

NO. 79124-4

COA 36257-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPHINE KATHLEEN SPARLING,

Petitioner.

APPELLANT
BRIEF OF PETITIONER

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SUPERIOR COURT
STATE OF WASHINGTON

PETITION FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Sergio Armijo
No. 05-1-04714-5

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A. ASSIGNMENTS OF ERROR

1. The trial court committed error by finding Petitioner Josephine Sparling guilty of Robbery in the First Degree under RCW 9A.56.200 (1) (a) (ii) in that during the commission of a robbery or in the immediate flight therefrom she displayed what appeared to be a deadly weapon, that weapon being the automobile she used to arrive at and depart from the robbery scene.
2. The trial court committed error by equating RCW 9A.56.200 (1) (a) (i) Robbery in the First Degree, (armed with a deadly weapon) and RCW 9A.56.200 (1) (a) (ii) (displays what appears to be a firearm or other deadly weapon).
3. The trial court committed error by misinterpreting the meaning of the word "displays" contained in RCW 9A.56.200 (1) (a) (ii) and what the Legislature intended this alternative to mean.
4. The trial court committed error by concluding in its Conclusions of Law III that the defendant used or threatened to use force to retain the stolen gasoline or to overcome resistance to the taking.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether in enacting RCW 9A.56.200 (1) (a) (ii) Robbery in the First Degree, the Legislature intended the "displays what appeared to be a firearm or other deadly weapon" alternative to include the motor vehicle used by the defendant to drive to the scene of the robbery and/or used

by the defendant to depart the scene of the robbery.

2. Whether a person "displays what appears to be a deadly weapon" under RCW 9A.56.200 (1) (a) (ii) then when the weapon is a real motor vehicle plainly visible throughout the robbery, not concealed, with no verbal threat and physical manifestation to indicate the presence of the apparent deadly weapon (vehicle)?
3. Whether the Legislature intended RCW 9A.56.200 (1) (a) (i) (armed with a deadly weapon) to be distinguishable from RCW 9A.56.200 (1) (a) (ii) (displays what appears to be a firearm or other deadly weapon)?
4. Whether the defendant could have been found guilty of the lesser degree crime of robbery in the second degree or lesser included offense of theft in the third degree?

C. STATEMENT OF THE CASE

On September 24, 2005, the defendant Josephine Sparling drove a silver Honda Accord to the gasoline kiosk at the Safeway store located at 21310 Highway 410 in Bonney Lake, Washington. The defendant pumped twenty dollars (\$20.00) worth of gasoline into her tank and entered the fuel station to pay for the gas. (RP 105-107). The defendant attempted to pay for the gas with a check drawn on the account of Nathan Bindara. (RP 107). The fuel station attendant, realizing that the

name on the check was male and not the defendant's, requested identification. (RP 107). The defendant had no identification on her person so the attendant asked the defendant to remain why she called the store manager. (RP 108). The attendant had some suspicions concerning the validity of the check. (RP 108). The defendant then said she would go to the cash machine and get some money to pay for the gasoline. (RP 108-09). The defendant further said she was also going to her car to get her keys. (RP 109). The attendant told the defendant to remain until the manager arrived. (RP 109). The defendant did not remain and left the fuel station area. She then entered her vehicle and started the engine. (RP 109). The attendant called the police. (RP 109). While the defendant was entering the vehicle, the service manager arrived. (RP 78). The manager had already been apprised of the situation concerning the check. (RP 73). The manager approached the defendant's vehicle and tried to get her to stop by attempting to get in front of it. (RP 80). The manager was not wearing any clothing that would have immediately identified him as a Safeway employee. (RP 78-79) (RP 91-92). The vehicle, driven by the defendant, began to accelerate away from the kiosk and the manager had to jump out of the way to avoid being struck. (RP 80-81). The vehicle

slightly grazed the manager's thigh but he was not injured. (RP81) (RP 92). The vehicle entered the street at a high rate of speed and nearly struck an occupied police car stopped nearby. (RP 127). The vehicle then continued at a high rate of speed, ignored a stop sign, and refused to immediately stop when pursued by clearly marked police vehicles with lights flashing and sirens sounding. (RP 128-31). The defendant's vehicle was eventually surrounded and stopped in a dead end cul-de-sac. The defendant was then arrested. (RP 132). A records check indicated three outstanding King county felony warrants for the defendant's arrest. (CP 35). A search of the vehicle incident to arrest led to the discovery of bank checks, in the defendant's purse, belonging to three different people including Mr. Bindara whose check the defendant used to attempt to pay for the gasoline. (RP 136-37). A search of a backpack found in the vehicle led to the discovery of a drug measuring scale, multiple hypodermic needles, and a baggy containing a white powdery substance which field tested positive for amphetamine. (RP 135). The substance was later tested in the laboratory and confirmed to be cocaine. (RP 151-52).

The defendant, Ms. Sparling, was charged by information with the crimes of Robbery in the First Degree, Attempting to Elude a Pursuing

Police Vehicle, Forgery, and Unlawful Possession of a Controlled Substance. (CP 1-4). Ms. Sparling was arraigned on September 26, 2005. The original information was amended on May 22, 2006 only to change the charge of Unlawful Possession of a Controlled Substance from methamphetamine to cocaine. (CP 6-8).

The information charged the defendant, Ms. Sparling, with Robbery in the First Degree under RCW 9A.56.200 (1) (a) (ii) in that she "displayed what appeared to be a deadly weapon" in the commission of or in the immediate flight therefrom the crime of robbery. (CP 1-4). The weapon alleged to have been displayed was the motor vehicle she arrived with and subsequently used to depart the fuel station after taking the gasoline. (CP 1-4).

On May 22, 2006, the defendant waived her constitutional right to a jury trial and elected to have the case tried to the bench. A waiver of jury trial was signed and accepted by the court following a colloquy with Ms. Sparling. (CP5) (RP 6-7). Ms Sparling, at trial, only contested the charge of Robbery in the First Degree. (RP12).

