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DIVISION II

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No. 43295-1-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN McGRAW,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in holding a statement it would have admitted had it been in “affidavit form” was inadmissible even though it met all the requirements for unsworn statements under RCW 9A.72.085.
2. The subsequent decision to prevent appellant Steven McGraw from introducing the statement was also an abuse of discretion because the statement was admissible as a “prior inconsistent statement.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Appellant Steven McGraw was accused by his ex-girlfriend of having assaulted her by strangulation one early morning at McGraw’s home.

At trial, counsel sought to impeach the ex-girlfriend with statements she made in writing when reporting the alleged assault to police. She repeatedly said she did not remember if she had said certain things and then admitted the statement was not correct, stating that everything was a “blur.” When counsel tried to admit the written statement, the court denied that request again and again.

- 1) Under RCW 9A.72.085, an unsworn declaration is considered as legally effective as an affidavit, provided the requirements of the statute are met.

In excluding the ex-girlfriend’s written statement to police, the trial court admitted that it was treating the statement differently than it would treat the exact same information contained in “affidavit form.” Was this holding an error of law under RCW 9A.72.085?

Further, because the trial court incorrectly applied the law, did it abuse its discretion?

- 2) The statement was made under penalty of perjury under the laws of the state of Washington and the witness averred at the time she made them that the statements were “true and correct.” The witness also signed the statement, dated it and indicated where it had been executed.

Had the trial court applied the proper standard, would it have admitted the statement where the statement met all of the requirements of RCW 9A.72.085 and was admissible as a “prior inconsistent statement”?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven McGraw was charged by information with one count of second-degree assault, alleged to be a “domestic violence” incident. CP 1; RCW 9A.36.021(1)(g).

Continuances and pretrial proceedings were held before the Honorable Elizabeth Martin on June 16, 2011, the Honorable Edmund Murphy on August 3, September 20 and October 10, 2011, the Honorable D. Gary Steiner on November 18, 2011, and the Honorable Judge Brian Tollefson on January 25, 2012, after which trial was commenced before Judge Tollefson on January 31 and February 1.¹ A mistrial was granted and, after further proceedings on February 3, 2012, a new trial was held on February 6-10, 2012, and McGraw was convicted of a lesser-included offense of third-degree assault with the domestic violence finding. 7RP 146; CP 89-94.

On March 9, 2012, Judge Tollefson ordered McGraw to serve a first-time offender sentence. 7RP 44; CP 95-107. McGraw appealed. See CP 110.²

¹The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:

the volume containing the proceedings of June 16, 2011, as “1RP;”
August 3, 2011, as “2RP;”
September 20, 2011, as “3RP;”
October 10, 2011, as “4RP;”
November 13, 2011, as “5RP;”
November 18, 2011, as “6RP;”
the four chronologically-paginated volumes containing January 25, 31, February 1 and 3, 6-10, 13, 15, 2012, as “7RP.”

²An order of the court entered a few days ago apparently amended the judgment and sentence to reduce term of community custody/supervision. A supplemental designation of clerk’s papers is being filed to transmit this document to the Court.

2. Testimony at trial

On December 13, 2010, at about six in the morning, Erin Johnson called police to complain that she was in severe pain, which she said was caused by her ex-boyfriend, Steven McGraw, when he tried to strangle her. 7RP 175-77, 231-33. Johnson and McGraw had started dating in 2007 and had a child in common. 7RP 229, 232, 271. They had stopped living together, however, a few months before, in October. 7RP 229, 232, 271.

At trial, Johnson testified that, on the night of December 11, 2010, she had gone to her 31st birthday party at a restaurant and had “a few beers” and McGraw had called her at about 1 in the morning on the 12th, as she left the party. 7RP 233-34, 268, 271-78. Johnson first maintained that she did not remember what McGraw said in the phone call. 7RP 234. A few moments later, however, Johnson said McGraw had told her he wanted her to come over to his home. 7RP 272, 278.

When she spoke to police several days later, Johnson told them something different, saying she had gone over to McGraw’s that night because he said life was not worth living anymore. 7RP 295-96. Johnson admitted that what she had written in the statement she gave to police was “not accurate” on that point. 7RP 296.

Phone records introduced at trial showed that it was in fact **Johnson** who placed the phone call that night, not McGraw. 7RP 592-97. The records showed that Johnson had made the call at 2:08 in the morning and it lasted 39 seconds for Johnson’s phone bill but only 6 seconds on the receiving end, McGraw’s phone, where it was apparently routed to voice

mail. 7RP 596-97.

Johnson drove over to McGraw's house, finding him there with friends Shawn Ward and Aaron Grebler. 7RP 236, 614. They all started drinking. 7RP 236, 273. Johnson admitted taking a "shot" of alcohol only, which she said made her "buzzed." 7RP 236, 273.

Ward stated his belief that Johnson had "quite more than one" shot that night. 7RP 487. Indeed, Ward said, every time he "took a shot," Johnson "tried to make it into a game where she took a shot with me" - meaning at least four shots. 7RP 485-89. Johnson had been very upset that she was not invited to go to a concert that Ward, McGraw and the others had gone to earlier that night and Ward remembered that she seemed already "very intoxicated" when she arrived. 7RP 485.

McGraw confirmed that Johnson clearly had been drinking already when she arrived and then was going "shot for shot with us guys." 7RP 602.

Despite her admissions of having been "buzzed" at trial, when asked by a doctor involved in the case later, Johnson claimed she had not had *any* alcohol that night. 7RP 291, 298. Johnson had also claimed to be a nonsmoker when talking to the doctor. 7RP 291. At trial, Johnson first admitted that she actually smoked, then said something about "actually" having quit, without saying when that occurred in relation to her declaration to the doctor. 7RP 291.

Johnson would later tell police that she stayed and had drinks with McGraw and the others because she thought McGraw was going to harm himself. 7RP 296. At trial, she made no such claim and, when confronted

with that declaration, said she was “just trying to get pieces out of [her] brain” and that her statement was “true in different part.” 7RP 296. She also said her brain was not thinking clearly at the time she made the statement but was more clear now. 7RP 297.

