

65377-6

65377-6

NO. 65377-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD BOWEN,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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2010 SEP 30 PM 4: 58

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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A. ASSIGNMENTS OF ERROR.

1. Instruction 7 relieved the State of its burden to prove every element of the offense of second degree assault beyond a reasonable doubt and violated Richard Bowen's right to due process under the Fourteenth Amendment.

2. The court imposed a term of community custody that was not authorized by statute.

3. The court improperly entered a finding of fact that Bowen had the ability to pay significant legal fines and fees without any evidence supporting that finding. CP 17 (Finding 2.5).

4. The court violated Bowen's rights under the Sixth and Fourteenth Amendments by sua sponte finding Bowen's offense constituted a crime of domestic violence and imposing an additional financial penalty based on that finding.

5. The court failed to exercise its discretion by imposing legal financial obligations without inquiring into Bowen's indigence or requiring proof that the costs imposed were actually incurred in the case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a

reasonable doubt. Where a jury is instructed that proof of one element conclusively establishes another, the State is relieved of its burden of proof and the defendant is denied the process due. In a prosecution for second degree assault, where the State alleged Bowen intentionally assaulted another and thereby recklessly caused injury, was the State relieved of its burden of proof when the jury was instructed that the proof of intent necessarily proves recklessness?

2. The authority to impose a term of community custody is derived solely from statute. The governing statute authorizes an 18-month term of community custody for second degree assault. Did the court lack authority to impose a 24 to 48 month term of community custody for second degree assault?

3. A court lacks authority to impose legal financial obligations unless it first determines that the individual has some ability to pay and assesses the actual cost of the items for which the defendant is required to pay. Here, the court imposed numerous legal financial obligations without any information about Bowen's ability to pay, even though it had previously found him indigent, and did not ascertain whether the requested costs were actually incurred during the trial. Did the court lack evidence that

Bowen had the ability to pay costs and lack authority to impose non-mandatory legal financial obligations?

4. Did the court's assessment of an additional \$100 penalty for "domestic violence," based solely on the court's determination of domestic violence, violate Bowen's right to a jury determination of any factual issue that increases the punishment imposed?

C. STATEMENT OF THE CASE.

Alison Black accused Richard Bowen of hitting her repeatedly over a 24-hour period, and telling her she could not leave. 1RP 98-103, 113-23.<sup>1</sup> She had multiple bruises over her legs and marks on her face and arms. The injuries were painful although not permanent. 1RP 131-33.

The State charged Bowen with one count of second degree assault and one count of unlawful imprisonment. CP 62-63. The court instructed the jury that, although the elements of second degree assault are an intentional assault that recklessly causes substantial bodily harm, recklessness is necessarily proven by evidence of intent. CP 34, 36.

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<sup>1</sup> The verbatim report of proceedings consists of two volumes of transcripts referred to herein as follows:  
1RP contains April 20-21, 2010;  
2RP contains April 22 & 29, 2010.

After Bowen was convicted following a jury trial, the court ordered him to serve a standard range sentence along with 24 to 48 months of community custody. CP 20. The court also ordered \$2650 of legal and financial obligations notwithstanding Bowen's longstanding poverty. CP 17-18.

Pertinent facts are addressed in further detail in the relevant argument sections below.

D. ARGUMENT.

1. INSTRUCTION 7 CREATED A MANDATORY PRESUMPTION ON THE ISSUE OF RECKLESSNESS RELIEVING THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF SECOND DEGREE ASSAULT AND DEPRIVING BOWEN OF DUE PROCESS.

a. A jury instruction which creates a mandatory presumption violates the Due Process Clause of the Fourteenth Amendment. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and

a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77; U.S. Const. amends. 6 & 14

To convict Bowen of second degree assault, the State was required to prove he intentionally assaulted Black and “thereby recklessly inflict[ed] substantial bodily harm.” RCW 9A.36.021 (1)(a). CP 62.

Jury Instruction 7 created a mandatory presumption, providing that if the jury found Bowen intentionally assaulted Black, he necessarily “recklessly inflict[ed] substantial bodily harm” upon Black. That presumption improperly relieved the State of its obligation to prove the second element of this crime in violation of Bowen’s right to due process.

A mandatory presumption is a presumption, created by jury instructions, that requires the jury “to find a presumed fact from a proven fact.” State v. Hayward, 152 Wn.App. 632, 642, 126 P.3d 354 (2009) (citing State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). A mandatory presumption exists if a reasonable juror would interpret the presumption to be mandatory. Sandstrom v.

Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979);  
Hayward, 152 Wn.App. at 642.

