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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39930-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Damis,

Appellant.

Thurston County Superior Court Cause No. 08-1-01860-5

The Honorable Judge Anne Hirsch

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that violated Mr. Damis's Fourteenth Amendment right to due process.
2. The prosecutor committed misconduct in closing by vouching for prosecution witnesses.
3. The prosecutor committed misconduct in closing by expressing personal opinions about the evidence.
4. The trial judge erred by admitting inadmissible hearsay.
5. The trial judge erroneously admitted C.M.'s hearsay statements as excited utterances.
6. Mr. Damis was denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
7. Defense counsel was ineffective for failing to object to inadmissible hearsay bolstering C.M.'s accusations of sexual misconduct.
8. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor may not vouch for a witness nor express a personal opinion about the evidence. In this case, the prosecutor vouched for the state's witnesses and expressed her personal opinion about the evidence. Did the prosecutor's misconduct violate Mr. Damis's Fourteenth Amendment right to due process?
2. Hearsay is inadmissible unless it falls within an exception to the rule against hearsay. In this case, C.M. made statements to Martha Miller concerning alleged incidents of sexual misconduct that had started months earlier. Did the trial judge err by admitting C.M.'s hearsay statements as "excited utterances?"

3. An accused person has a constitutional right to the effective assistance of counsel. Mr. Damis's attorney failed to object to inadmissible hearsay. Was Mr. Damis denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

4. When faced with prosecutorial misconduct in closing, a reasonably competent defense attorney will request a bench conference to lodge objections, seek curative instructions, or request a mistrial. In this case, Mr. Damis's attorney failed to make appropriate objections to prosecutorial misconduct in closing. Was Mr. Damis denied his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

C.M., aged 13, hated living at her father's residence. His property was very isolated, he spent little time at home, and she didn't like his girlfriend, Rita. RP¹ 62, 89-90, 167-169, 236. Instead, she wanted to live with Rita's father, Michael Damis. Mr. Damis treated her well, and lived in an RV park where some of her friends lived. She moved into Mr. Damis's RV in September or December of 2007, and he drove her to school in Yelm (saving her a walk through rain to the bus stop). RP 13, 114, 123, 170-173, 242.

During her 2007 spring break, C.M. traveled to Arizona, to stay in a home Mr. Damis had there. RP 68, 104. He had previously taken her other siblings to the Arizona house, and C.M. was excited to take a road trip and swim in the pool there. RP 231. Mr. Damis bought her a bathing suit to wear. RP 107, 191. After they returned to Washington, they showed pictures from their trip to C.M.'s aunt Martha Miller, including a photo, taken with Mr. Damis's cell phone, of C.M. in her bikini. RP 69-70. Following this trip, C.M. initiated paperwork at her school so that she

¹ The Verbatim Report of Proceedings from the trial was numbered consecutively. Citations to transcripts from hearings other than the trial will include the date.

could live with Mr. Damis and register for school from his home. RP 134-135, 243.

C.M.'s aunt, Martha Miller, contacted the police on June 10, 2008, and reported that Mr. Damis had been touching C.M.'s breasts for five minutes every half hour, all day every day since C.M. had moved in with him. RP 79, 88, 97. The state charged Mr. Damis with two counts of Child Molestation in the Second Degree, occurring between December 1, 2007 and June 10, 2008. CP 2.

At Mr. Damis's jury trial, Detective Kolb testified first. RP 27-52. He told the jury that he'd interviewed, C.M., who claimed that Mr. Damis he fondled her breasts, under her bra, daily. RP 33. C.M. told Kolb that Mr. Damis threatened to take away her phone privileges if she didn't allow him to touch her. RP 33. At that point in Kolb's testimony, Defense counsel raised a hearsay objection; however, when the court sustained the objection, defense counsel didn't ask the court to strike the testimony. RP 33.

Martha Miller told the jury that Mr. Damis was very excited to show her the picture of C.M. in her bikini, and claimed that he opened his mouth like he was drooling. RP 69-71, 131. She said the picture was inappropriate and described C.M. as a very modest person. RP 69-71, 75.

Over defense objection, the state sought to introduce statements C.M. made to Martha Miller in June of 2009. RP 83. Ms. Miller said that she asked C.M. what was wrong more than once, and told her that if anything was wrong she could tell Ms. Miller. RP 79-80. She described C.M. as quiet, pale, sad and fidgeting. RP 80-82. Ms. Miller said that after being prompted, C.M. told her about the touching, and then broke down crying hysterically. RP 82. The court found that C.M.'s hysterical crying meant that she was still under the stress of the incident when she made her statements, and that the statements therefore qualified as excited utterances. RP 86-88. The court admitted the statements, and Ms. Miller repeated C.M.'s allegations in front of the jury. RP 86-89.