The defendant argued at trial that the Legislature in enacting RCW 9A.56.200 (1) (a) (ii) never intended the term "displays" to be used in the

manner charged in the case. (RP 173-196). The defendant further argued that existing Washington caselaw defining "displays" as used in robbery in the first degree, presumed that the apparent weapon in question was hidden on the person or otherwise concealed and that the defendant, in addition to a verbal threat, must make some overt act to indicate the possible presence of the apparent weapon. (RP 177-181). The defendant also argued that this manner of charging robbery in the first degree would turn every robbery into a first-degree robbery where the vehicle that the suspect arrives with or uses to depart the robbery scene, is visible to the victim. (183-84) The trial court found the defendant guilty of first-degree robbery as charged. (RP 209). The court also found the defendant guilty of the other charged crimes. (RP 209).

The defendant was sentenced to 129 months in the Department of Corrections on the robbery charge. (CP 9-21). The defendant filed a timely notice of appeal seeking direct review by this court of the robbery in the first degree conviction. (CP 32).

D. ARGUMENT

I. THE TERM "DISPLAYS" CONTAINED IN RCW 9A.56.200 (1) (a) (ii) WAS NOT INTENDED BY THE

LEGISLATURE TO INCLUDE THE MOTOR VEHICLE
USED BY THE DEFENDANT TO ARRIVE AT AND
DEPART FROM THE SCENE OF THE ROBBERY.

- a. Washington caselaw has clearly defined the term "displays", and this definition requires that the defendant manifest by words and actions the presence of an apparent deadly weapon and also presumes that the apparent weapon was previously hidden or concealed prior to the manifestation by the defendant.

The issue in the present case is one of statutory interpretation.

Questions of statutory interpretation are reviewed de novo. State v. Ammons, 136 Wn. 2d 453, 456, 963 P. 2d 812 (1998). A courts primary duty in interpreting a statute is to discern and implement the intent of the legislature. State v. J.P. 149 Wn. 2d 444, 450, 69 P. 3d 318 (2003). The plain meaning of a statute may be discerned "from all the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question" J.P. 149 Wn. 2d at 450 quoting Davis v Dept. of Licensing 137 Wn. 2d 957, 963, 977 P. 2d 554 (1999) and Whatcom County v City of Bellingham, 128 Wn. 2d 537, 546, 909 P. 2d 1303 (1996).

This court has summarized the "plain meaning rule" to include a review of the entire statute and related statutes. Advanced Silicon v Grant

County, 156 Wn. 2d 84, 89-90, 124 P. 3d 294.

We review de novo decisions based on statutory interpretation. Dept of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn. 2d 1,943 P. 3d 4 (2002). Our chief goal in analyzing and applying a statute is to give effect to the legislature's intent, "and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Id. at 9-10. The plain meaning of a statute "is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Id. at 11. If a statute might be accorded more than one reasonable meaning after this inquiry, "the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history." Id. at 12. "We avoid readings of statutes that result in unlikely, absurd, or strained consequences." Glaubach v. Regence BlueShield, 149 Wn. 2d 827, 833, 74 P. 3d 115 (2003).

Petitioner has filed for direct review with this court because impact of the trial court's decision completely changes the manner in which robbery in the first degree could be charged statewide and completely distorts the "displays" element alternative.

RCW 9A.56.200 (1) states in pertinent part:

A person is guilty of robbery in the first degree if:

- (a) In the commission of a robbery or in immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon;
 - (iii) Inflicts bodily injury; or

The defendant was charged under section (a)(ii) in that during the commission of a robbery or in immediate flight from the robbery she displayed what appeared to be a deadly weapon, that being the automobile she arrived with and used to depart the scene.

Several Washington appellate cases have addressed the "displays" alternative, all of these cases dealt with an apparent weapon possibly concealed on the defendant's person, a verbal threat made by the defendant, and whether or not the verbal threat was accompanied by some physical manifestation by the defendant indicating the presence of an apparent weapon.

A proper analysis begins with State v Henderson, 34 Wn. App 865, 664 P. 2d 1291 (1983) in which the defendant was convicted of two first-degree robberies. The first robbery involved the defendant entering a convenience store and demanding that the employee give him "all the bills."

Id at 866. The employee noticed that the defendant's right hand was concealed in the right front pocket of his coveralls and that it had a bulge. The employee did not actually see a weapon but believed the defendant was armed with one. In the second robbery the defendant demanded a store employee to give him "all the money". Id at 866. The employee said, "Are you kidding"? The defendant then put his hand in his pocket and said, "No, I have this". Id at 867. The employee did not see a gun but believed the defendant was armed. The appellate court affirmed both convictions. The court first noticed that "display" is not defined in the first degree robbery statute. The court applied the ordinary dictionary meaning which defined display to mean "to spread or stretch out wide, unfold to exhibit to the sight or mind.... manifest, disclose." Henderson at 867 (quoting Webster's Third New International Dictionary at 654. (1976). The court reasoned that to satisfy the "display" element a verbal threat must be accompanied by a physical manifestation by the defendant that the defendant is armed. Henderson at 868-69.

It seems to us that where the accused indicated (verbally or otherwise) the presence of a weapon (real or toy), the effect on the victim is the same whether it is actually seen by the victim or whether it is directed at the victim from inside a

pocket. In either situation the apprehension and fear is created which leads the victim to believe the robber is truly armed with a deadly weapon. Accordingly, the victim feels compelled to comply with the accused's demand for money....

....Here, the evidence established both victims apprehended defendant's *words and actions* to mean he had a gun.

We hold, therefore, the trial court properly submitted the first-degree robbery charges to the jury...

