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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

DEPUTY

NO. 39972-5-II

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

STATE OF WASHINGTON, Respondent

v.

HAMZAI TARIK AKEEM RUDOLPH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00189-8

BRIEF OF RESPONDENT

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F.M. 9-9-2010

TABLE OF CONTENTS

I. STATEMENT OF FACTS	1
II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1	1
III. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 2 AND 3	5
IV. CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<u>Seattle v. Richard Bockman Land Corp.</u> , 8 Wn. App. 214, 217, 505 P.2d 168, review denied, 82 Wn.2d 1003 (1973)	2
<u>State v Hagler</u> , 150 Wn. App. 196, 202, 208 P.3d 32 (2009).....	7
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)	3
<u>State v. Castro</u> , 32 Wn. App. 559, 565, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982).....	2
<u>State v. Forsyth</u> , 13 Wn. App. 133, 136-37, 533 P.2d 847 (1975)	2
<u>State v. Guloy</u> , 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).....	2
<u>State v. Hill</u> , 10 Wn. App. 851, 854, 520 P.2d 946 (1974)	2
<u>State v. Humphries</u> , 21 Wn. App. 405, 411, 586 P.2d 130 (1978).....	2
<u>State v. Johnson</u> , 7 Wn. App. 527, 539, 500 P.2d 788 (1972), aff'd, 82 Wn.2d 156, 508 P.2d 1028 (1973).....	1
<u>State v. Saraceno</u> , 23 Wn. App. 473, 475, 596 P.2d 297, review denied, 92 Wn.2d 1030 (1979).....	2
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980)	2
<u>State v. Tharp</u> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981).....	3
<u>United States v. Ford</u> , 632 F.2d 1354, 1379 n.28 (9th Cir. 1980).....	2

Statutes

RCW 10.99	6, 7
RCW 10.99.020.....	6

Rules

CrR 6.15 (f).....	1
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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defense is a claim that the Judge denied a fair trial when he told the jury in response to a jury question evidence concerning the case. Their claim is the Judge's response to the question interpreted the facts and expressed doubt about a key witness's credibility.

A copy of the Court's Instructions to the Jury (CP 5) are attached hereto and by this reference incorporated herein. Also attached and incorporated by this reference will be found the jury note in question (CP 30) and the Special Verdict Form (CP 29)

Once a jury begins its deliberations, the trial court may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence. State v. Johnson, 7 Wn. App. 527, 539, 500 P.2d 788 (1972), aff'd, 82 Wn.2d 156, 508 P.2d 1028 (1973); CrR 6.15 (f). Whether words used in an instruction require definition is necessarily a matter of

judgment for the trial court. State v. Castro, 32 Wn. App. 559, 565, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982); Seattle v. Richard Bockman Land Corp., 8 Wn. App. 214, 217, 505 P.2d 168, review denied, 82 Wn.2d 1003 (1973). Words which have ordinary and accepted meanings are not subject to clarification. State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985) (common scheme or plan), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986); State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) (knowledge); State v. Humphries, 21 Wn. App. 405, 411, 586 P.2d 130 (1978) (obstructing). However, the court is required to define technical rules or expressions. State v. Hill, 10 Wn. App. 851, 854, 520 P.2d 946 (1974).

The Appellate Court follows the harmless error standard adopted by most jurisdictions. The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475, 596 P.2d 297, review denied, 92 Wn.2d 1030 (1979); see also State v. Forsyth, 13 Wn. App. 133, 136-37, 533 P.2d 847 (1975). Nonetheless, the defendant must first raise at least the possibility of prejudice. See, e.g., United States v. Ford, 632 F.2d 1354, 1379 n.28 (9th Cir. 1980). An “error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Bourgeois, 133 Wn.2d 389, 403, 945

P.2d 1120 (1997) *quoting State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). There is no reasonable probability of a different verdict here. Accordingly, any error was harmless.

In our case, the question dealt with whether or not a witness was right or left handed and that that should be determined somehow by the blow that she claims she struck against the alleged victim. The alleged victim had testified that she was struck by the defendant, who broke her jaw.