C.M. testified, and told the jury that Mr. Damis bought her a cell phone after hers broke. RP 173-174. According to her, when she wanted more texts on the phone plan, he told her that her payment would be to let him touch her breasts. RP 178-179. She claimed that he would tell her it was time, that she would sit in a certain chair, and that he would pull up her shirt and bra and touch her breasts for a predetermined amount of time. RP 178-181, 184-185. She alleged that the two times she tried to stop him, he threatened to take away her phone, and she relented. RP 182. She said he never used any force, did not spend time alone afterward, and did not expose himself to her or try to touch her privates. RP 183, 185, 199, 251.

Mr. Damis asked the jury to acquit because the state had not proved its case beyond a reasonable doubt. The attorney urged the jury to question the completeness of the investigation and the evidence presented by the state. RP 306-328. He listed evidence the state had failed to present, which could have shed light on the case, including the lack of testimony from C.M.'s father (who had legal custody of her), the lack of evidence from her siblings or other members of the family who lived with or near Mr. Damis, and the absence of damning photos or phone records corroborating C.M.'s allegations. RP 310-314, 326-327.

During her rebuttal closing argument, the prosecuting attorney faulted Mr. Damis for failing to subpoena his wife (or ex-wife):

We didn't hear from Aleta, this supposed ex-wife, wife. We don't know who she is. Who is Aleta? We didn't hear from Aleta. And where are all these other witnesses, right?
RP 331.

The prosecutor also faulted Mr. Damis for failing to present testimony from C.M.'s father Vern, or Vern's girlfriend Rita:

Why didn't we hear from Vern? Why didn't we hear from Rita? Well, the State has got the magical power to subpoena Jesus Christ himself. We put him on the stand and he's got to talk. Well, the State actually has the ethical obligation not to put on perjured testimony. We can't put on people who are going to get up there—
RP 331-332.

An objection was sustained. RP 332. Despite this, the prosecutor revisited the topic after a short speech on the burden of proof:

Defense counsel said well, he's got no obligation. He said it right. Defense has zero obligation. The entire burden is on the State to prove the case. There is no obligation whatsoever to put on any testimony whatsoever, and there's even an instruction that tells you that you cannot use it against him or prejudice this defendant in any way because he didn't testify. You're right, you can't do that. But what did he tell you? Oh, I've got two witnesses, Vern and Rita. Where are they? You know the why the State didn't put them on.
RP 332 .

The jury voted to convict on both counts. CP 3-16. The court sentenced Mr. Damis, and he timely appealed. CP 3-16, 17-31.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A. Standard of Review

Prosecutorial misconduct may be raised for the first time on appeal when it amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).² An error is manifest if it results in actual

² The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, such misconduct requires reversal if it is “so flagrant and ill-intentioned” that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

B. The prosecutor committed misconduct by shifting the burden of proof in closing.

A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006). A prosecutor may not comment on the lack of defense evidence because the defendant has no duty to present evidence. *State v. Dixon*, 150 Wn.App. 46, 54, 207 P.3d 459 (2009). It is improper even to imply that the defense has a duty to present evidence. *Toth*, at 615. Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *Id.*

Here, the prosecutor faulted Mr. Damis for failing to call witnesses, and for failing to explain why their testimony was not presented.³ RP 331-332. This was misconduct that shifted the burden of proof, and is presumed prejudicial. *Dixon*, *Toth*, *supra*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

³ Although defense counsel didn't object, the error may be reviewed for the first time on appeal under RAP 2.5(a) because it had practical and identifiable consequences at trial: the prosecutor shifted the jury's attention away from weaknesses in the state's case and onto Mr. Damis's failure to present testimony. *Nguyen*, 433.

- C. The prosecutor violated Mr. Damis's Fourteenth Amendment right to due process by improperly vouching for state witnesses.

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003) ("Horton I"); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), citing *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981).

Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617, 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986).

In this case, the prosecutor told the jury that "the State actually has the ethical obligation not to put on perjured testimony." RP 331. The clear import was that the prosecutor believed all of the prosecution witnesses. *Price, supra*. This was misconduct, and violated Mr. Damis's right to a fair trial. *Id.* Mr. Damis objected, but the jurors had already heard the statement and knew that the prosecutor personally believed the state's witnesses.

Because the prosecution was based on C.M.'s credibility, there is a substantial likelihood that the misconduct affected the verdict. *Henderson*, at 800. Accordingly, Mr. Damis's conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT SHOULD HAVE EXCLUDED INADMISSIBLE HEARSAY.

A. Standard of Review

The interpretation of an evidence rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. Hearsay is inadmissible unless it fits within an exception to the rule against hearsay.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay evidence is generally inadmissible.⁴ ER 802. “Excited utterances” are admissible as an exception to the rule against hearsay. An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2); *State v. Bird*, 136 Wn.App. 127, 136, 148 P.3d 1058 (2006).

The underlying theory “is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.” Hence, “the ‘key determination is whether the statement was made while the declarant was still under the influence of the event *to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.*’ ”

⁴ In addition to excluding statements, the rule against hearsay excludes general testimony about a statement, if the content of the statement can be inferred from the testimony. See *State v. Johnson*, 61 Wn. App. 539 at 546-547, 811 P.2d 687 (1991) (if “the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant’s guilt, the testimony is hearsay... notwithstanding that the actual statements made by the non-testifying witness are not repeated”); *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999) (“It is improper under the guise of artful cross-examination, to tell the jury the substance of inadmissible evidence.” *Sanchez* at 1222 (internal quotations and citations omitted)).