A few moments later, Johnson declared that what she put in her statement to police was not in fact untrue but just that “it’s in the wrong order[.]” 7RP 308. When counsel asked her how what Johnson said in her statement could be put in different order to make it true and correct, Johnson demurred. 7RP 312-14. A moment later, she denied ever having said anything about “order” in her testimony that day. 7RP 313-15.

After awhile, Grebler left, followed soon after by Ward. 7RP 237, 274. At this point, Johnson and McGraw ended up in bed. 7RP 237, 274. Johnson claimed they did not have sex; McGraw said they did. 7RP 237, 274, 603. McGraw recalled lying there talking after sex and said Johnson got upset when the subject turned to their relationship. 7RP 603-604. Johnson thought they might have talked but she could not recall, although she was positive that they “weren’t arguing.” 7RP 238.

It is at this point that the versions of events told by Johnson and McGraw radically diverge. According to Johnson, they were just laying on the bed when McGraw suddenly got on top of her, put one hand on her throat and started to squeeze. 7RP 237. He did not move “fast or anything” and Johnson said she thought at first he was “joking” but then she could not breathe, so she started trying to pull his hand off. 7RP 239, 274. McGraw then let go. 7RP 239.

Johnson told him he was hurting her and he said nothing, just

putting his hand on her throat and squeezing again. 7RP 239. A moment later, he stopped and said, "I know you're sleeping with Don," meaning Don Hardesty, Johnson's friend. 7RP 240. Johnson told McGraw that she was not sleeping with Hardesty and that everything was going to be okay. 7RP 240, 299.

Johnson's words had no effect and McGraw again started squeezing her throat one-handed. 7RP 240. Although it was dark in the bedroom, Johnson said she could see his face and his expression was "[g]lazed." 7RP 241. At that point, Johnson claimed, McGraw put his other hand over her mouth and her nose so she could not breathe further and she "passed out." 7RP 240, 275.

Johnson said she woke up later to see McGraw asleep next to her. 7RP 241, 278. It was still dark outside and Johnson got up out of bed. 7RP 242. Johnson said McGraw suddenly asked her what she was doing. 7RP 242. She told him she was going to the restroom and started walking out. 7RP 242. She heard him get up so she "hurried" and ran into his daughter's bedroom, hiding under the bed. 7RP 242.

Johnson admitted that she was in the living room onto which the front door opened when she went to hide. 7RP 281. She explained that the living room was big and she did not think she would have made it to the front door. 7RP 281, 305. Johnson said McGraw was calling out "where are you" and there was some "banging" elsewhere in the home. 7RP 243.

After a little while, it got quiet, so Johnson got up and went out the front door, noting that the back door was "wide open." 7RP 245. Instead

of going to her car, Johnson went to the home of the next-door neighbor, “Honey” Dean, opening Dean’s unlocked door and just walking in. 7RP 247, 283, 305. Johnson said McGraw was there, as was his brother Tom, and that she announced to them that McGraw had strangled her. 7RP 247. Dean responded by telling Johnson to “get the fuck out of her house” and that it was Johnson’s “fault.” 7RP 247. Johnson nevertheless described Dean as someone with whom she was “friends” at the time. 7RP 247.

After she walked out, Johnson said, McGraw and his brother did, too. 7RP 248. Johnson said she was planning to walk home even though her car was there but decided not to leave, because McGraw had “said he didn’t want to live anymore.” 7RP 248, 283. Johnson “didn’t want his death on” her hands so she went into the house with McGraw and his brother. 7RP 249. She and Tom McGraw started bandaging McGraw’s arm, which was bleeding very badly. 7RP 249. They then got McGraw to bed. 7RP 251, 284, 311.

Johnson admitted that McGraw’s brother told her she needed to leave. 7RP 289-90. She refused, even though Tom McGraw was there to take care of his brother. 7RP 289-90. Johnson maintained at trial that she was afraid McGraw would “do something to himself,” that she was scared and that she was not “thinking clearly.” 7RP 306-307. Johnson said here was no conversation about what Johnson said McGraw had done to her. 7RP 251.

Despite what she said occurred earlier that day, Johnson not only stayed but ultimately lay down next to McGraw on the bed. 7RP 251, 285. She said McGraw passed out right away and it took her about an hour to

fall asleep. 7RP 251.

At trial, Johnson tried to explain lying on the same bed where she had been attacked next to the man she said had unexpectedly attacked her. 7RP 311. She said she was afraid he would either follow to her house or hurt himself and that she was not in her “right mind.” 7RP 311. A moment later, however, she clarified that she stayed because she feared McGraw would harm himself, not that he was “going to do something” to her if she left. 7RP 312. She also said she could not really explain what she had been thinking at the time. 7RP 311-12.

For his part, McGraw firmly denied that he had done anything which could in any way be construed as strangling Johnson that early morning. 7RP 602-54. After his friends left, McGraw said, he went into the bedroom and Johnson followed behind. 7RP 603. They had sex and then, afterwards, were lying in bed talking when the discussion turned to their relationship and their child. 7RP 603-604. Johnson was accusing McGraw of bad parenting and she got up and started getting dressed. 7RP 603-604. McGraw admitted he was “kind of happy” she was leaving, because Johnson kept saying “lots of mean things” to McGraw and he was worried about what she was saying about things like limiting his access to their son. 7RP 604.

After Johnson left the bedroom, McGraw then got up and started to get dressed because he needed to continue the conversation regarding their son. 7RP 605. When he came out of the bedroom, however, Johnson was not there, so McGraw called for her and walked through the main parts of the house. 7RP 606. He then went next door to see he could find

her there but, unsuccessful, returned home. 7RP 606-607.

McGraw freely admitted that he was pacing and frustrated at that time, worried about what she had said. 7RP 606-607. He was in the kitchen and leaning over the back of the kitchen chair when, out of that frustration, he pushed the chair forward and it ended up going into his back window, breaking the glass. 7RP 607. A big piece was still hanging and he just put his hand through it, ending up with a big cut. 7RP 609.