The witness for the defense who claims that she struck the alleged victim was Larissa Winfrey. Ms. Winfrey indicated that she was approximately 13 years old and was younger than the alleged victim, who was 15 at the time. (RP 216). She testified for the jury that she believed she hit the girl more than once. (“She started swinging back and then she fell after I hit her. I hit her a couple of times”.) (RP 216, L19-20). (“I don’t know. Could have been once, twice, three times. I know I hit her.”) (RP 220, L20-21).

This type of testimony leads to questions. The State submits that these questions would confuse a jury and prevent them from concentrating on the main factors in the case. Further, they do not shed any light on the credibility of a witness, but merely on the credibility of the events that she has described. For example, she indicates that she struck her more than

once. Was this with both fists? Did she begin with a jab and then follow it up with a power punch? Where was the alleged victim standing during this period? She had apparently fallen to the floor at some time when she continued to be punched on with multiple fists. Is the defendant right or left handed? Had that evidence come before the jury prior to this? It certainly doesn't appear so from the transcript.

In other words, when the Judge responds to the question that there is no evidence he is merely asserting what is obvious under these circumstances. This is not some type of clarifying information. For example, suppose both the defendant and the witness are right handed? Or left handed? That opens the door for rank speculation on the part of the jury. Further, the young lady says she was struck once by the defendant who broke her jaw. Was there any evidence of multiple bruising or multiple lacerations to her face? All of these are concerns that should create in the Judge a belief that maybe this should be controlled and left to the jury. He has that discretion.

It also, of course, goes to help the defense in that it flies in the face of what the young complaining witness had testified to. The first several times that she had talked about this, she talked about being jumped by a bunch of women, being beaten up by people, and it was only after going to the hospital and having her jaw wired shut that she was talking about the

defendant. This additional story then from another witness creates a credibility issue with the complaining witness. The jury had that credibility issue in its sights at the time that it made its decision.

Further, none of this was questioned or objected to by the defense at the time that the court was responding to the questions. The defense doesn't seem to mind this information going to the jury because it, in effect, is neutral. To make a long story short, there simply was no evidence one way or the other and what information was available would be confusing and lead to nothing but speculation on the part of a jury. Further, it inures to the benefit of the defendant because it continues to cast doubts on the credibility of the complaining witness. All these factors lead to the conclusion, that the State submits, that there was no credible evidence to be provided in this and the court properly answered the jury's query.

III. RESPONSE TO ASSIGNMENTS OF ERROR NOS. 2 AND 3

The second and third assignments of error deal with the instructions and the concept of domestic violence. By statute, the domestic violence required that the complaining witness be 16 years old or older during the time of the dating relationship with the defendant. The evidence

in the case appears to show that she was 15 at the time that the dating took place and certainly during the time that the assault took place.

The domestic violence act, chapter 10.99 RCW, was designed to “recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse.” The legislature sought to correct “policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers.” Among other things, the legislature required that courts “identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence.” Pretrial no-contact orders are provided for, and such cases are to receive priority in scheduling. The King County prosecutor designates domestic violence crimes on charging documents, presumably in part to assist the court in meeting these responsibilities.

The designation “does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.” The designation need not be proved to a jury under Blakely. Upon conviction of a domestic violence offense as defined by RCW 10.99.020, however, “sentencing courts are authorized to impose specialized no-contact orders, violation of which constitutes a

separate crime.” State v Hagler, 150 Wn. App. 196, 202, 208 P.3d 32 (2009).

The jury's task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. State v Hagler, 150 Wn. App. at 203.

The State agrees with the defense that this was an error in the special interrogatory going to the jury concerning the age of the complaining witness. The evidence at the time of trial clearly demonstrates that she was 15 and the defendant was 17 at the time of the attack. It does not have any impact on the fact of the two convictions, but it has to do with the finding under the special interrogatory.

The State concurs with the defense that the special interrogatory was inappropriate and this matter should be returned for resentencing at the trial court.