Such presumptions violate a defendant's right to due process because they relieve the State's of its obligation to prove every element of a charged crime. Sandstrom, 442 U.S. at 522 (citing Morissette v. United States, 342 U.S. 246, 274-75, 72 S.Ct. 240, 96 L.Ed. 288 (1952)) (impermissible presumption in jury instructions conflicts with presumption of innocence for each element of charged crime)); Hayward, 152 Wn.App. at 642 (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)); Deal, 128 Wn.2d at 699. A reviewing court must examine the jury instructions as a whole to determine if the mandatory presumption unconstitutionally relieves the State's obligation. Deal, 128 Wn.2d at 701; State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

b. Instruction 7 created an improper mandatory presumption. The court's "to convict" instruction accurately defined the elements of assault in the second degree as:

- (1) That on or about the 5<sup>th</sup> day of February, 2010 the defendant intentionally assaulted Alison Black and thereby recklessly inflicted substantial bodily harm on Alison Black; and
- (2) That this act occurred in the State of Washington.

CP 40 (Instruction 10), compare RCW 9A.36.021. The jury was further instructed: “When recklessness as to a particular fact is required to establish an element of a crime, *the element is also established if a person acts intentionally or knowingly.*” CP 47. (emphasis added) (Instruction 7).

A reasonable juror who found that Bowen intentionally assaulted Black (element one) would understand Instruction 7 to mean that the ‘recklessness element’ (element two) was also automatically established, because Bowen had “act[ed] intentionally or knowingly.” See Jury Instruction 7. This confusion would naturally arise because Jury Instruction 7 does not inform the jury that the ‘intentional act’ must be specifically related to the second element of recklessness. Moreover, Jury Instruction 10, the to-convict, treated the intentional assault and the reckless causing of injury as a single element, thereby collapsing the distinction between these two aspects of second degree assault. CP 40. Jury Instruction 7 thus created a mandatory presumption. Sandstrom, 442 U.S. at 514; Hayward, 152 Wn.App. at 642, citing Deal, 128 Wn.2d at 701.

This conclusion is precisely the result this Court recently reached in Hayward. Just as in the present case, the first two elements in the “To Convict” in Hayward’s provided:

(1) That on or about the 25<sup>th</sup> day of March, 2007, the Defendant intentionally assaulted [the victim];

(2) That the Defendant thereby recklessly inflicted substantial bodily harm on [the victim].

152 Wn.App. at 640. The instructions stated further “Recklessness also is established if a person acts intentionally.” Id. This Court found the instructions created a mandatory presumption which

conflated the intent the jury had to find regarding Hayward’s assault against [the victim] with a [sic] intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its burden of proving [the defendant] recklessly inflicted substantial bodily harm.

Id., at 645 (internal citations omitted). The Court concluded

Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), [the jury instructions] violated [the defendant’s] constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove [the defendant] recklessly (or intentionally) inflicted substantial bodily harm.”

Id. at 646.<sup>2</sup>

The instructions in Hayward are similar to those in the present case. Both instructions state that ‘recklessness’—or the ‘recklessness element’—is “established if a person acts intentionally”. Furthermore, neither instruction specifies that “intention” must be related to the element at issue. Just as in Hayward, Instruction 7 violated Bowen’s right to due process.

This Court reached a contrary result in State v. Holzkecht, \_\_ Wn.App. \_\_ , COA No. 63017-2-I, Slip op. at 10 (Sept. 13, 2010), “respectfully disagreeing” with Hayward. The Holzkecht Court relied in part on a plurality decision in State v. Sibert, 168 Wn.2d 306, 316, 230 P.3d 142 (2010), a drug possession case, which found that defining knowledge to include acting intentionally did not create an improper presumption. Sibert is inapposite to the issue in the case at bar, since the only mens rea required for drug possession is knowledge of the possession of the drug and the

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<sup>2</sup> The language of RCW 9A.08.010 (2) does not limit the substituted mental states (‘intent’ or ‘knowledge’) to a specific element of a crime. However, RCW 9A.08.010(2) does not exist within the confines of a specific crime and could not, therefore, specify which element ‘intent’ must relate to. More importantly, this Court recognized in Hayward that RCW 9A.08.010(2) clearly intends to “limit[] the substituted mental states... to the specific element at issue.” Hayward 152 Wn.App at 646.

Court found no possibility that the jury misunderstood the mens rea element when the to-convict instructions did not mention any other mens rea. 168 Wn.2d at 316.

On the other hand, assault in the second degree contains and requires the mens rea of intent and recklessness. CP 40. The Hayward Court correctly analyzed the confusion resulting from the jury being told that proof of intent necessarily proves recklessness.