McGraw then went back to the neighbor's home but Johnson was not there. 7RP 610. McGraw was at home when his brother, Thomas³ showed up and they went outside to smoke a cigarette. 7RP 610. They then heard Johnson and Dean having a loud discussion or argument. 7RP 610. His brother told him to get into the house so McGraw did so. 7RP 611.

Eventually, Johnson came into McGraw's home. McGraw was tired and laid back down and went to sleep. 7RP 612. He next remembered his mom waking him up and then falling back asleep quickly. 7RP 612.

McGraw did not recall having further contact with Johnson that day. 7RP 612-18.

McGraw's brother, Thomas, testified that he was at the neighbor's house that night after going to the concert with his brother. 7RP 500-505. Early morning, someone woke him up to tell him he needed to see what was going on with McGraw. 7RP 506. Thomas went outside and

³Because he shares his brother's last name, Thomas McGraw will be referred to herein by his first name for purposes of clarity. No disrespect is intended.

McGraw was on the front porch. 7RP 506-507. Dean and Johnson were also outside and Thomas heard the two women arguing. 7RP 507.

After talking with his brother a little, Thomas and McGraw went into the house. 7RP 508. When he noticed that Johnson had followed them inside, Thomas asked her to leave. 7RP 508. Thomas said he could tell there was something “going on between” Johnson and McGraw but he did not know what. 7RP 516-17. He “got along just fine” with Johnson at the time but it seemed like things were not going well with her and his brother and she should go. 7RP 516-17.

To Thomas, Johnson said nothing about McGraw having strangled her, choked her or put his hand over her mouth or nose or “anything like that.” 7RP 509, 512. Thomas also saw no marks on Johnson at all. 7RP 510.

Thomas said he and Johnson got McGraw’s wound bandaged and Thomas was starting to doze off on the bed next to his brother when Johnson came into that room. 7RP 510. Thomas moved to the couch and, the next morning, woke up to find Johnson in the house, awake, while McGraw was still asleep. 7RP 511. Again, Thomas asked Johnson to leave, and again, she refused. Thomas testified that he had things he had to do that day so he could not stay but did not feel comfortable leaving Johnson there with alone. 7RP 511.

Johnson admitted that McGraw’s brother told her she needed to leave and that she refused. 7RP 289-90. Although she said at trial that she was afraid McGraw would “do something to himself,” that she was scared and that she was not “thinking clearly,” she admitted that she was aware

that McGraw's brother was right there to take care of him. 7RP 306-307.

Eventually, Thomas said, he had to leave. 7RP 511. He called his mom and dad as he left and asked them to "come over and peek in," to make sure everything was all right. 7RP 512. He explained his concerns about leaving Johnson alone with McGraw and that he did not really know what had occurred. 7RP 512.

Johnson claimed that she slept next to her alleged attacker, not waking up until around 8 the following morning. 7RP 252. According to Johnson, her neck "felt swollen" and, in the mirror, she had seen that it was red and had "abrasions." 7RP 253. She admitted, however, that she did not have "a lot of pain" but just a little soreness "[I]ike if you wake up and you sleep wrong on it." 7RP 254.

Johnson said she displayed her neck to a neighbor who came over. 7RP 255. That neighbor, Lydia Morris, had come over at about 10 in the morning. 7RP 472. Morris said Johnson told her something about McGraw having strangled her and wanted Morris to look at her neck, so Morris did. 7RP 472.

Morris looked closely. 7RP 473. There were no red marks. 7RP 473. There was no swelling. Nor was there bruising. 7RP 473.

Morris was also surprised by what Johnson was claiming because of Johnson's demeanor, which Morris said was "very calm and relaxed." 7RP 475-77.

At trial, Johnson did not recall exactly what she and McGraw talked about that morning, with the exception of her remembering asking him if he recalled what had happened the night before. 7RP 251-52.

McGraw did not say anything in response to that question and his parents then arrived. 7RP 252.

Johnson testified that she told McGraw's parents to "watch over him, that he wasn't right in the head." 7RP 252. Johnson also claimed she "showed them what he did." 7RP 285.

Johnson admitted, however, that she never told McGraw's mother or father anything about McGraw allegedly strangling her. 7RP 286. Johnson said that was because they were not "friends" of hers and they "probably wouldn't believe" whatever she said. 7RP 305-306.

McGraw's mother conceded that, given the situation as she knew it existed between Johnson and McGraw, even if Johnson had made some claim that McGraw had hurt her to McGraw's mother that day, his mom would not have believed Johnson or trusted in that claim unless there was some proof. 7RP 464. When the parents had arrived at the home, Johnson had answered the door and told them McGraw was asleep, but his mom and dad came in anyway, wanting to see what was going on. 7RP 458-59.

McGraw's mom was clear that Johnson never said anything about having been hurt, or try to show off anything on her face or neck. 7RP 461. Nor did Johnson say anything about his parents needing to take care of McGraw because he was not right in the head. 7RP 462.

McGraw's mom conceded that she did not want Johnson and her son getting back together as a couple. 7RP 459-60. Johnson's behavior that day made his mom nervous, because Johnson did not act upset, angry, concerned or hurt but rather was "[c]hipper" and acting "like everything was really peachy." 7RP 459-60.

Like Thomas, McGraw's mother told Johnson that she should leave because McGraw's parents were there now to take care of him. 7RP 460. Just as when before, however, Johnson did not leave. 7RP 460. It was only several hours later, after she got insulted by something McGraw's mother said, that Johnson finally left McGraw's home. 7RP 461.

After she left, Johnson called a friend and he came over. 7RP 255-56. Johnson first hesitated to say the name of the "friend" but ultimately admitted that it was Hardesty, the same man that she had denied being involved with when confronted by McGraw. 7RP 256-57, 286. Johnson also first identified Hardesty as the person who was paying for her cellular telephone service at the time of the incident, although she later corrected herself and said it was McGraw. 7RP 271.

Johnson admitted that Hardesty spent the night. 7RP 255-86.