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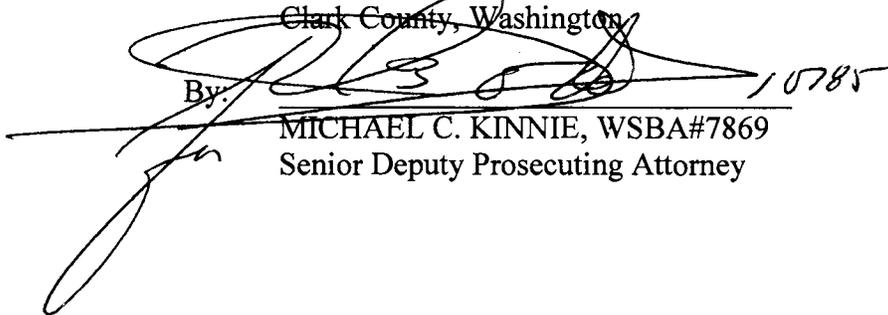
IV. CONCLUSION

This matter should be sent back for resentencing on the special interrogatory issue. All other matters in the case, the trial court should be affirmed.

DATED this 9th day of September, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 

10785
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney



FILED

OCT 22 2009

Sherry W. Parker, Clerk, Clark Co.

*Received by Jill More,
Deputy Clerk @
2:02 pm*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

HAMZAI TARIK AKEEM RUDOLPH,

Defendant.

No. 09-1-00189-8

**COURT'S INSTRUCTIONS
TO THE JURY**

Robert H. Lane

SUPERIOR COURT JUDGE

DATED this 24 day of October, 2009.

*CS
BTM*

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The complaint in this case is only an accusation against the defendant which informs the defendant of the charge. You are not to consider the filing of the complaint or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the Court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

INSTRUCTION NO. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 8

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

INSTRUCTION NO. 9

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 14, 2008, the defendant intentionally assaulted Ashlee D. Chiara;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Ashlee D. Chiara; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 11

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 12

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result.

INSTRUCTION NO. 13

A person commits the crime of tampering with a witness when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding, or a person whom he or she has reason to believe may have information relevant to a criminal investigation, to testify falsely, or to withhold from a law enforcement agency information which he or she has relevant to a criminal investigation.

INSTRUCTION NO. 14

To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between November 17, 2008, and November 24, 2008, the defendant attempted to induce Ashlee Chiara to testify falsely or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That Ashlee Chiara was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings, or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

For purposes of this case, "family or household members" means a person sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.

"Dating relationship" means a social relationship of a romantic nature. In deciding whether two people had a "dating relationship," you may consider all relevant factors, including (a) the nature of any relationship between them; (b) the length of time that any relationship existed; and (c) the frequency of any interaction between them.

INSTRUCTION NO. 16

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 17

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 18

You will also be given a special verdict form for the crimes charged in counts one and two. If you find the defendant not guilty of these crimes, do not use the special verdict form. If you find the defendant guilty of one or both of these crimes, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

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OCT 22 2009
5:26
Sherry W. Parker, Clerk, Clark Co.
M. McNeil

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

HAMZAI TARIK AKEEM RUDOLPH,

Defendant.

No. 09-1-00189-8

SPECIAL VERDICT FORM – FAMILY
OR HOUSEHOLD MEMBER

We, the jury, answer the question submitted by the court as follows:

QUESTION: Are Hamzai Tarik Akeem Rudolph and Ashlee D. Chiara "family or household members", as defined in these instructions?

ANSWER: Yes (Write "yes" or "no")

DATED this 22nd day of October, 2009.

[Signature]
PRESIDING JUROR

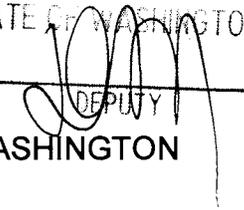
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STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

HAMZAI TARIK AKEEM RUDOLPH,
Appellant.

No. 39972-5-II

Clark Co. No. 09-1-00189-8

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On Sept 9, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

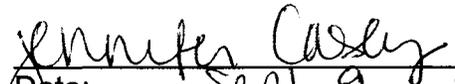
TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Lisa E Tabbut
Attorney at Law
PO Box 1396
Longview WA 98632

HAMZAI TARIK AKEEM RUDOLPH
c/o Appellate Attorney

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Date: Sept. 9, 2010.
Place: Vancouver, Washington.