

29187-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS A. BUTLER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that Mr. Butler's statements to the police were voluntary.
2. Insufficient evidence exists to support the conviction for kidnapping in Count I.
3. The trial court erred by denying Mr. Butler's motion to dismiss the kidnapping charge at the conclusion of the trial.
4. Insufficient evidence exists to support the conviction for conspiracy in Count III.
5. The trial court erred by *sua sponte* giving Instruction 31:

The use of deadly force by a homeowner or person in possession of premises is justifiable when committed in the lawful defense of the homeowner or any person in the homeowner's presence or company when:

- (1) the homeowner reasonably believed that the person in question or others whom the homeowner reasonably believed were acting in concert with the person in question intended to commit a felony or to inflict death or great personal injury;
- (2) the homeowner reasonably believed that there was imminent danger of such harm being accomplished; and
- (3) the homeowner employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the homeowner, taking into consideration all the facts and circumstances as they appeared to him or her, at the time of the incident.

(CP 81)

B. ISSUES

1. Was Mr. Butler's waiver of his rights knowing, intelligent and voluntary when he had just awakened from a coma, was immobile in a hospital bed with a bullet lodged in his spine, and was on a constant drip of opiate pain medication?
2. When an alleged victim requests to move to another room, and when the detention is merely incidental to the robbery, does insufficient evidence exist to support a kidnapping conviction?
3. Is the mere presence of two perpetrators sufficient to establish a conspiracy?
4. Where the State fails to establish that an agreement existed between two perpetrators to rob a house, does insufficient evidence exist to support a conviction for conspiracy to commit first degree robbery?
5. Does a trial court comment on the evidence when it *sua sponte* gives an instruction for the announced purpose of responding to the defense theory of the case?

6. Where the trial court *sua sponte* suggests and modifies a WPIC related to defense of property, does the court improperly violate a defendant's State and Federal constitutional rights that prohibit a judge from commenting on the evidence?

C. STATEMENT OF THE CASE

In the early morning hours of March 30, 2009, gunfire broke out in a house on 4113 East 16th in Spokane. (CP 174) When it was over, Thomas Allen Butler had been shot three times. (2RP¹ 26)

The parties offered very different versions of what happened inside the house. Mr. Butler said that he and his friend Derick wanted to buy marijuana from a local dealer they had visited on previous occasions. (2RP 7-8) They went to the house and were let in by Brad Benson. They began to smoke marijuana with him, when Derick and Mr. Benson got into an argument. Suddenly, gun shots rang out, and Mr. Butler returned fire. (2RP 15-17) Mr. Butler was hit, and fearing he would be killed, he ran outside. He eventually could only crawl, and he sought refuge under the deck of the next-door neighbors. (2RP 19-20)

¹ "2RP" refers to the separately numbered volume V, morning session from April 20, 2010.

The occupants of the home told a different story. Brad Benson said he was asleep in his downstairs room when two men awakened him and started yelling at him and hitting him in the face with a gun. (CP 179-81) The men demanded drugs and money. (CP 184) Mr. Benson suggested that they go upstairs, in the hopes that his roommates would hear he needed help. (CP 184-85)

Once upstairs, Mr. Benson offered the two men a jar of marijuana. One of the men began rummaging through the electronics while the other man, whom he identified as Mr. Butler, kept the gun pointed at him. (CP 186) Mr. Benson reported that the next thing he knew, gunfire erupted, and he hurdled the couch and ran to the back bedrooms. (CP 197-98) He saw Mr. Butler fall behind the futon. (CP 199) Mr. Benson also stated that his roommate, Taylor Robertson, was the first to fire a gun. (CP 207)

Taylor Robertson's version of the events was that he was awakened by a commotion in his house. (3RP² 6-8) He told his girlfriend Ms. Carpenter to get inside the bathroom, and he grabbed his .9mm handgun. (3RP 7-8)

Mr. Robertson peeked out his bedroom door and saw a man with a gun on his roommate, and another man rifling through his things. (3RP

² "3RP" refers to the separately paginated verbatim transcript from April 13, 2010, Tyler Robertson's trial testimony.