The next day, Johnson said, she woke up in pain and decided to call police. 7RP 258. An officer came to her home and she told him what happened, also writing out a statement. 7RP 258. A female officer also came and took pictures of her face and neck. 7RP 259. Johnson then noticed that her tooth bit her lip at some point. 7RP 261.

At trial, Johnson remembered only some of what she said and wrote to the officers that day. 7RP 288. She did not remember telling an officer that she went to McGraw's house in the first place because he had said something about not wanting to live. 7RP 288. She did not remember telling the officer that, once she got to McGraw's home, "for no apparent reason" he got upset and grabbed her by the throat and

“slammed” her onto the bed while holding his hand around her throat. 7RP 289.

After police left, Johnson asked her mom to drive her to the emergency room. 7RP 262. The doctor who saw her there said Johnson was complaining of a headache and sore neck. 7RP 355. Although they gave her a neck brace when she arrived, Johnson did not leave the emergency room wearing one, because after the doctors did a CAT scan and other tests they determined it was not needed. 7RP 265, 301.

The emergency room doctor said that it appeared that Johnson had a bruise on her lower lip. 7RP 355. He did not, however, note any other bruises. 7RP 355, 372-73.

Several days later, Johnson went to a medical clinic. 7RP 189. A doctor at a family medical group testified that she treated Johnson on December 17, 2010, for “[neck pain.]” 7RP 189-99. The doctor saw swelling at the front of Johnson’s neck and prescribed pain medication. 7RP 202. The swelling was “mild.” 7RP 226. The doctor also noted that Johnson’s range of motion was only “[a] little limited.” 7RP 202.

The only information the doctor had about the incident came directly from Johnson. 7RP 210. At the time she saw Johnson, the doctor admitted, Johnson was not agitated, was talking and it seemed her “memory was still good.” 7RP 214.

The doctor said there was no bruising on Johnson, whether on her face, neck or elsewhere. 7RP 214. There was also no redness on the neck or face. 7RP 215. In addition, the doctor reported, Johnson did not have any “petechiae,” marks where small blood vessels in the skin “kind of

rupture.” 7RP 216.

In contrast to the doctor, Johnson claimed she had bruising on her neck at the time of that visit. 7RP 302. Johnson said the bruising was even darker than when Johnson had gone to the emergency room on the day after the incident, and Johnson said she “clearly saw that bruising” the morning she saw the doctor. 7RP 302.

A state’s expert testified that it takes only about 4 pounds of pressure and 10 seconds or less for a person to lose consciousness if their jugular vein was impacted. 7RP 389. She also said symptoms for strangulation may take some time to appear although most people generally have some sign such as bruising or swelling the day after an incident. 7RP 392. In fact, the expert said, any external injuries will show up within the first two or three days “[a]bsolutely.” 7RP 408.

Berthiaume admitted she was not a physician, had never published a study or conducted any clinical research on strangulation. 7RP 405.

Berthiaume reviewed police reports, Johnson’s statement and police reports, as well as photos police had taken of Johnson the day after the event. 7RP 397. She found that Johnson had some small clustered or patterned bruising to the left neck, although it was not very significant (only 3 or 4 on a scale of 1-10 for seriousness), and it seemed like there were multiple acts involved. 7RP 339, 402.

Unlike the two doctors who had seen Johnson in person the day after and a few days after the incident, Berthiaume thought she saw some petechial hemorrhaging in the pictures, which would be a sign of pressure and potential strangulation. 7RP 402. Berthiaume also said that she

thought it was “common” for people who are strangled to be a little inconsistent in reporting or not remembering pieces of the incident due to having been without oxygen. 7RP 429.

Johnson admitted that she was told by the doctor and police to seek further medical care if the pain did not resolve or further bruises showed up. 7RP 302. Although she claimed further bruises, she never went back. 7RP 302. She said she did not do so because she did not want to leave her house. 7RP 303. She was having anxiety, she said, and that is why she did not go to police to let them “document anything,” take more pictures or talk to her further. 7RP 303.

Johnson neglected to take her own pictures of those further bruises or injuries. 7RP 303. She did not have her mother or any of the friends who came over to help her do so, either. 7RP 303, 309.

D. ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ALLOW
ADMISSION OF EVIDENCE FOR SUBSTANTIVE PURPOSES
AND THE ERROR WAS NOT HARMLESS

Reversal is required, because the trial court erred in refusing to allow admission of the evidence for substantive purposes and the error cannot be deemed harmless.

a. Relevant facts

At trial, after asking Johnson about the statement she wrote when the officer responded to her complaint, the prosecutor established that 1) Johnson gave the statement to the officer after he responded to her call to police (7RP 258), 2) Johnson told the officer “what had happened” (7RP 258), 3), she spent and 1-2 hours with police responding to her complaint

(7RP 258) and 4) she “wrote a statement for them,” i.e., the police (7RP 258). On cross-examination, counsel established that Johnson remembered talking to Officer Thompson but did not recall telling him crucial things which were inconsistent with her testimony at trial, such as whether she went to the home because McGraw said he did not want to live (7RP 288), whether McGraw had “slammed” her onto the bed or climbed slowly on top of her as she claimed at trial (7RP 289), and whether McGraw was awake or “passed out” when she left the bedroom. 7RP 289.

Counsel then showed Johnson Exhibit 16,⁴ which Johnson identified as a statement she had handwritten when the investigating officers responding to her call had told her to write down what she could remember of what had occurred. 7RP 292-93. Johnson said she wrote everything “[a]s best as” she could and remembered filling out the police form, although she was not sure if it was more than one page. 7RP 293-94. Johnson identified her own signature on the document and pointed to the date, which Johnson said she written onto the document when she signed. 7RP 294.

Counsel then tried to admit the statement, but the prosecutor objected that it was hearsay. 7RP 294. After the court said it would reserve ruling, counsel attempted again to elicit what was in the statement but the prosecutor again objected. 7RP 294.