More recent cases have expounded upon Henderson. In State v Kennard, 101 Wn. 2d Wn. App 533, 6 P. 3d 38 (2000) the defendant entered a bank, demanded money from a teller, stated he had a gun, patted his hip and told the teller he knew where she lived. The court, in affirming the first-degree robbery conviction approved of the following instruction based on Henderson,

"To display what appears to be a firearm' means to exhibit or show what appears to be a firearm to the view of the victim or to otherwise manifest by *words and actions* the apparent presence of a firearm even though it is not actually seen by the victim."

Kennard, Id at 537.

In State v Barker, 103 Wn. App 893, 14 P. 3d 863 (2000), the

defendant entered a store, told the clerk he had a gun, ordered the clerk to give him cash and threatened to shoot her if she didn't make it fast. When the clerk turned away, the defendant pressed something hard into her back. The court found that the "display" element was met for first-degree robbery.

Henderson, Kennard, and Barker all involved verbal threats of a weapon accompanied by a physical act or manifestation in addition to threatening words alone. These cases must be contrasted with In re Personal Restraint of Bratz, 101 Wn. App 662, 5 P. 3d 759 (2000) and State v Scherz, 107 Wn. App 427, 27 P. 3d 252 (2001) in which the courts held that "displays" element requires some physical manifestation and that mere words alone and the victims fear is not sufficient to meet the "displays" element.

In Bratz, the defendant entered a bank and told the teller "I have nitroglycerin in my coat and I need you to give me money or I'll blow up the bank". Id at 665. The defendant made no physical move to show the teller the apparent nitroglycerin and none was found on him when he was arrested shortly after the robbery. The defendant argued that verbal threats alone are not sufficient to meet the "displays" element. The state

attempted to argue to the contrary. The court agreed with Bratz' argument.

Bratz at 675-76.

In arguing that words alone can bring a defendant within the parameters of the first degree robbery statute, the State seeks an interpretation that would render "displays" tantamount to "threatens." Yet we are aware that in other instances the Legislature has provided that the mere threat of use of a deadly weapon is sufficient to sustain a first-degree charge. See *RCW 9A.44.040* (first degree rape). Here, the Legislature did not so provide, instead choosing to require the act of display. We find this significant, as "it is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed. "*Millay v. Cam*, 135 Wn.2d 193, 202, 955 P. 2d 791 (1998); see also *State v. Coe*, 109 Wn.2d 832, 845, 750 P.2d 208 (1988) (recognizing that threatened use is not included in the definition of first degree robbery); *State v. Ingham*, 26 Wn. App. 45, 52, 612 P.2d 801, review denied, 94 Wn.2d 1008(1980) (distinguishing between the display and threatened use of a deadly weapon).

Thus, we hold that the mere threatened use of a deadly weapon in the commission of a robbery, unaccompanied by any physical manifestation indicating a weapon, is second degree robbery, not first. To conclude otherwise would negate

the presumed distinction the Legislature intended when it enacted the first and second-degree robbery statutes. While providing that second-degree robbery can be committed by the threatened use of immediate force, the Legislature made no mention of threats as being sufficient to constitute first degree robbery. We consequently conclude that the statutory requirement of displays is not satisfied by the mere verbal allusion to a weapon.

In Scherz, the defendant entered a bank and told the teller "I need about a thousand dollars, I have a hand grenade in my pocket". Id at 429. The teller asked the defendant if he was serious, he said "yes". Id at 429. The defendant never displayed a grenade and did nothing other than verbally indicate he had one. The court held that the case was no different than Bratz, rejecting the state's argument that display includes exhibiting to the mind and that a verbal threat meets that definition. Scherz at 435-36.

We agree with Mr. Scherz that Bratz is controlling here. Unlike in Henderson, Kennard, and Barker, where the defendants' physical manifestations justified first degree robbery instructions for displaying what appeared to be a weapon, Mr. Scherz's mere statement he had a hand grenade is akin to Mr. Bratz's mere verbal threat to blow up the bank with nitroglycerin. Critically, not only did

no witness see the silver end of the toenail clippers, but there is also no evidence in the record that anyone saw Mr. Scherz motion toward his pocket or make any physical gesture indicating a weapon along with the verbal threat. No witness was asked that question.

The State nevertheless contends that the dictionary definition of "display" includes exhibiting to the sight or mind, thus making Mr. Scherz's verbal threat of a deadly weapon a display to the mind. *Henderson*, 34 Wn. App. at 867. And, any physical act by Mr. Scherz would only have reinforced the verbal display already completed. The State thus concludes Mr. Scherz's words were the equivalent of a "toy gun," which the victim was not expected to investigate to determine if it was real.

This reasoning is flawed because in both *Henderson* and *Kennard*, it was the defendants' *words and actions* that exhibited a weapon to the victims' minds. Mr. Scherz's mere statement allowed the victim only to imagine a weapon, yet perceive a threat that satisfied the elements of second degree robbery. Although the effect of fear on the victim may be the same, the defendant's verbal statement without more is insufficient for first-degree robbery.

The present case involves no verbal threat and physical manifestation at all. Display by its very meaning presumes that the apparent weapon was hidden or concealed and that the defendant made

some verbal threat and physical manifestation to exhibit to the victims sight or mind that he or she had a deadly weapon even if they have no weapon at all. In the present case, the vehicle was plainly visible at all times to the store manager. The defendant here arrived at the gas kiosk in the vehicle and departed in the vehicle. It is no coincidence that the Washington cases on the "display" element all involve an apparent weapon concealed or possibly concealed on the person. A person who enters a store with a deadly weapon openly visible at all times and commits robbery by taking property by force or otherwise uses or threatens to use the weapon to retain possession of the property might be armed with a deadly weapon and might be guilty of first degree robbery under RCW 9A.56.200 (1) (a) (i), but not under the "displays" alternative of (a)(ii).