11-12) The door creaked, and everyone in the living room turned to face him. (3RP 12) Mr. Robertson opened fire. (3RP 13) He estimated he shot five times, and he saw the man holding the gun fall down. (3RP 13) He ran after the second intruder, and he heard gunshots from the man he had shot. (3RP 15)

The police located Mr. Butler underneath the neighbor's porch. (RP 89) The officers located on or near Mr. Butler an iPod, gray sports gloves and a wallet. (RP 153-54) Mr. Benson said these items were his. (CP 204-06) Mr. Butler was transported to the hospital. (RP 92)

He was eventually charged with eight counts: (1) first degree kidnapping of Brandon Benson; (2) first degree burglary; (3) conspiracy to commit first degree robbery; (4) first degree robbery of Brandon Benson; (5) first degree robbery of Taylor Robertson; (6) first degree robbery of Shelsey Carpenter; (7) first degree assault of Brandon Benson; and (8) first degree assault of Taylor Robertson. (CP 12-14)

2. The 3.5 Hearing.

During the 3.5 hearing, Deaconess Medical Center Nurse David Henry testified he had no experience in making assessments of whether medicated patients were coherent enough to speak with police. (RP 10) But he had experience in determining whether a patient was coherent

enough to speak with a doctor, and the nurse opined that no difference existed between speaking with the police or a doctor. (RP 10)

Over objection, Nurse Henry testified that on April 6, Mr. Butler gave a neurosurgeon consent to operate on him. (RP 11) Nurse Henry gave his opinion that on that date, Mr. Butler was “fully alert, oriented, and able to clearly discuss his surgery with the surgeon, and then give informed consent.” (RP 12) Nurse Henry acknowledged that at the time, Mr. Butler had a bullet lodged in his spine. (RP 15) Mr. Butler gave consent to the surgery between 8:00 and 9:00 a.m. (RP 12)

Mr. Butler was medicated with Dilaudid, hydromorphone, an opiate, for pain. (RP 16) Mr. Butler was in pain, and told Nurse Henry that he was not receiving enough medication. (RP 19)

Detective John Miller testified that he arrived at the hospital at 9:45 a.m. on April 6. (RP 27) When he arrived, Nurse Henry told Detective Miller that Mr. Butler could speak. (RP 28) Detective Miller reported that he read Mr. Butler his rights. (RP 29) Detective Miller testified that Mr. Butler said he wanted to speak with him, and then he made a partial confession. (RP 33-34)

Detective Miller was unaware that Mr. Butler had been in a coma, or that he had awakened from the coma recently. (RP 36) Detective Miller did not recall asking Mr. Butler any orienting questions, such as the

day of the week, what city he was in, or his age. (RP 37) Detective Miller relied upon Nurse Henry's assessment of Mr. Butler's mental acuity. (RP 37-38)

Detective Miller acknowledged that at the end of the interview, Mr. Butler had a difficult time talking. (RP 39) The detective also acknowledged that Mr. Butler could not sign the waiver because he had intravenous tubing and dressings on his body, and he was physically incapable of holding a pen. (RP 39)

Mr. Butler's mother Colleen testified that the hospital staff informed her that they did not expect Mr. Butler to live through his first night in the hospital. (RP 42) She reported that Mr. Butler was in a coma for two or three days. (RP 43) Mrs. Butler recalled that while in the hospital, her son had experienced hallucinations, and said things that made no sense. (RP 45) While she could not recall specific dates, she expressed doubt that Mr. Butler was coherent on April 6 because "it took a long time" before he was coherent. (RP 45)

Mr. Butler also testified at the 3.5 hearing. He stated that he and Nurse Henry did not get along at all. (RP 53) He could not recall with particularity giving consent for surgery. (RP 54) Mr. Butler reported he was "out of it" and he pushed the pain medication button every ten minutes. (RP 54) During the course of his hospital stay, Mr. Butler had a

kidney removed, suffered partial paralysis in his leg due to the bullet hitting his spine and had a colostomy. (RP 55-56) Mr. Butler recalled seeing Detective Miller, but he had no recollection of their conversation. (RP 56)

The court ruled that Mr. Butler was not in police custody at the time he spoke with Detective Miller. (RP 69) The court found that Mr. Butler had been in the hospital for a week and had been “stabilized.” (RP 70) The court concluded that Mr. Butler “validly waived his rights.” (RP 70) As a result, Detective Miller told the jury about the details of Mr. Butler’s confession during trial. (RP 415-16)