Counsel then asked Johnson about the inconsistencies between the

⁴A supplemental designation of clerk’s papers has been filed for this Exhibit. For the Court’s convenience, a copy is attached as Appendix A.

statement she gave to police and what she claimed at trial, and Johnson admitted that what she had written in the statement was “not accurate” in what it said about why she went over to McGraw’s house. 7RP 296. Counsel also established that Johnson knew she was swearing to the information in the declaration as “true and correct.”

Q: And do you see what’s written in bold below your handwritten statement there?

A: What’s in bold? I don’t know.

Q: [“I declare under the penalty of perjury[”] - -

A: Yes.

Q: - -[“]under the laws of the State of Washington that the above statements are true and correct[“]?

A: Yes.

Q: And you signed that?

A: Yes.

7RP 297.

A few moments later, counsel again moved to admit the declaration, and the court said it would “make a ruling outside the presence of the jury in a moment.” 7RP 303-304.

The prosecutor then elicited that Johnson was suffering “shock” at the time she spoke to police and that she was “shaking and. . .hurting” at the time she wrote the statement. 7RP 307.

With the jury out, the issue of the declaration by Johnson to the police after the incident was again discussed. 7RP 316-17. The court said that, if the declaration was “in affidavit form,” there was “a very good chance” that the court would admit it, but that the form was instead “in

declaration under penalty of perjury form,” which made the court hesitate to admit it. 7RP 317. The court thought there was no case law on the use of such language “except for two Division 1 Court of Appeals cases which are somewhat inconclusive in their holdings about the admissibility of this document.” 7RP 317.

Counsel noted that RCW 9A.72.085 provided that such a form was actually sufficient, but the court felt the Division 1 cases had held that the statute no longer applied. 7RP 318. The court held that the document could be further used for impeachment but could not be otherwise used. 7RP 318. Counsel argued for other grounds of admission but was apparently rebuffed. 7RP 318.

The prosecutor said that Johnson had not “denied” making the handwritten statement so the evidence could not be used to impeach her. 7RP 319. Counsel then pointed out that Johnson had not answered clearly on the stand about the claims in the statement, instead declaring that it was “all a blur.” 7RP 320. The court adhered to its ruling, encouraged counsel to read a treatise on evidence and declared its willingness to reconsider if further authority was found. 7RP 320.

The next day, counsel renewed his motion to admit the exhibit, arguing that RCW 9A.72.085 specifically provided that affidavits are not required and a sworn declaration is to have the same effect in any proceeding. 7RP 326. The prosecutor described the declaration as a “Smith affidavit” given to police officer and written in the officer’s presence. 7RP 327.

The prosecutor conceded that there was evidence that the statement

was made voluntarily and there were “at least minimal guarantees of truthfulness” based on Johnson’s testimony. 7RP 327-28. The prosecutor objected, however, that Thompson was not there to testify that it was “standard practice” to ask a witness to fill out a statement when the officer arrives to investigate that witness’ complaint. 7RP 328. The prosecutor also questioned whether a “Smith affidavit” is admissible as a statement in an “official proceeding” because the prior statement, while written for police as part of their investigation, was not made during an actual trial. 7RP 239.

Counsel agreed with the prosecutor that there were ample indicia of reliability and all the other elements but said because of Thompson’s absence “we’ve got a little bit of a unique or odd position[.]” 7RP 330. He said he did not even have the opportunity to do a “preservation deposition” of Thompson’s testimony because apparently the officer had been deployed “for what would consist of most of this case[.]” 7RP 330.

The court again refused to allow Johnson’s statement into evidence.

Later, when the state’s expert on strangulation testified, counsel established that the expert had reviewed and relied on Johnson’s written statement to police in forming her expert opinion. 7RP 410. Over the prosecutor’s objection, the expert was allowed to read Johnson’s written statement to police, which provided:

I showed up at his house around 2 a.m. due to him calling me. I thought he was going to harm himself, so I stayed while his friends left. He wasn’t making a lot of sense and he grabbed my throat. . . making me so I could breathe or that I may not - - or that I was not - - I’m sorry - - or - - so I could not breathe or talk. I was able to

pull his hand off for a second but he kept grabbing my throat. I asked him to stop and told him everything was going to be okay.

7RP 412.

The court later gave the state's limiting instruction, Instruction 5, which provided:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an expert witness's testimony regarding out of court statements that the expert relied upon in reaching her opinion and may be considered by you only for the limited purpose of assisting you in determining the weight and credibility of the expert witness's opinion. **You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.**

7RP 631; CP 70 (emphasis added).

- b. The trial court erred in excluding the evidence and the error was not harmless

The trial court erred in refusing to allow McGraw to introduce Johnson's written statement to police and the error was not harmless.

First, the court erred in holding that Johnson's statement was inadmissible because it was not in "affidavit form." While in general the decision whether to admit or exclude evidence is reviewed for an abuse of discretion, where an evidentiary ruling "is based on an incomplete analysis of the law or one that is based on misapprehension of the legal issues" is a decision made on "untenable grounds" and is an abuse of discretion. State v. Derouin, 116 Wn. App. 38, 42, 64 P.3d 35 (2003).

Here, the court was simply wrong in holding that the statement would have been admissible if it was an "affidavit" but was not admissible because of its form.

RCW 9A.72.085 specifically provides:

Whenever, under the laws of this state or under any rule, order or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

As this Court has declared, RCW 9A.72.085 “provides that an unsworn statement ‘certified or declared by the person to be true under penalty of perjury’ may be substituted” for a sworn written statement.” Johnson v. Department of Licensing, 71 Wn. App. 326, 334-35, 858 P.2d 1112 (1993).

Thus, the trial court was wrong that it was somehow material that Johnson's written statement to police was not in the form of affidavit. Under RCW 9A.72.085, if the statement met the requirements of that statute, the written statement Johnson gave to police was admissible in lieu of a more formal affidavit. The trial court erred as a matter of law and abused its discretion in holding to the contrary.

It appears that the trial court was confused by the interplay between RCW 9A.72.085 and what is called a “Smith” affidavit, so-called because it was first approved by the Supreme Court in State v. Smith, 97 Wn.2d

856, 651 P.2d 207 (1982). Indeed, the court seemed to think that the validity and application of RCW 9A.72.085 was in question based upon cases involving interpretation of Smith. See 7RP 315-20.