Because the conclusive presumption required the jury to find the second element was established whenever the first was, the State was relieved of its obligation to prove all elements of assault in the second degree. This violated Bowen's right to due process. U.S. Const. amend 14; Sandstrom, 442 U.S. at 520 (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); Hayward, 152 Wn.App. at 642; Deal, 128 Wn.2d at 699. This Court should thus hold that Jury Instruction 13 violated Bowen's right to due process.

c. This Court must reverse Bowen's sentence. A constitutional error is presumed prejudicial unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v.

United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Applied to instructions which create a mandatory presumption, this standard requires reversal unless the error was “unimportant in relation to everything else the jury considered on the issue in question...” Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in part on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in two-step analysis.

First, it must ask what evidence the jury actually considered in reaching its verdict. . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy Chapman's reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman's words, that the presumption did not contribute to the verdict rendered

Yates, 500 U.S. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id. at 405-06.

Here, the effect of the presumption was not "comparatively minimal." The presumption narrowed the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed. Id. at 405-06. Instruction 7 told the jury that if they found Bowen had a mens rea of intent he also necessarily had acted recklessly. CP 47. The instruction did this without limitation of which acts those mens rea were to apply to; i.e., jurors could presume guilty knowledge from proof of *any* intentional act. CP 47. A straightforward application of the instruction would require jurors to conclude that if it conclude Bowen had intentionally assaulted Black and Black was injured, Bowen necessarily did so recklessly.

The prosecutor drew the jury's attention to this specific issue during closing argument, emphasizing its claim that Bowen acted intentionally and stating that the jury did not need to concern itself

with recklessness. 2RP 221. Because “we know the injuries were inflicted intentionally” the recklessness standard did not apply. *Id.* While the prosecutor may have intended to convey its belief that Bowen both intentionally assaulted Black and intentionally caused substantial bodily harm, his argument further collapsed the distinct requirements of both an intentional assault and the causation of injuries that must be reckless at the least.

The absence of a limitation on which intentional act the jury could rely upon to find recklessness makes it impossible to know what act the jury relied upon, much less whether that act was independent of the predicate for presumption. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Under Yates and Chapman, the State cannot show the presumption was harmless beyond a reasonable doubt; i.e., that it did not contribute the verdict obtained in this case.

2. THE COURT IMPOSED AN ERRONEOUS AND UNAUTHORIZED TERM OF COMMUNITY CUSTODY

A term of community custody must be authorized by the legislature. In re: Personal Restraint of Brooks, 166 Wn.2d 664, 667-68, 211 P.3d 1023 (2009); State v. Motter, 139 Wn.App. 797, 801, 162 P.3d 1190 (2007).

The legislature set forth the mandatory terms of community custody in RCW 9.94A.701. Bowen was convicted of one count of second degree assault. CP 27; RCW 9A.36.021. The legislature classifies this offense as a violent offense, not a serious violent offense. RCW 9.94A.030(44)(a)(viii), (50). Pursuant to RCW 9.94A.701(2), when imposing sentence for a violent offense, the court “shall, in addition to the other terms of the sentence, sentence the offender to community custody for eighteen months.” (emphasis added).

Instead of complying with the unambiguous terms of the statute, the court ordered a range of 24 to 48 months of community custody. CP 20. This term of community custody is not authorized by statute. See WAC 437-20-010 (setting forth formerly applicable community custody ranges but noting ranges superceded by Laws of 2009, ch. 253 § 5). The court improperly imposed a range of 24

to 48 months of community custody for second degree assault when the legislature authorizes a fixed term of 18 months. 2RP 248; RCW 9.94A.701(2). This term must be reduced upon resentencing. Brooks, 166 Wn.2d at 675.

3. THE COURT IMPROPERLY IMPOSED  
LEGAL FINANCIAL OBLIGATIONS BASED  
ON AN UNSUPPORTED AND INCORRECT  
FINDING BOWEN HAD THE ABILITY TO PAY

Courts may require an indigent defendant to reimburse the state for only certain authorized costs and only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his poverty. Id.

a. There is no evidence to support the trial court's finding that Bowen had the present or future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay; “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118

Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the constitution “direct [a court] to consider ability to pay.” Id. at 915-16. RCW 10.01.160(3) provides,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Here, the court made an express and formal finding that Bowen had the ability to pay financial obligations. CP 17 (Finding of Fact 2.5).<sup>3</sup> But a finding must have support in the record. A trial court’s findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep’t of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

There was no evidence Bowen was employed or employable following his release from prison for a violent offense. As the court remarked at sentencing, Bowen was addicted to drugs and seemed

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<sup>3</sup> In what appears to be a boilerplate section of the Judgment and Sentence, the court’s findings include the statement:

The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. The court finds the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

to suffer from serious mental health issues. 2RP 251.