State v. Hochhalter, 131 Wn.App. 506, 514, 128 P.3d 104 (2006)

(footnotes and citations omitted, emphasis in original).

- C. C.M.'s hearsay statements were made months after the start of upsetting (but not startling) events and thus were not excited utterances.

The trial court erroneously admitted C.M.'s hearsay statements to Martha Miller as excited utterances. RP 86. The statements were made after prompting that took place over the course of a day C.M. spent with Miller, and described sexual misconduct that had allegedly commenced months earlier. RP 79-82, 88. Although the allegations were upsetting, they cannot be described as "startling," as required under the rule.⁵ Furthermore, C.M. unquestionably had time for reflection and conscious fabrication, if that suited her purpose. Accordingly, the statements did not qualify as excited utterances under ER 803(a)(2). *Hochhalter*, at 514. The trial judge erred by overruling Mr. Damis's objection. *Id.*

- D. The erroneous admission of hearsay testimony prejudiced Mr. Damis and affected the outcome of the trial.

The inadmissible hearsay testimony bolstered C.M.'s credibility by emphasizing that she'd repeated her accusation to Martha Miller, and by

⁵ Even if the first alleged incident misconduct could be described as startling, the ongoing offenses described by C.M. were not.

establishing that Miller believed her. But repetition “is not a valid test of veracity.” *State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). Furthermore, a witness’ belief in the accuser’s credibility is inadmissible. ER 608; *State v. Kirkman*, 126 Wn. App. 97, 107 P.3d 133 (2005).

The erroneous admission of the evidence prejudiced Mr. Damis because there is a reasonable probability that the error materially affected the outcome of the trial. *Asaeli*, at 579. The improperly admitted evidence is not minor compared to the evidence as a whole; instead, the trial court’s error allowed the jury to infer that C.M. made consistent disclosures to Detective Kolb and to Martha Miller. The error also allowed the jury to infer that these witnesses believed C.M.’s allegations. Because there is a reasonable probability that the error affected the verdict, the conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. DAMIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006) (“Horton II”).

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

C. Defense counsel should have objected to inadmissible hearsay offered through Detective Kolb.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

In this case, defense counsel should have objected to Detective Kolb's testimony about his interview with C.M. RP 32-33. Detective Kolb was permitted to tell the jury the essence of what he'd learned from C.M.

RP 32-33. The testimony was inadmissible hearsay, and should have been excluded. Defense counsel's failure to object amounted to ineffective assistance of counsel under the three part test set forth in *Saunders, supra*.

First, there was no legitimate strategic reason to allow the evidence to be admitted, and, in fact, defense counsel objected (albeit too late). RP 33. Second, an objection likely would have been sustained—and the court did sustain counsel's objection when it was finally made. RP 33. Third, the result of the trial would have differed had the evidence been excluded. This is especially true because of the trial court's error overruling Mr. Damis's later objection to hearsay admitted through Martha Miller's testimony. RP 86.

The prosecution in this case rested entirely on the credibility of C.M.; the state was able to improperly bolster her credibility by emphasizing that she'd twice made the same accusation outside of court, and that on both occasions the listeners believed her. But repetition is not proof of veracity, and Kolb's and Miller's belief in C.M.'s credibility is irrelevant. *Purdom*, at 750; ER 608; *Kirkman, supra*.

Counsel's deficient performance prejudiced Mr. Damis, and infringed his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments. *Reichenbach, supra*; *Saunders, supra*.

Accordingly, his convictions must be reversed and the case remanded for a new trial. *Id.*

D. Defense counsel should have objected to all instances of the prosecutor's misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'" *Hodge v. Hurley*, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel objected to some of the prosecutor's misconduct in closing, but failed to object to all of it. RP 331-332. Trial counsel should have objected when the prosecutor shifted the burden of proof and faulted Mr. Damis for his failure to call witnesses to testify (or to explain their absence). RP 331-332. Counsel's failure to object constituted deficient performance, and prejudiced Mr. Damis; accordingly,

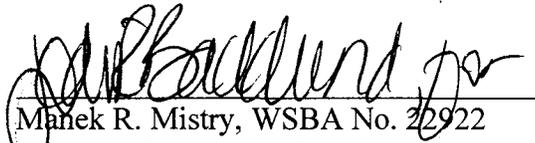
he was deprived of the effective assistance of counsel. His conviction must be reversed and the case remanded for a new trial. *Reichenbach, supra.*

CONCLUSION

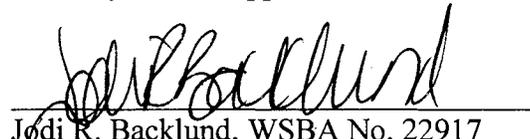
For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on March 1, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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Airway Heights Corrections Center
P. O. Box 1899
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and to:

Thurston County Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 1, 2010.

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

Signed at Olympia, Washington on March 1, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant