:

The provisions of RCW 9.73.030 . . . shall not apply to police . . . in the following instances:

.....

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event.

....

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances.

RCW 9.73.090(1)(c)(emphasis added).

The Supreme Court recently applied RCW 9.73.090 to conversations that police engage in with detainees during traffic stops and concluded: “the privacy act requires that officers inform detainees that the officers are recording their conversation.” Lewis v. State, Dept. of Licensing, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006). The court ruled that traffic stop conversations were not private for purposes of the privacy act, hence not a violation of RCW 9.73.030. Lewis, 157 Wn.2d at 460. However, the court held

that police must still inform detainees of the recording because RCW 9.73.090(1)(c) creates a separate set of requirements for recording conversations that occur during a police investigation. Lewis, 157 Wn.2d at 462.

Police officers must strictly comply with RCW 9.73.090(1)(c). Lewis, 157 Wn.2d at 465. RCW 9.73.090(1)(c) does not mandate that an officer use specific language when informing a detainee that the officer is recording their conversation. Lewis, 157 Wn.2d at 470. In Lewis, the court ruled that an officer simply telling a detainee that “he was being recorded” satisfied the statutory notice requirement. Lewis, 157 Wn.2d at 454, 470-71.

The trial court here erred by concluding that exigent circumstances excused the police officers from their duty to inform Humphrey that they were creating a sound recording. Once the officers located and handcuffed Humphrey, any exigency dissipated and officers had time to inform Humphrey that they were creating a recording. Officer Yorio testified that he was concerned about “an ambush,” but there are no facts in the record to support this concern that others might appear to aid Humphrey. RP 117. By the officer’s own account, the apartment was “small” and they had

searched slowly before locating Humphrey in the bathroom. RP 211-12.

Police did not find any weapons on Humphrey and he cooperated with them once found in the bathroom. RP 226-27. Two uniformed officers handled the arrest. RP 212. Humphrey was in handcuffs as police escorted him from the apartment. RP 212. Officer Yorio testified that Chatman appeared “a little more relaxed” once she realized that Humphrey was in custody. RP 214. The record is devoid of facts to support the trial court’s conclusion that after the arrest exigent circumstances prevented either officer from simply informing Humphrey that he was being recorded. Further, the State failed to cite any case law in support of the argument that an officer’s intent to expeditiously move an arrested person to a patrol car amounts to exigent circumstances.

The State also claimed that the officers did not have time to inform Humphrey that they were creating a recording. RP 122-25. This assertion is contrary to common sense and established facts of the case. Informing Humphrey that “he was being recorded” would have taken only a couple of seconds and could have been accomplished while handcuffing him. Officer Yorio did interject “Come on Donald, we’re going out this way” into Humphrey’s

conversation with Chatman. CP 84. In the same manner, Officer Yorio could have interrupted and informed Humphrey that he was being recorded.

The remedy for a police officer's failure to strictly comply with the notice requirement in RCW 9.73.090(1)(c) is that the recording is inadmissible. Lewis, 157 Wn.2d at 472. Admission of evidence in violation of the privacy act is a statutory violation. Courtney, 137 Wn. App. at 383. To prevail, Humphrey must show that the erroneous admission of the recording materially affected the outcome of the trial. Courtney, 137 Wn. App. at 383. This Court must reverse Humphrey's conviction if there is a reasonable probability that the outcome of the trial would have been different if the recording been excluded. Courtney, 137 Wn. App. at 383-84.

The erroneous admission of the recording was prejudicial error. The State would have found it far more difficult to prove that Humphrey was guilty of Count II without the unlawful recording. Chatman refused to cooperate with the State in the prosecution of the case, so the State used the recording to identify her voice on the jail recording. RP 192-95, 218-19, 271, 275-78.

Without the apartment recording, prosecutors would have been left only with Officer Yorio's testimony that the two people in

the jail recording sounded like Humphrey and Chapman based on his recollection of their voices. See RP 225. With the recording from Chapman's apartment, however, the prosecutor was able to let jurors compare the voices in each recording. See RP 276-277 (prosecutor tells jurors "you can hear for yourselves" the voices are the same and uses both recordings to make point). In short, the recording from the apartment was *the* key evidence used to identify Humphrey and Chatman on the jail recording.

The recording also was a key piece of evidence demonstrating that Humphrey had unlawfully contacted Chatman on May 25, 2008. Further, the recording placed irrelevant and highly prejudicial statements from Chatman about the alleged, uncharged assault before the jury (e.g. "I'm not gonna press charges against you but I'm not gonna be here for you no more, its over. You can't keep hitting on me.") CP 84.

It was error for the trial court to admit the recording and that error was not harmless. This Court must reverse Humphrey's convictions and remand the case for a new trial without the improper recording. State v. Christensen, 153 Wn.2d 186, 201, 102 P.3d 789 (2005).

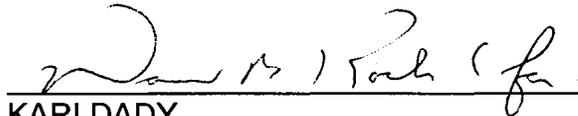
D. CONCLUSION

In violation of the privacy act, police failed to inform Humphrey that they were creating a recording when they arrested him. The trial court erred in admitting the recording, and this error prejudicially impacted the outcome of Humphrey's trial. This Court should reverse Humphrey's convictions for Domestic Violence Felony Violation of a Court Order.

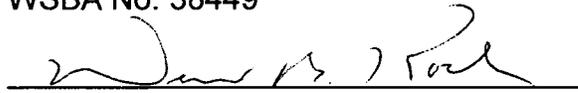
DATED this 4th day of February 2010.

Respectfully submitted,

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APPENDIX

FILED
KING COUNTY, WASHINGTON

AUG 07 2009

**SUPERIOR COURT CLERK
GARY POVICK
DEPUTY**

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DONALD HUMPHREY,

Defendant.

No. 08-1-04859-1 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on July 16, 2009 before the Honorable Judge Regina Cahan

The court informed the defendant that:

- (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement;
- (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility;
- (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial;
- and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant declined to testify at the hearing.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

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1 After considering the evidence submitted by the parties and hearing argument, to wit: the
2 testimony of Officer James Yorio, the court enters the following findings of fact and conclusions
3 of law as required by CrR 3.5.

4
5 I. Findings of Fact

6 1. On May 25, 2008, at approximately 6:55am, 911 hang-up call came in from a residence
7 located at 1830 10 Ave West, #2, Seattle, WA

8 2. When no one was reached at the phone number that called 911, Seattle Police Department
9 Communications dispatched Officers Patrick Nolting and James Yorio to the location of the call.

10 3. The two officers were in full police uniform and separate marked patrol cars when they were
11 dispatched on the call.

12 4. When the Officers arrived at the residence, a woman, later identified as Crystal Chatman,
13 answered the door.

14 5. Ms. Chatman who appeared to have been crying and had a black eye immediately stated,
15 "he punched me".

16 6. When Officer Yorio asked if the person was still in the apartment, Ms. Chatman nodded in
17 the affirmative.

18 7. When Officer Yorio asked if the officers could come in to the apartment to locate the
19 individual Ms. Chatman was referring to, Ms. Chatman nodded in the affirmative.

20 8. Officer Yorio noticed that Ms. Chatman was speaking very quietly at the time and seemed
21 hesitant to answer questions for fear of being overheard.

22 9. Upon entry into the small apartment the officers did not see the defendant, later identified as
23 Donald Humphrey, but shortly were able to locate him hiding behind the bathroom door.'

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1 10. The defendant Humphrey was arrested on suspicion of assault and hand-cuffed him and
2 walked him out of the apartment.

3 11. While walking the defendant out of the apartment the officer did not read Miranda warnings
4 to the defendant or warn him that he was being recorded, nor did that ask the defendant questions.

5 12. As the defendant was being walked out of the apartment Ms. Chatman and the defendant
6 began speaking with each other and the following exchange was audio recorded by Officer Yorio's
7 patrol car video system as he was wearing a microphone for that video system:

8 CHATMAN: When you get out I won't be here

9 HUMPFREY: Sir, I didn't do nothin' man

10
11 CHATMAN: I'm not gonna press charges against you but I'm not gonna be here for you no more,
12 its over. You can't keep hitting on me

13 HUMPFREY: I did not hit you

14
15 CHATMAN: You can't do this, I have a daughter I have to go see. What is she going to think
16 when mommy shows up with a black eye? What is my mom gonna think?...What is my mom
17 gonna think?...I'm not gonna show up to court, I'm not pressing charges but you cannot, I don't
18 wanna be with you no more

19 OFFICER: Come on Donald

20 CHATMAN: You hurt me

21
22 OFFICER: we're going out this way

23 HUMPFREY: What did I do, what am I being charged with sir?

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13. Officer Yorio's video recording system had immediately turned on prior to his arrival at the residence as a result of having turned on the flashing lights on the roof of his patrol car.