That belief, however, was wrong. RCW 9A.72.085, enacted by the Legislature in 1981, is not limited in the proceedings to which it applies and remains intact. See Laws of 1981, ch. 187; see RCW 9A.72.085. Smith, decided shortly after RCW 9A.72.085 was enacted, did not address that statute and instead dealt specifically with a prior inconsistent statement of a witness and the requirements under the relevant evidence rule. Smith, 97 Wn.2d at 857. In Smith, the Court answered the question of whether a statement can be considered a “prior inconsistent statement,” admissible for substantive purposes, “when that statement was made as a written complaint (under oath subject to penalty of perjury) to investigating officers.” Smith, 97 Wn.2d at 857.

In that context, in Smith, the Supreme Court interpreted ER 801(d)(i), the evidence rule providing that a prior inconsistent statement is not hearsay if it meets the requirements of the rule, which are 1) that the declarant testifies at trial and is subject to cross-examination about the statement, 2) that the statement is inconsistent with her testimony, 3) that it was made under oath subject to the penalty of perjury and 4) that it was so given “at a trial, hearing, or other proceeding, or in a deposition.” Smith, 97 Wn.2d at 859 (emphasis in original).

After reviewing the history of the rule, the Smith Court refused to adopt a “bright line” rule holding such statements were always to be excluded or omitted, instead declaring that the question was “reliability.”

Id. The Court also rejected the idea put forward by the prosecutor here - that a statement to police is only admissible if that statement is made in another *trial*. Id.; see 7RP 239. Instead, the Court held, the requirement that a statement be made in another “proceeding” is met if the statement was “taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, i.e., the “filing of an information by the prosecutor in superior court.” 97 Wn.2d at 862. The Court declared that such a filing “is usually the result of police investigations into alleged criminal activity, and the taking of statements from witnesses and the presentment of them to the prosecuting attorney,” so that the statement to police met the requirement of being given as part of an “other proceeding” under the evidence rule. 97 Wn.2d at 862-63.

A few years later, in State v. Nelson, 74 Wn. App. 380, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994), the issue of a “Smith affidavit” and its relationship to RCW 9A.72.085 was briefly discussed. Nelson involved a statement an accused prostitute made to police about her “pimp,” the defendant. 74 Wn. App. at 382-83. An officer wrote down what was said as the witness’ “official statement,” and she was later taken in front of a notary where she signed the statement as a “Smith affidavit,” two days after the statement was originally made. 74 Wn. App. at 383. At trial, the witness changed her story, saying she had lied to police because they told her she was going to jail unless she admitted that she had a pimp. Id. Her “Smith affidavit” was then introduced.

On appeal from the resulting conviction, Nelson argued that, under Smith, the statement was not admissible because it was not voluntary,

“lacked minimal guarantees of truthfulness,” and was not made during an “other proceeding,” as required. Nelson, 74 Wn. App. at 386. Division One disagreed. Not only had the witness voluntarily made the initial statement, the court noted, she had gone *back* to the prosecutor’s office to sign it two days later. 74 Wn. App. at 388. Further, the court found, even though the police officer had written the statement (rather than the witness), it appeared that the statement was the reflection, mostly, of what the witness had said.

In addition, the court was not concerned that the notary did not administer an oath or read the affidavit to the witness. 74 Wn. App. at 389. Citing RCW 9A.72.085, the court noted, because “the series of declarations included in the affidavit” satisfied the requirements of that statute, the document “may therefore be regarded as a sworn statement.” The court also found that there was sufficient evidence in the record to prove that the witness knew that her statement was “being taken under the penalty of perjury,” because the statement said it was read to her and she knew its contents, and the detective testified that the prosecutor had reviewing it with the witness and explained its “import.” Nelson, 74 Wn. App. at 390.

The Nelson Court also held that the statement was made in an “other proceeding” under Smith, because

[the] statement was taken as standard procedure in a police investigation that resulted in the filing of an information. **Absent other indicia of unreliability, our Supreme Court has indicated that this method for determining the existence of probable cause constitutes an “other proceeding.”**

Nelson, 74 Wn. App. at 391 (emphasis added).

Thus, Nelson was really the first case to apply RCW 9A.72.085 in the context of a Smith affidavit. The mandates of the statute were not used to substitute the requirements set forth in Smith but instead were examined in order to determine if the statement was made under “oath,” as required for admission as a “prior inconsistent statement.”

Next, in 2003, Division One and this Court both issued decisions involving Smith affidavits and RCW 9A.72.085. In State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003), the defendant was accused of indecent liberties by forcible compulsion and the teenage victim wrote a statement on a printed form to that effect. 115 Wn. App. at 32. Her mother also wrote a statement. Neither of them signed their statement “under oath or penalty of perjury,” although they signed beneath a printed paragraph that provided, “[t]he above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me.” 115 Wn. App. at 33.

At trial, when the prosecution tried to admit the written statements, counsel objected and the prosecutor declared that the only purpose for the evidence was “for impeachment value,” rather than “substantive evidence.” 115 Wn. App. at 34. Counsel requested a limiting instruction, which was given. The same thing occurred with the mother’s statement, with the prosecutor again saying it was solely “for purposes of impeachment” that the prosecutor wanted to admit the evidence. Once the defense moved to dismiss based on insufficient evidence, however, the prosecution suddenly started arguing that the evidence was admissible

under Smith and Nelson not just for impeachment but also for substance. Sua, 115 Wn. App. at 37. The defense objected that neither exhibit was made under penalty of perjury and also that it was improper to allow the prosecution to suddenly shift its use of the evidence at this late hour. Id. The trial court nevertheless admitted the evidence, refusing to further instruct the jury, after which the prosecutor relied on the evidence in arguing guilt. 115 Wn. App. at 38. During deliberations, when the jury questioned whether the limiting instruction should apply, the court instructed them it did not. Id.