Further, in State v Tongate, 93 Wn. 2d 751, 613 P. 2d 121 (1980), this court held that under RCW 9A.56.200 (a) (ii) that a robber can use a toy gun or other object that merely resembled a deadly weapon in the commission of a robbery and be convicted of first degree robbery since he displayed what appeared to be a firearm or deadly weapon. A person does not have to be actually armed with a real weapon to be convicted under the "displays" alternative.

What is obvious from the Legislature's creation of the separate "armed" and "displays" alternatives is that they intended them to mean something different. A difference in Legislative intent and meaning is presumed when language is used in one instance and different language is used in another instance. Millay v Cam 135 Wn. 2d 193, 202, 955 P. 2d 791 (1998) Sherz, supra at 435. Simply put, armed and display cannot and do not mean the same thing. What is also obvious is that the "armed" alternative was meant to apply where there is an actual real firearm or deadly weapon. Armed has been defined as "having a weapon readily assessable and available for use." State v Faille, 53 Wn. App 111, 113, 766 P. 2d 478 (1988). Faille involved the "armed with a deadly weapon" alternative in the Burglary in the First Degree statute, RCW 9A.52.020 (1) (a). A similar definition has been applied to being armed with a deadly weapon for purposes of a special sentencing enhancement finding under RCW 9.94 A. 602. State v Willis 153 Wn. 2d 366, 103 P. 3d 1213 (2005).

The dictionary meaning of armed is:

- 1a. furnished with weapons.
- b. furnished with something that provides security, strength or efficacy.

Webster's Collegiate Dictionary 10th ed (2001) P. 63. A person can be

armed with a deadly weapon for purposes of robbery in the first degree and never show or display the weapon. The weapon however for the "armed" alternative must be a real one as opposed to a fake one or none at all which can provide for a conviction under the "displays" alternative.

The defendant in the present case did not display what appears to be a deadly weapon for the following reasons. The motor vehicle was real, not apparent or fake. The Legislature by creating two separate alternatives under RCW 9A.56.200 (1) intended real weapons for the armed alternative and apparent or fake weapons for the "displays" alternative. Secondly, the motor vehicle was openly visible at all times, also Ms. Sparling made no verbal threats and made no physical manifestation to display it as that term has been defined by caselaw.

The trial court in finding the defendant guilty of robbery in the first degree clearly confused "armed" and "displayed" and found them to mean the same. A clear example of this confusion is the court's use of a hypothetical. (RP 195) (RP 209). The court described a person who enters a grocery store having just left a baseball field. The person enters, dressed in a baseball uniform with a bat and glove. The person decides to take something without paying for it and uses the bat in doing so. The

court concluded that the bat was "displayed". Defense counsel argued that the person was "armed" in this hypothetical, that the court has improperly equated "armed" and "display", and that the Legislature intended them to mean entirely different things. (RP 195-96). The court relied on its hypothetical in finding the defendant guilty. (RP 209). If one were to accept the court's theory then there would be no need to distinguish "armed" and "display" as the Legislature has done in defining the alternative means of robbery in the first degree. The trial court's theory would have a person displays what appears to be a deadly weapon every time a real weapon is openly visible throughout the robbery, which includes leaving the scene.

The charge of Robbery in the First Degree, in this case, if allowed to stand, completely changes how robbery can be charged in this state. Potentially every second degree robbery becomes elevated to first degree every time the victim observes the vehicle that the defendant arrived with at the scene of the robbery or used to depart the scene.

The following hypothetical illustrates this point:

[A] enters a store and takes merchandise without paying for it. [A] starts to exit the store and is approached by an employee. [A] pushes the employee back and flees out the door with the merchandise. [A] then jumps into his vehicle, which he left running outside the store's

front door. The employee clearly sees the vehicle as [A] flees the scene. The employee gets the license plate number of the vehicle and soon [A] is arrested.

Based on the charging theory used in the present case, [A] would be guilty of first degree robbery instead of second degree because he displayed what appeared to be a deadly weapon, the vehicle he arrived with and used to depart the scene. Any case of robbery in which a victim observes the defendant's vehicle becomes first degree robbery under the "displays" alternative. There is nothing in existing caselaw or in RCW 9A.56.200 itself to indicate that the Legislature intended this result when it enacted RCW 9A.56.200 (a) (ii). The court committed error in equating the "displays" alternative with the "armed" alternative. Washington law and caselaw does not and cannot support a conviction for robbery in the first degree in this case.

- b. Assuming that the defendant is not guilty of Robbery in the First Degree as argued above, the defendant may be found guilty of any lesser included crime.

Generally, when there is insufficient evidence to support a conviction on the charged offense, the appellate court may direct that the defendant be found guilty and re-sentenced on a lesser-included offense or a lesser degree offense. The essential consideration in making such a determination is to

focus on whether the trier of fact found each element of the lesser-included offense or lesser degree offense in reaching its verdict on the charged crime. State v DeRosia 124 Wn. App 138, 151, 100 P. 3d 331 (2004), State v Gilbert, 68 Wn. App 379, 385, 842 P. 2d 1029 (1993). There are two possibilities in this case, the lesser degree crime of robbery in the second degree or the lesser included crime of theft in the third degree.

The test to determine whether an offense is a lesser degree offense is whether (1) the statutes for both the charged and inferior degree offense proscribe but one offense; and whether (2) the charged offense is one that is divided by degrees, the lesser degree crime must be an inferior degree of the crime charged; and that the evidence shows that only the lesser degree offense was committed. State v Fernandez-Medina, 141 Wn. 2d 448, 454, 6 P. 3d 1150 (2000). Robbery in the second degree is obviously a lesser degree offense of robbery in the first degree.

RCW 9A.56.210 provides that a person commits robbery in the second degree when he commits robbery. RCW 9A.56.190 defines robbery as:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or

threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Washington adopts a transactional view of robbery requiring that force be used to either take the property, retain the property, or overcome resistance to the taking. State v Johnson, 155 Wn. 2d 609, 121 P. 3d 91 (2005).