At the close of the trial, Mr. Butler moved to dismiss the kidnapping charge. (3RP 76) The court summarily denied the motion. (3RP 77)

During closing argument, the State argued that because Mr. Butler pointed the gun at Mr. Benson while Derick gathered up items, a conspiracy was established:

The circumstantial evidence shows that the two of them acted in concert. Mr. Benson testified that one of them, Mr. Taylor, was gathering the stuff downstairs, while it was Mr. Butler that was holding the gun to him. That’s evidence of an agreement. That’s evidence of concerted action. And a substantial step in performance. Well, they showed up, showed up armed, kicked the door in, the evidence shows, assaulted Mr. Benson, and then gathered up those items.

Clearly many substantial steps in furtherance of the agreement.

(3RP 44)

Sua sponte, the court included an instruction related to lawful force defenses. Mr. Butler objected, and the court overruled the objection and included the instruction:

MR. COLLINS: Your Honor, I have an exception to the instruction about the use of deadly force by a homeowner, a person in possession of premises. It's my understanding from Mr. Haskell that that is a statute.

THE COURT: Well, actually it's modified from one of the WPICs. My thought was, a big part of the defense case here is arguing that somehow the homeowner did something wrong if he fired first. And given that central aspect of the defense case here, I think, you know, that - - ordinarily we probably wouldn't instruct on that, but I think that it's important to advise what the state of Washington law is.

MR. COLLINS: Well, my issue with that, Your Honor, I see that it's actually based essentially on the self-defense instruction --

THE COURT: Right.

MR. COLLINS: -- looks like, and I'm not sure that that would be approved as a WPIC. I'm not sure that it's not a comment on the evidence, given that that is the specific defense in this case.

THE COURT: I understand. And I wouldn't give it if the defense hadn't made it kind of a central part of their case.

MR. COLLINS: Right. Right. And I'm also noting that it was not proposed by the State, which I think is a little bit extraordinary because I think the State, you know, was cognizant of that defense at the same time the Court was. But my exception would be I don't believe that's a WPIC, and I don't believe it's appropriate, and it could be a comment on the evidence to that

instruction. With the self-defense instruction as pertains to Mr. Butler that I proposed, it says defense of the charge of first-degree assault in Count 8.

THE COURT: Right.

MR. COLLINS: It should actually say seven and eight.

THE COURT: No, because he only said that he only fired at the -- Mr. Robertson, by his own testimony. So therefore, it's only a defense to the Count 8 involving Mr. Robertson.

MR. COLLINS: Okay. So I guess we're discounting the fact that he was -- that the person that was with him was fighting with Mr. Benson? I mean, I'm not sure at this point whether or not Mr. Benson was armed or not. I know he only indicated he shot at Mr. Robertson. But beyond that, the conflict, it appears to be between everybody that was in the house, essentially. So we would just take exception to that as well, Your Honor.

THE COURT: Okay.

MR. COLLINS: Thank you.

(3RP 3-5)

The instruction read:

The use of deadly force by a homeowner or person in possession of premises is justifiable when committed in the lawful defense of the homeowner or any person in the homeowner's presence or company when:

(1) the homeowner reasonably believed that the person in question or others whom the homeowner reasonably believed were acting in concert with the person in question intended to commit a felony or to inflict death or great personal injury;

(2) the homeowner reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the homeowner employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the homeowner, taking into consideration all the facts and

circumstances as they appeared to him or her, at the time of the incident.

(CP 81)

Mr. Butler was convicted of (1) first degree kidnapping; (2) first degree burglary; (3) conspiracy to commit first degree robbery; (4) first degree robbery; (5) first degree assault; and (6) first degree assault. (CP 327) He was acquitted of two additional counts of first degree robbery. (CP 93; 95)

D. ARGUMENT

1. MR. BUTLER'S MEDICAL CONDITION PREVENTED HIM FROM MAKING A VOLUNTARY WAIVER OF HIS RIGHT TO REMAIN SILENT, AND THE ADMISSION OF THE CONFESSION VIOLATED MR. BUTLER'S STATE AND FEDERAL DUE PROCESS RIGHTS.