Bowen was represented by a court-appointed attorney during trial and the court found he remained unable to pay for counsel on appeal. The court signed an Order Authorizing Appeal At Public Expense. Supp. CP \_\_, sub. no. 38. The order was predicated on a sworn statement by counsel that Bowen “has no income or assets.” Supp. CP \_\_, sub. no. 37. Inexplicably, the court entered a finding on the judgment and sentence that Bowen “has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 17.

The trial court’s explicit finding that Bowen had the ability to pay legal financial obligations is contrary to the record and should be stricken. Moreover, because the record does not support a finding that Bowen has the present or future ability to pay costs, non-mandatory legal financial obligations may not be imposed. Fuller, 417 U.S. at 47-48; Curry, 118 Wn.2d at 915-16.

b. The court improperly and without authority ordered Bowen to pay discretionary costs and penalties. Costs that may be imposed on a criminal defendant must be “expenses specially

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CP 17.

incurred by the state in prosecuting” and convicting the defendant. RCW 10.01.160(1), (2). “Costs may be imposed only upon a convicted defendant,” and therefore, costs incurred when a defendant is not convicted may not be imposed. RCW 10.01.160(1).

The court ordered Bowen to pay a \$100 “domestic violence penalty” under RCW10.99.080. The jury did not find Bowen committed a domestic violence offense. The court’s own finding that Bowen’s offense constituted domestic violence cannot be used to increase his punishment, without violating his rights under the Sixth and Fourteenth Amendments. Blakely, 542 US. at 300-01.

Furthermore, the statute “encourages” judges to consider the offender’s financial obligations and actual ability to pay before determining that this penalty should be imposed. RCW 10.99.080(5). The court did not evaluate Bowen’s ability to pay before imposing an added penalty.

The judgment and sentence required Bowen to pay a \$200 - “Criminal filing fee” and \$250 “Jury demand fee.” CP 17-18. This amount appears preprinted on the judgment and sentence as if they are imposed as a matter of routine rather than based on the amounts actually incurred. Id. Because there is no evidence in the

record to establish the actual costs, the trial court erred in imposing the filing fee.

Similarly, the court imposed a \$1500 fee for a court appointed attorney without inquiry into the cost or ability to pay. cp 18. Here, the court insisted on imposing costs and fees notwithstanding uncontested evidence of Bowen's indigence.

One of the goals of the Sentencing Reform Act is to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Washington State Sentencing Guidelines Commission, Adult Sentencing Manual, I-vii (2008). But the amount of fines and fees imposed upon conviction vary greatly by "gender and ethnicity, charge type, adjudication method, and the county in which the case is adjudicated and sentenced." See Katherine A. Beckett, et al, Washington State Minority and Justice Commission, The Assessment of Legal Financial Obligations in Washington State, 32 (2008). This study found that, three years post-sentencing, less than 20 percent of the fees, fines and restitution had been paid for roughly three quarters of the cases in the study. Id. at 20.

The court's imposition of legal financial obligations without giving any weight to the person's ability to pay exacerbates the

problems that those released from confinement must face and may, in fact, lead to increased recidivism.

It therefore appears that the legislative effort to hold offenders financially accountable for their past criminal behavior reduces the likelihood that those with criminal histories are able to successfully reintegrate themselves into society. Insofar as legal debt stemming from LFOs makes it more difficult for people to find stable housing, improve their occupational and education situation, establish a livable income, improve their credit ratings, disentangle themselves from the criminal justice system, expunge or discharge their conviction, and re-establish their voting rights, it may also increase repeat offending.

Beckett, The Assessment of Legal Financial Obligations in Washington State, at 74.

The court's imposition of substantial legal financial obligations, even though it knew of Bowen's on-going poverty coupled with the obvious hardship of reentering society after spending four years in prison, constitutes significant punishment that violates the right to equal protection of the law, is contrary to statute, and must be reconsidered on remand, giving attention to his poverty.

E. CONCLUSION.

For the foregoing reasons, Richard Bowen respectfully requests this Court order a new trial based on the instructional error, and alternatively, remand the case for a correct and legally valid sentence.

DATED this 30<sup>th</sup> day of September 2010.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 65377-6-I
	)	
RICHARD BOWEN,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |      |  |                   |                                     |
|------|--|-------------------|-------------------------------------|
| [X ] | DAVID MCEACHRAN, DPA<br>WHATCOM COUNTY PROSECUTOR'S OFFICE<br>311 GRAND AVENUE<br>BELLINGHAM, WA 98225 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
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**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2010.

X \_\_\_\_\_ 

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