Petitioner disputes the trial courts conclusion of law that the crime committed was robbery and Petitioner believes that the crime committed was theft.

In the present case, Ms. Sparling took twenty dollars of gasoline without paying for it. She attempted to pay for it with an obviously bogus check. The trial court concluded that when she drove her vehicle away at a high rate of speed brushing the store manager, that Ms. Sparling used force to retain the stolen property (the gasoline in the tank), or prevent resistance to the taking. However, the evidence clearly suggests that there existed

several other reasons why Ms. Sparling could have fled the scene. First, she had attempted to use a check that was either forged, stolen or both. Second, she had additional forged and or stolen checks in her vehicle. Third, she had an illegal controlled substance and drug paraphernalia in the vehicle. Finally, Ms. Sparling had three outstanding felony warrants for her arrest out of King County. Petitioner argued at trial that any or all of these reasons would more likely be the reason for her flight and that the existence of these reasons made it unlikely that the State proved beyond a reasonable doubt that she used force to retain the property. (RP 191-193). Petitioner believes that only the crime of theft in the third degree was committed by taking twenty dollars worth of gasoline.

RCW 9A.56.050 provides in pertinent part that a person who commits theft of property valued at two hundred fifty dollars or less, is guilty of theft in the third degree. The test to determine whether an offense is a lesser included offense is the traditional Workman test. The test, originating in State v Workman, 90 Wn.2d 443, 584 P. 2d 382 (1978) provides that an offense is a lesser included offense if first, each of the elements of the lesser offense is a necessary element of the charged offense, and second, the evidence in the case must support an inference that only the lesser offense

was committed. Fernandez-Medina, supra; at 455. Theft in the third degree meets this test. Petitioner argued at trial that the only crime committed by taking the gasoline was theft in the third degree. (RP 196-97).

Petitioner has just argued above why the facts in the present case do not support a robbery conviction. Ms. Sparling had for more serious reasons to want to flee the scene than taking twenty dollars worth of gasoline. The theft of gasoline would only be a gross misdemeanor while the other evidence clearly shows that she had several possible ongoing felony crimes prior to fleeing in her vehicle, including, unlawful possession of a controlled substance, forgery, and possession of stolen property in the second degree. She also had three outstanding King County felony warrants as well. The trial court's Conclusion of Law III that the defendant threatened and used force to retain the stolen property (the gasoline) or to prevent or overcome resistance to the taking is error because given the far more serious reasons the defendant had to flee, a gross misdemeanor theft would not be one of them. The State did not prove beyond a reasonable doubt that Ms. Sparling fled and used force to retain the stolen gasoline.

A review of the sufficiency of the evidence claim arising from a bench trial is limited to whether substantial evidence supports the court's findings

of fact and whether the findings support the conclusions of law. State v Alvarez, 105 Wn. App 215, 220, 19 P. 3d 485 (2001). Evidence is sufficient to support a conviction if after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v Green, 94 Wn 2d 216, 616 P. 2d 628 (1980). The trial courts legal conclusions are reviewed de novo. State v Collins, 121 Wn. 2d 168, 174, 847 P. 2d 919 (1993). The evidence in the present case does not support a conviction for the lesser degree crime of robbery in the second degree and only supports the lesser included crime of theft in the third degree.

E. CONCLUSION

The trial court committed error when it concluded that the defendant was guilty of robbery in the first degree. The "displays what appears to be a firearm or other deadly weapon" alternative means of committing robbery in the first degree (RCW 9A.56.200 (1) (a) (ii)) was not intended by the Legislature to include the automobile used by the defendant to arrive at and depart from the robbery scene. The court's above conclusion turns every second degree robbery into first degree every time the victim sees the

automobile used by the defendant to arrive at and depart from the robbery scene, the Legislature never intended this result.

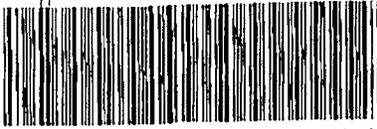
The only lesser crime supported by the evidence in this case is theft in the third degree. Petitioner respectfully asks this court to reverse her conviction of robbery in the first degree, find her guilty of theft in the third degree and remand to the trial court for resentencing.

Respectfully submitted this 22nd day of December, 2006



DINO G. SEPE, WSBA# 15879
Attorney for Appellant
949 Market Street, Ste 334
Tacoma, WA 98402
(253) 798-6989

APPENDIX I
INFORMATION



05-1-04714-5 23778227 INFO 08-27-05

FILED
IN COUNTY CLERK'S OFFICE

A.M. SEP 28 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY *[Signature]*

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04714-5

vs.

JOSEPHINE KATHLEEN SPARLING,

INFORMATION

Defendant.

69A 15155

DOB: 11/26/1960
PCN#: 538548669

SEX : FEMALE
SID#: UNKNOWN

RACE: UNKNOWN
DOL#: WA SPARLJK405Q6

COUNT I

I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JOSEPHINE KATHLEEN SPARLING of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

That JOSEPHINE KATHLEEN SPARLING, in the State of Washington, on or about the 24th day of September, 2005, did unlawfully and feloniously take personal property belonging to another with intent to steal from the person or in the presence of T. Williams, the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to T. Williams, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking, and in the commission thereof, or in immediate flight therefrom, the defendant displayed what appeared to be a firearm or other deadly weapon, to-wit: an automobile, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(ii), and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JOSEPHINE KATHLEEN SPARLING of the crime of ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE, a crime of the same or similar

INFORMATION- 1



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930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 character, and/or a crime based on the same conduct or on a series of acts connected together or
2 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
3 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
4 follows:

5 That JOSEPHINE KATHLEEN SPARLING, in the State of Washington, on or about the 24th
6 day of September, 2005, did unlawfully, feloniously, and wilfully fail or refuse to immediately bring her
7 vehicle to a stop and drive her vehicle in a reckless manner while attempting to elude a pursuing police
8 vehicle, after being given a visual or audible signal to bring her vehicle to a stop by a uniformed officer in
9 a vehicle equipped with lights and sirens, contrary to RCW 46.61.024(1), and against the peace and
10 dignity of the State of Washington.