A confession is deemed voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). To be voluntary for state and federal due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made. *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). The court must consider factors such as a

defendant's physical condition, age, mental abilities, physical experience, and police conduct. *Id.*

A defendant's mental disability and use of drugs at the time of a confession are also considered, but those factors do not necessarily render a confession involuntary. *See State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985).

When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988).

In this case, Mr. Butler was immobile in a hospital bed, and very recently revived from a coma. He was constantly administering to himself an opiate-type pain medicine. Detective Miller asked no orienting questions to determine if Mr. Butler knew where he was, the day of the week, or even his own name. Instead, Detective Miller wholly relied upon Nurse Henry's assertions that he was capable to talk to the detective.

Nurse Henry and Mr. Butler did not get along well. And Nurse Henry admitted that he had no experience in determining if and when a patient was coherent enough to talk to a police officer, and he believed no difference existed between the mental awareness necessary to consent to

surgery and the awareness necessary to make a knowing and intelligent waiver of Constitutional rights. Given these circumstances, the court's decision to admit Mr. Butler's confession was error. Mr. Butler was incapable of knowingly, intelligently and voluntarily waiving his right to remain silent. As a result, the admission of his confession from his hospital bed violated his State and Federal due process rights.

2. THE "RESTRAINT" OF MR. BENSON WAS MERELY INCIDENTAL TO THE ROBBERY AND THUS THE KIDNAPPING CONVICTION MUST BE VACATED.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In order to convict Mr. Butler of kidnapping, the jury was instructed it had to find in relevant part:

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

- (1) That on or about the 30th day of March, 2009, the defendant, or one with whom he was an accomplice, intentionally abducted BRANDON BENSON;
- (2) That the defendant, or one with whom he was an accomplice, abducted that person with intent to facilitate the commission of first degree burglary or first degree robbery or flight thereafter; and
- (3) That any of these acts occurred in the State of Washington.

(CP 46)

The instructions defined “abduct” as “restrain a person by using or threatening to use deadly force.

Restraint or restrain means to restrict another person’s movements without consent and without legal authority in a manner that interferes substantially with that person’s liberty.

(CP 47)

The mere incidental restraint and movement of the victim during the course of another crime, which has no independent purpose or injury, is insufficient to establish a kidnapping. *State v. Brett*, 126 Wn.2d 136, 166, 892 P.2d 29 (1995), overruled on other grounds by *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) (*citing State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980); *State v. Johnson*,

92 Wn.2d 671, 680, 600 P.2d 1249 (1979); and *State v. Allen*, 94 Wn.2d 860, 862-64, 621 P.2d 143 (1980)).

Where kidnapping is incidental to a robbery, the kidnapping convictions will be dismissed. *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006); *see also State v. Green*, 94 Wn.2d at 227 (“While movement of the victim occurred, the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping”); *State v. Johnson, supra* (kidnapping merged with rape in the first degree in a situation where the kidnapping did not have an independent purpose or effect).

The record in this case reveals that the alleged kidnapping of Mr. Benson was merely incidental to the robbery. According to Mr. Benson’s testimony, the two men woke him up, pointed a gun at him and demanded drugs and money. At Mr. Benson’s request, the trio proceeded upstairs where Mr. Benson gave the intruders a small jar of marijuana, and the men began packing up electronics before shots were fired. The restraint of Mr. Benson was simply to facilitate the taking of items from the house, specifically drugs, money and electronics.

Additionally, the kidnapping allegation lacked factual support. The record reveals that according to Mr. Benson the men took him

upstairs at his suggestion. Mr. Benson proposed that the group head upstairs, and thus Mr. Butler did not restrict Mr. Benson's movement. Instead, he followed Mr. Butler upstairs. No other references in the record indicate that Mr. Benson's movements were restricted. As a result, insufficient evidence exists to support the kidnapping conviction and it should be dismissed.

3. INSUFFICIENT EVIDENCE EXISTED OF A CONSPIRACY.

A conspiracy is a plan to carry out a criminal scheme together with a substantial step toward carrying out the plan; the punishable criminal conduct is the plan. See RCW 9A.28.040(1); *State v. Williams*, 131 Wn. App. 488, 496, 128 P.3d 98, review granted and cause remanded on different grounds, 158 Wash.2d 1006, 143 P.3d 596 (2006); see also *State v. Bobic*, 140 Wn.2d 250, 262-65, 996 P.2d 610 (2000). The nature and extent of the conspiracy lies in the agreement, which embraces and defines its objects. *Williams*, 131 Wn. App. at 496.