On review, this Court first examined the relevant rules of evidence on hearsay and prior inconsistent statements at length. 115 Wn. App. at 40-47. Discussing both Smith and Nelson, the Court rejected the state's claims that the documents should be admitted even though not given under oath or subject to penalty of perjury, because they "carried sufficient guarantees of truthfulness to allow admissibility[.]" Sua, 115 Wn. App. at 47-48. "[W]e cannot just ignore ER 801(d)(1)(i)'s requirement that the out-of-court statement of an in-court witness be 'given under oath subject to penalty of perjury,'" this Court pointed out, because it was required to construe the rule "according to its plain meaning, and to give effect to all of its language." Sua, 115 Wn. App. at 47-48.

Further, this Court noted, Smith and Nelson involved declarants who either "took an oath from a notary public" or "gave her statement under oath subject to penalty of perjury, for she complied with RCW 9A.72.085." Sua, 115 Wn. App. at 48. Because neither of the declarants in Sua "actually took an oath, complied with RCW 9A.72.085, or in any

other way gave her statement “under oath subject to the penalty of perjury,” they were not admissible as prior inconsistent statements under the evidence rules. Sua, 115 Wn. App. at 48.

Several months later, in State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003), Division One looked at admission of a “prior inconsistent statement” in a case involving a charge of third-degree rape of a child. After a lengthy interview at the police station, the victim handwrote and signed a 7-page statement admitting that she had engaged in consensual sexual intercourse with the defendant, but at the bench trial, she recanted. 119 Wn. App. at 160. The trial court admitted her prior written statement as substantive evidence under the “prior inconsistent statement” rule. Id.

On appeal, Nieto first argued that the statement was not properly given under oath as required for admission as a “prior inconsistent statement” under ER 801(d)(1)(i). Nieto, 119 Wn. App. at 161. The Court noted that “[a]n unsworn written statement will satisfy the oath requirement if it is signed and contains language such as, ‘I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct,’” citing RCW 9A.72.085, Nelson and Sua.

The Nieto Court found that the statement in that particular case, however, did not meet those requirements. The document, which was seven pages long, was on a pre-printed police form which had the following language on the bottom of the first page and the top of each remaining page:

I have read each page of this statement consisting of _____ page(s). Each page bears my signature, and all corrections, if any, bear my initials. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

119 Wn. App. at 162. Division One found this “boilerplate” language “ambiguous” because it was unclear from its placement what the term “foregoing” referred to, i.e., whether it referred to the first two sentences of the boilerplate language or whether it referred to the statement contained on the pages. “Because of this ambiguity,” Division One held, “we cannot conclude that the statement satisfied the oath requirement,” as “the nature and placement of the boilerplate language does little to aver that the statement’s content is true.” 119 Wn. App. at 162.

In addition, the Nieto Court was concerned that the statements were not made in an “other proceeding” as required, because there were no formal proceedings or notary involved, the officer did not remember reading the “penalty of perjury” language, and the record did not otherwise establish that fact. 119 Wn. App. at 163. Indeed, the Court compared the case to Nelson, noting that, although the declarant in Nelson had denied knowing that her statement was being taken under penalty of perjury, there was testimony in that case that the prosecutor had explained the importance of it and that the notary asked relevant questions. Id. Because there was no similar evidence in the case, the Court held, the declarant’s statement was inadmissible.

The trial court here appeared to rely on Nieto in its belief that the currency of RCW 9A.72.085 was somehow in question in cases involving Smith affidavits. 7RP 317-20. But that case clearly was based upon its

specific facts. And indeed, consideration of the specific facts of a particular statement is exactly what the Supreme Court prescribed in rejecting a “bright-line” rule. See Smith, 97 Wn.2d at 859 .

Applying the proper standards here, Johnson’s statement should have been admitted, as it met all of the requirements of both a Smith affidavit and RCW 9A.72.085. The statement was handwritten by Johnson onto a preprinted police form which had the police incident number written on it and was titled “DOMESTIC VIOLENCE: Supplemental Report Form.” App. A. The relevant section was set off from the top of the form, in a separate box, titled “VICTIM’S STATEMENT.” App. A. It included a “check-the-box” section which used first person for the “victim,” with “yes” or “no” to be indicated for statements such as, “I have physically pointed out to the Officer where I was injured,” “I was able to point out to the Officer the person who injured me,” and “I understand all of the questions.” App. A.

After that section but still in the same box, the form indicated “Victim’s Statement:” and then had multiple blank lines, on which Johnson had handwritten her statement. App. A. Directly after that, the form set forth in both bold and capital emphasis:

“I DECLARE, UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.”

App. A (emphasis in original). Right after that declaration, Johnson filled in the location where she had signed the statement (“Tacoma” and “Pierce County, WA.”) and affixed her signature on a line for “Victim’s Signature,” followed by the date of the signing, “12-13-10.” App. A.

Thus, the statement here met all of the requirements, both under RCW 9A.72.085 and as a Smith affidavit.

Under RCW 9A.72.085, the statement was equal to one made under oath because it 1) had a declaration that it was true and correct under penalty of perjury, 2) was signed by Johnson, 3) states the date and place of its execution, 4) states that it is declared true under penalty of perjury under Washington laws, 5) is followed by a signature, date and place of signing. In fact, the certification is almost identical to the one set forth in the statute as the form which is proper (“I certify (or declare) under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct”). RCW 9A.72.085.

Further, there was no indication whatsoever at trial that Johnson was incapable of understanding the certification set all in capital letters and in bold type above which she wrote and below which she signed. Nor was there any evidence that she did not read that certification, or did not understand the seriousness of her statement. If anything, the evidence is to the contrary, because Johnson herself contacted police for the purpose of making a complaint about a crime and knew that officer was there to investigate that crime.

And indeed, the declaration in this case is even better than the one set forth in RCW 9A.72.085. As Nieto made clear, the use of the phraseology referring to “the foregoing” in a declaration can cause ambiguity if that language is not properly placed so that its reference point is clear. 119 Wn. App. at 161.