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COUNT III

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse JOSEPHINE KATHLEEN SPARLING of the crime of
UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, a crime of the same or similar
character, and/or a crime based on the same conduct or on a series of acts connected together or
constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
follows:

That JOSEPHINE KATHLEEN SPARLING, in the State of Washington, on or about the 24th
day of September, 2005, did unlawfully and feloniously, possess a controlled substance, to-wit:
Methamphetamine, classified under Schedule II of the Uniform Controlled Substances Act, contrary to
RCW 69.50.4013, and against the peace and dignity of the State of Washington.

COUNT IV

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse JOSEPHINE KATHLEEN SPARLING of the crime of
FORGERY, a crime of the same or similar character, and/or a crime based on the same conduct or on a
series of acts connected together or constituting parts of a single scheme or plan, and/or so closely
connected in respect to time, place and occasion that it would be difficult to separate proof of one charge
from proof of the others, committed as follows:

That JOSEPHINE KATHLEEN SPARLING, in the State of Washington, on or about the 24th
day of September, 2005, did unlawfully and feloniously, with intent to injure or defraud and knowing the
same to be forged, possess, utter, offer, dispose of, or put off as true to a Safewy store clerk, a written

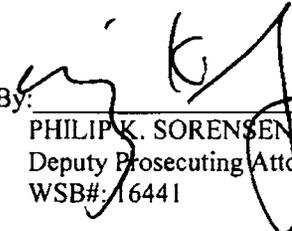
1 instrument, described as follows, to-wit: a bank check belonging to another, contrary to RCW
2 9A.60.020(1)(b), and against the peace and dignity of the State of Washington.

3 DATED this 26th day of September, 2005.

4 BONNEY LAKE POLICE DEPARTMENT
WA02714

GERALD A. HORNE
Pierce County Prosecuting Attorney

5
6 pks

By: 

PHILIP K. SORENSEN
Deputy Prosecuting Attorney
WSB#: 16441

1 NO. 05-1-04714-5
 2 DECLARATION FOR DETERMINATION OF PROBABLE CAUSE

3 PHILIP K. SORENSEN, declares under penalty of perjury:

4 That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police
 5 report and/or investigation conducted by the BONNEY LAKE POLICE DEPARTMENT, incident
 number 05002286;

6 That the police report and/or investigation provided me the following information;

7 That in Pierce County, Washington, on or about the 24th day of September, 2005, the defendant,
 8 JOSEPHINE KATHLEEN SPARLING, did commit several crimes including robbery, forgery,
 possession of stolen property and unlawful possession of controlled substances.

9 On the above date at 1600 hours Bonney Lake Police Officer K.Torgerson was driving his patrol
 10 car in the 21400 block of SR 410, near the Safeway store driveways. Officer Torgerson's car was almost
 11 struck by a small silver car exiting the store parking lot at a high rate of speed. Officer Torgerson
 12 activated his lights and siren and gave chase. The silver car fled at a high rate of speed, ignoring traffic
 signals and driving into oncoming lanes of traffic. Eventually the silver car stopped in a cul-de-sac on
 107th Avenue Court East. The driver, identified as SPARLING, was arrested. A records check showed
 that three warrants were outstanding for her arrest. SPARLING told officers that various bags and a
 purse inside the silver car belonged to her.

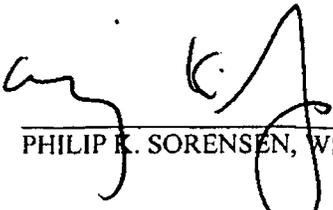
13 In SPARLING'S purse officers found bank checks belonging to three different people, including
 14 N.Bindara. Bindara was contacted, indicated that he was missing checks, and identified SPARLING as
 the mother of an ex-girlfriend of Bindara. SPARLING told officers that she tried to pay for gas at the
 Safeway using a check belonging to "Nathan" something.

15 Officers contacted store employees who reported that SPARLING pumped gas at the store's fuel
 16 station, then tried to pay for the gas using a possible stolen check. SPARLING returned to her car before
 the check was processed and drove off. Store Manager T.Williams was alerted to the possible theft and
 17 made his way into the parking lot. Williams stood near the exit and tried to stop SPARLING'S car.
 SPARLING drove straight at Williams, forcing Williams to dive out of the way. As it was, Williams' leg
 was struck by SPARLING'S car.

18 From a backpack in SPARLING'S a bag of powder and several syringes. A field test was
 19 positive for methamphetamine. The investigation continues. Additional charges related to stolen
 property, identity theft and forgery may be added if warranted.

20 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
 21 WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

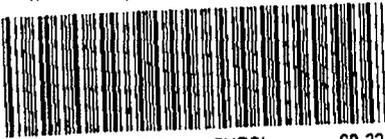
22 DATED: September 26, 2005
 PLACE: TACOMA, WA

23 
 24 PHILIP K. SORENSEN, WSB# 16441

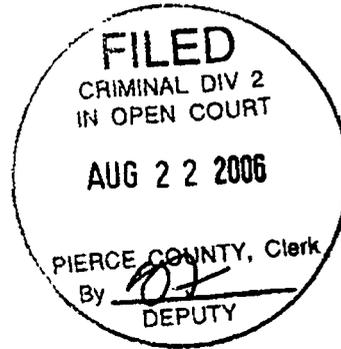
DECLARATION FOR DETERMINATION
 OF PROBABLE CAUSE -1

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 930 Tacoma Avenue South, Room 946
 Tacoma, WA 98402-2171
 Main Office (253) 798-7400

APPENDIX II
FINDINGS OF FACT AND CONCLUSIONS OF LAW



05-1-04714-5 28017874 FNCL 08-22-06



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04714-5

vs.