14. After the defendant was walked out of the residence he was placed into the back of Officer Nolting's patrol car and transported to the Seattle Police Department's West Precinct.

15. Officer Yorio stayed behind and took a statement from Ms. Chatman that was audio recorded by his patrol car video system.

16. Before beginning the interview with Ms. Chatman, Officer Yorio advised her that she was being recorded.

17. Officer Yorio then went back to the precinct where he read the defendant Miranda warnings and took a brief oral statement from him.

18. After processing at the station the defendant was booked into the King County Jail.

II. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT(S):

1. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

Under CrR 3.5 the statement(s) of the defendant made in the patrol car video under Finding of Fact 12 are admissible in the State's case-in-chief

2. Under current case law the statements are admissible under CrR 3.5 because Miranda was not applicable as they were not a product of custodial interrogation by a state actor. While the parties and the court agree that the defendant was in custody at the time, his statements ^{were} ~~are~~ not a product of officer interrogation or questioning and ^{were} ~~are~~ rather spontaneously made in the presence of the officers.

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1 3. Both statements were also voluntarily made under a due process analysis as the defendant
2 was not threatened, coerced nor promised anything in order to obtain statements and there was
3 no evidence that the defendants will had been overcome as a result of such threats or coercion.

4 4. Under RCW 9.73.090 (c) the court finds the recording of the defendant's statements are
5 admissible under the exigent circumstances exception as the police ^{were} ~~are~~ responding to a 911 hang-
6 up call and ^{were} ~~are~~ immediately faced with a woman who appears ^{ed} ~~s~~ upset and has ^d ~~a~~ black eye. The
7 court further finds that the conversation between the defendant and Ms. Chatman was not a
8 private one as it involved yelling in the presence of two police Officers. Under the
9 circumstances reflected by the testimony the officers were responding to an ongoing emergency
10 and potentially dangerous situation where the timing of a warning of being recording was not
11 practicable. Further, the fact that the officers did not ask any questions of the defendant and
12 Officer Yorio warned Ms. Chatman with regard to being recorded when he later interviewed her
13 leads the court to conclude that Officer Yorio was acting in good faith and was not attempting to
14 circumvent RCW 9.73.090 by failing to give such a warning.

15 5. Under a Crawford analysis, the court finds that Ms. Chatman's initial statement to police,
16 nods of affirmation and statements made on the recording are admissible as they are non-
17 testimonial under the Davis factors and are not offered for the truth of the matters they assert.
18 Rather, the initial statement and nods are offered merely to explain the officer's actions in this
19 case and the recorded statements are offered for identity. Further the court finds that Ms.
20 Chatman's statements are excited utterances under ER 803 made during the course of an ongoing
21 emergency rather than induced by a formal interview or interrogation. Additionally, the
22 defendant's statements are admissions by a party opponent under ER 801. Because the court is
23 allowing the audio recording to be played for the jury and is offered for identity and presence of

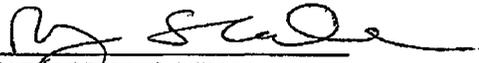
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1 the defendant and Ms. Chatman, the court will not allow Officer Yorio to additionally testify to
2 the substance of such statements however he may testify to the circumstances of the statements.

3 4. Based on the above facts and conclusions the court finds that the State has met its burden
4 for admissibility of the defendant's statements in this case.

5
6 III.
7 In addition to the above written findings and conclusions, the court incorporates by reference,
8 without limitation, its oral findings of fact and conclusions of law as stated on the record.

9 Signed this 7 day of August, 2009.

10
11 
JUDGE REGINA CAHAN

12 Presented by:

13 
14 Samantha Kanner, WSBA #36943
15 Deputy Prosecuting Attorney

16 Approved for entry:

17 
18 Melissa Odama, WSBA #34226
19 Attorney for Defendant

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21
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23

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64127-1-I
)	
DONALD HUMPHREY,)	
)	
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 4TH DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONALD HUMPHREY
DOC NO. 976669
LARCH CORRECTIONS CENTER
15314 DOLE VALLEY ROAD
YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF FEBRUARY, 2010.

x. *Patrick Mayovsky*