Here, the box in which the declaration was placed was titled

“VICTIM’S STATEMENT,” followed by the check-the-box section using the first person in the voice of the victim for the first part of the section (i.e., “I was able to point out to the Officer the person who injured me”). App. A. The handwritten portion of the statement was clearly labeled, “Victim’s Statement:” followed by lines where Johnson had written. App. A. The declaration immediately follows that handwritten section and specifically refers to “**THE ABOVE STATEMENTS.**” App. A (emphasis in original).

Indeed, there is no other section on the entire form which is denoted a “statement,” save for the sections in the box where the adoption and certification of the “above statements” occurs. App. A.

The certification here was absolutely clear to what it referred and thus did not suffer from the same infirmities as the proposed language in the state as under Nieto.

Further, the other requirements for the Smith affidavit were met. Johnson testified at trial and was subject to cross-examination about the statement, which was inconsistent with her claims on the stand. In addition, because the statement was created at the request of the officer as part of his investigation of Johnson’s claims of assault, the statement was made in an “other proceeding” under Smith and Nelson. Finally, because the statement satisfied the requirements of RCW 9A.72.085, it met the requirements of being under oath and subject to penalty of perjury.

The trial court erred in refusing to admit the statement, and this Court should so hold. Further, reversal is required. Where a court’s

the outcome of the trial.

In response, the prosecution may try to argue that the admission of the evidence through the testimony of the expert was sufficient to place the evidence before the jury.

Any such argument should fail. The jury was given a specific limiting instruction, instruction 5, which told them they could not use the evidence for anything other than considering that it helped the expert form her opinion. See CP 70. A jury is presumed to follow a court's instructions when such an instruction is given. See, e.g., State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

E. CONCLUSION

The trial court erred and abused its discretion in excluding the evidence of Johnson's handwritten statement made to the investigating officer just a few days after the alleged incident. It erred and abused its discretion in failing to honor RCW 9A.72.085 and relying on the fact that the statement was not in "affidavit form." If the proper standard had been applied, the statement would have been admitted. Further, the error went directly to the sole issue in the case - credibility. This Court should reverse.

DATED this 18th day of November, 2012.

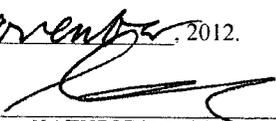
Respectfully submitted,


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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; Mr. Steven McGraw, 6625 Lawrence St., Tacoma, WA. 98409.

DATED this 18th day of November, 2012.

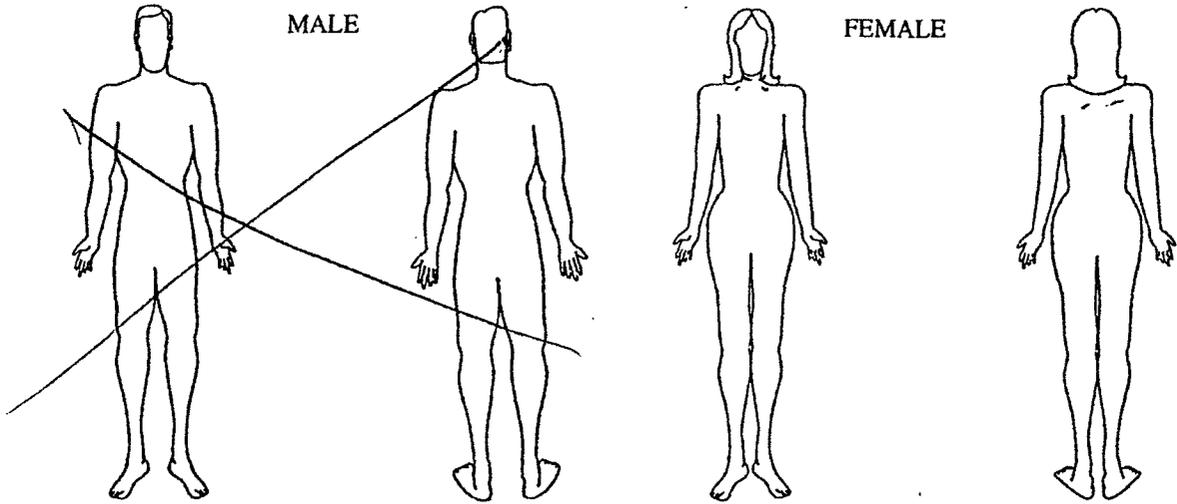


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FILED
COURT OF APPEALS
DIVISION II
2012 NOV -2 PM 1:06
STATE OF WASHINGTON
BY _____
DEPUTY

VICTIM'S ACCOUNT OF INJURIES

Incident Number
103470136



TO THE VICTIM:

Mark the areas where you were hit or injured. Indicate as much detail as possible without over simplifying or over exaggerating your injuries.

Other than the Police, did you call or speak to anyone else about the assault?

Yes No

If Yes, Who did you contact? Honey Deer & Don Hardesty

Victim will be at a temporary address...

Yes No

If Yes, Attach a memo.

Completed by OFFICER / victim was unavailable...

Yes No

VICTIM'S STATEMENT:

I have physically pointed out to the Officer where I was injured.

Yes No

I have indicated on the diagram where I was injured.

Yes No

I was able to point out to the Officer the person who injured me.

Yes No

I have pointed out to the Officer the object used to injure me.

Yes No

I understand all of the questions.

Yes No

Victim's Statement:

I showed up at His house around 2am
due to him calling me I thought he was
going to harm himself. So I stayed while his
friends left. He wasn't making alot of sense
and he grabbed my throat making so I could
not breath or talk if they able to pull His
hand off for a second but he kept grabbing my
throat I asked him to stop and told him every
thing was going to be ok

"I DECLARE, UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT."

Signed at Tacoma, Pierce County, WA

[Signature]
Victim's Signature

12-13-10
Date

Witness

Date

LIST AT LEAST (1) PERSON WHO HAS FREQUENT CONTACT WITH YOU

- | | | | |
|----|-------------------------------|-----------------------------|------------------------------|
| 1. | (Name) <u>DONALD HARDESTY</u> | (Phone) <u>253 282 8002</u> | (Relationship) <u>FRIEND</u> |
| 2. | (Name) | (Phone) | (Relationship) |