JOSEPHINE KATHLEEN SPARLING,

FINDINGS OF FACT AND CONCLUSIONS
OF LAW
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable Sergio Armijo, Judge of the above entitled court, for bench trial on the 22nd day of May, 2006, the defendant having been present and represented by attorney Dino G. Sepe, and the State being represented by Deputy Prosecuting Attorney Gregory L. Greer, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on September 26, 2005 an Information was filed charging the defendant with one count each of robbery in the first degree, attempting to elude, unlawful possession of a controlled substance and forgery.

That on May 22, 2006, the State filed an amended information charging the defendant with the identical charges of the original information with the exception of substituting the charge in Count III to reflect that the unlawful controlled substance alleged is cocaine and not methamphetamine.

05-1-04714-5

1 On September 24, 2005 at about 1600 hours, Bonney Lake Police Department Off. Kyle
2 Torgeson was in a marked patrol vehicle traveling southbound on 214th Ave. East from SR 410 when he
3 noticed a small silver vehicle driving at a high rate of speed eastbound across a Safeway Grocery Store
4 parking lot located at 21301 SR 410 (the defendant was later identified as the sole occupant and driver of
5 this vehicle). The vehicle entered into 214th Ave. East without stopping to check for traffic. Off.
6 Torgeson had to slam on his brakes in order avoid contact with the defendant's vehicle. The vehicle then
7 proceeded northbound on 214th Ave. East;

8 Off. Torgeson turned his patrol vehicle around and attempted to stop the defendant's vehicle.
9 The defendant's vehicle immediately turned eastbound into a Chevron Gas Station located on the
10 southeast corner of SR 410 and 214th Ave. East. Off. Torgeson activated his emergency lights and siren.
11 The defendant's driver's side window was rolled down and the passenger rear side window was missing.
12 The defendant's vehicle proceeded through the Chevron station parking lot and traveled eastbound on SR
13 410. The defendant's vehicle passed several other vehicles while traveling eastbound on SR 410. The
14 defendant was traveling at speeds between 60 and 70 mph. At this time, Off. Torgeson was notified via
15 dispatch that the defendant's vehicle had just left the Safeway Gas Station without paying for gas she had
16 pumped into her vehicle;

17 The defendant's vehicle turned southbound onto 234th Ave. East and continued at speeds between
18 60 and 70 mph and passed more vehicles on the left side while at times traveling into the oncoming lanes
19 of 234th Ave. East. The defendant's vehicle then turned westbound onto South Prairie Road without
20 making a complete stop at the stop sign and then traveled westbound on South Prairie Road to 200th Ave.
21 Ct. East. As the defendant's vehicle crossed 214th Ave. East, Off. Torgeson used his patrol system P.A.
22 and ordered the defendant to stop and pull over. The defendant then turned southbound onto 200th Ave.
23 Ct. East and proceeded southbound on 200th Ave. Ct. East before turning eastbound onto 107th St. Ct.
24 East. The defendant then came to the end of 107th St. Ct. East, a dead end, and stopped. After stopping,
25 the defendant was taken into custody without further incident.

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1 The defendant identified herself to Off. Torgeson and another responding officer discovered that
2 there were three felony warrants active out of King County, for the defendants arrest;

3 Off. Torgeson read the defendant her Miranda rights in their entirety and she knowingly and
4 voluntarily waived them after fully understanding each of the rights;

5 When asked, the defendant stated she did not know why she ran from the officer;

6 Off. Torgeson searched the defendant's vehicle incident to arrest and located a black purse in
7 between the two front seats of the vehicle. Inside the purse, Off. Torgeson located two separate
8 checkbooks, one of which had the name Nathan Bindara on the checks. The other checkbook had the
9 name Jennifer and Eric Messenger on them. Included in one of the checkbooks were two loose checks
10 with the name Thomas L. Bundy on them. The defendant stated that the purse was hers;

11 The defendant was taken to the Bonney Lake Police Department for an interview and her vehicle
12 was taken to Cascade Towing's secure impound lot. A further search of the defendant's vehicle revealed
13 several tote bags and backpacks. A black nylon case was found inside a blue backpack, located behind
14 the driver's seat. Notes with the defendant's name on them, a purple plastic scale, several empty Ziploc
15 baggies, a blue straw, a glass smoking pipe, and a Ziploc bag containing white powdery substance were
16 found inside the black nylon case;

17 The Washington State Patrol Crime lab tested the white powdery substance found inside the black
18 nylon case and determined that it was the controlled substance, cocaine;

19 The defendant was interviewed by Off. Torgeson at the Bonney Lake Police Department and she
20 told him that she had used a check belonging to someone she did not know and without his permission
21 when purchasing gas at the aforementioned Safeway Gas Station. The defendant could only say the
22 check belonged to "Nathan something." The defendant said she may have blacked out after that;

23 When advised that she nearly hit someone with her vehicle when she was leaving the Safeway
24 store parking lot, and that she almost hit Off. Torgeson's patrol vehicle as she was exiting the parking lot,
25 the defendant just stared at Off. Torgeson and would not say anything;

05-1-04714-5

1 The defendant told Off. Torgeson she had done "Meth" the night before. The defendant admitted
2 all the bags and backpacks were hers. When confronted by Off. Torgeson with the contents of the bags
3 and asked if she knew anything about them, the defendant would not answer;

4 Officers confirmed the checks found with the defendant's other property with the name "Nathan
5 Bindera" had been reported stolen.

6 Shortly after the defendant's apprehension by Off. Torgeson, Bonney Lake Police Department
7 Officer Todd Morrow responded to the Safeway store where the reported theft of gasoline had occurred.
8 Upon arrival he spoke with the manager of the store, Troy H. Williams.

9 Mr. Williams had been inside the Safeway store when he was notified by an employee at the gas
10 station kiosk that an unidentified female (later identified as the defendant) had just driven away after
11 fueling her vehicle without paying for the gas. Mr. Williams then walked out of the main store into the
12 parking lot in an attempt to identify and stop the vehicle. While Mr. Williams was standing in the south
13 exit of a parking stall, he saw the defendant's vehicle. Mr. Williams walked down the center of the lane
14 between the parking stalls and approached the defendant's vehicle from its front while putting both of his
15 hands up in the air to advise the defendant's approaching vehicle to stop. Upon seeing Mr. Williams, the
16 defendant accelerated her vehicle and attempted to drive right at him, forcing Mr. Williams to jump out of
17 the way of the vehicle. Mr. Williams was lightly swiped on the right leg by the defendant's vehicle's
18 front right bumper as it passed by him. If Mr. Williams had not jumped out of the way, he would have
19 been hit and probably severely injured.

20 ~~Mr. Williams was wearing clothing that associated him as an employee of the Safeway store.~~ 

21 Off. Morrow spoke with Miriam Graham, the gas station kiosk worker who witnessed and
22 reported the theft of the gas.

23 Ms. Graham was working in the gas station kiosk and attended to the defendant when she
24 attempted to pay for \$20 worth of gas that she had already pumped into her vehicle.

25 The defendant handed Ms. Graham a check written on "Nathan Bindera's" account, which Ms.
Graham suspected was a stolen check. When Ms. Graham asked the defendant for identification, the

05-1-04714-5

1 defendant stated she would go back to her car and find some possible cash to pay for the gas. Ms.
2 Graham told the female to wait and see if the check clears but she was really alerting Mr. Williams to
3 come out and take care of the situation. The defendant then said "let me go get my keys from the car"
4 and she went to her vehicle, got inside, and left the gas station without paying for the gas. Ms. Graham
5 saw the defendant drive away from her kiosk and then shortly after that Mr. Williams came into the kiosk
6 complaining that he had just been hit by the defendant's vehicle as she passed him in the parking lot.

7 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

8 CONCLUSIONS OF LAW

9 I.

10 That the Court has jurisdiction of the parties and subject matter.

11 II.

12 That all relevant events occurred in Pierce County.

13 III.

14 That Josephine Kathleen Sparling is guilty beyond a reasonable doubt of the crime of robbery in
15 the first degree, attempting to elude a pursuing police vehicle, unlawful possession of a controlled
16 substance – cocaine, and forgery, in that, on September 24, 2005, the defendant, in an attempt to defraud,
17 and knowing that she was forging a stolen check, personally wrote a check for \$20 from a stolen
18 checkbook belonging to Nathan Bindera, without his permission or knowledge, and put it off as a true
19 instrument when presenting it to the Safeway Gas Station kiosk worker, Ms. Miriam Graham. Thus the
20 defendant is guilty of Forgery as charged in Count IV of the Amended Information.

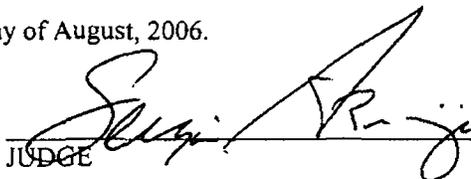
21 Further, after driving away from the kiosk without paying for the \$20 worth of gas (theft of the
22 gas), the defendant both threatened and used force, violence and injury in order to retain the stolen gas
23 and to overcome Mr. Troy Williams' efforts at resisting her taking of the gas, and while in flight from the
24 Safeway store, the defendant attempted to hit Mr. Williams with her vehicle, which under the
25 circumstances in which it was being used constituted a deadly weapon. Thus the defendant is guilty of
robbery in the first degree as charged in Count I of the Amended Information.

05-1-04714-5

1 The defendant, after almost hitting Off. Torgeson's vehicle as she left the Safeway store, willfully
 2 failed or refused to immediately bring her vehicle to a stop and she drove her vehicle in a reckless manner
 3 while attempting to elude Off. Torgeson's pursuing patrol vehicle, and after being given an audible and
 4 verbal signal to bring her vehicle to a stop by Off. Torgeson, who was in full uniform and operating his
 5 vehicle during the pursuit with lights and siren activated. Thus the defendant is guilty of attempting to
 6 elude a pursuing police vehicle as charged in Count II of the Amended Information.

7 And finally, after being apprehended, and during a lawful search of the defendant's personal
 8 property, the defendant was found to be in possession of cocaine, a controlled substance. Thus the
 9 defendant is guilty of unlawful possession of a controlled substance as charged in Count III of the
 10 Amended Information.

11 DONE IN OPEN COURT this 22nd day of August, 2006.

12 
 13 JUDGE

14 Presented by:

15 
 16 GREGORY L. GREER
 17 Deputy Prosecuting Attorney
 18 WSB # 22936

19 Approved as to Form:

20 
 21 DINO G. SEPE
 22 Attorney for Defendant
 23 WSB # 15879

Dino G. Sepe, a United States Citizen over 18 years of age, served Office of Prosecuting Attorney - Appeals Division, Pierce County
a true copy of the document to which this certification is affixed, on 12-22, 2006. Service was made by delivery to _____ (ABC Legal Messengers Inc.); X (DAC Staff Person Delivery); _____ (Depositing in the mails of the United States of America, properly stamped and addressed).
Dino G. Sepe
Signature
Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma WA 98402

Dino G. Sepe, a United States Citizen over 18 years of age, served Josephine Sparking DOC# 714462, 9601 Bujacich Rd N.W., Gig Harbor, WA 98332
a true copy of the document to which this certification is affixed, on 12-22, 2006. Service was made by delivery to _____ (ABC Legal Messengers Inc.); _____ (DAC Staff Person Delivery); X (Depositing in the mails of the United States of America, properly stamped and addressed).
Dino G. Sepe
Signature
Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma WA 98402