A conspiracy "may be proven by showing the declarations, acts, and conduct of the conspirators." *State v. McGonigle*, 144 Wash. 252, 260, 258 P. 16 (1927). The agreement may be shown by a "concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *State v. Casarez-*

Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987). Circumstantial evidence may provide proof of a conspiracy. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997)

Where no evidence exists in the record, by admission or otherwise, that a defendant agreed with one or more persons to commit an assault for which he was prosecuted, insufficient evidence exists to support a conviction of conspiracy. *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994).

In order to prove conspiracy to commit first degree robbery while armed with a deadly weapon, the State is required to show that (1) the individual agreed with one or more persons to engage in or cause the performance of conduct constituting first degree robbery, (2) the individual made the agreement with the intent that such conduct be performed, and (3) any one of the persons involved in the agreement took a substantial step in pursuance of the agreement. *See* RCW 9A.28.040; RCW 9A.56.200.

In this case, no evidence exists that an agreement was made between Mr. Butler and Derick. Mr. Butler testified that he and Derick went to the house that evening to purchase marijuana. (3RP 14) Derick did not testify. No evidence was ever introduced that the two men had any sort of formal or informal agreement to rob the homeowners.

During closing argument, the State argued that because Mr. Butler pointed the gun at Mr. Benson while Derick gathered up items, a conspiracy was established. The State's assertions are incorrect. In essence, the State argued that under any circumstances where two perpetrators take action, a conspiracy exists. But the law requires the State establish an agreement between the parties.

Here, the State failed to show the existence of any sort of agreement. The two men could have held very different objectives when they entered the house that night. The record lacks evidence that an agreement or plan to rob the house existed between Mr. Butler and Derick. As a result, this conviction should be reversed.

4. THE TRIAL COURT'S SUA SPONTE INSTRUCTION 31 CONSTITUTED AN UNLAWFUL COMMENT ON THE EVIDENCE AND THUS VIOLATED MR. BUTLER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

An instruction is a comment on the evidence if it conveys to the jury the personal attitudes of the judge toward the merits of the cause. *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979); *State v. Mayes*, 20 Wn. App. 184, 579 P.2d 999 (1978). An instruction that states the law correctly and concisely and is pertinent to the issues raised in the case

does not constitute a comment on the evidence. *State v. Foster, supra*; *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978).

The court's *sua sponte* instruction 31 was an unlawful comment on the evidence in violation of Const. art. 4, § 16. That constitutional provision prohibits a judge from conveying to the jury his or her personal belief in the merits of the cause or some issue therein. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). The determination of a prohibited comment depends upon the facts and circumstances of each case. *State v. Owen*, 24 Wn. App. 130, 600 P.2d 625 (1979).

In this case, the court modified a WPIC. It appears the court modified a self-defense instruction. (*See* WPIC 17.03) The State did not request the instruction. But the court, of its own accord, informed defense counsel that because a central part of the defense strategy was that Mr. Butler was firing in response to being fired at, the court wanted to ensure the jury had an instruction that such behavior was excusable. This constituted a comment on the evidence. Obviously, the court did not want Mr. Butler to be able to use the fact that the un rebutted evidence revealed that Mr. Butler was *not* the first to fire the gun. The court's offering of the instruction moved the court from impartial judiciary to advocate for the State.

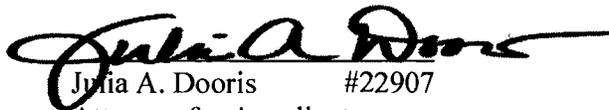
Moreover, the court's instruction was not an accurate reflection of the law. The court's instruction so changed the WPIC that it was no longer recognizable. Because the court's distortion of the WPIC rendered the instruction fatally flawed, giving the instruction constituted reversible error. Mr. Butler is entitled to a new trial.

E. CONCLUSION

Due to insufficient evidence, Mr. Butler's convictions for conspiracy and kidnapping should be reversed and vacated. Because the court impermissibly commented on the evidence and *sua sponte* provided a fatally modified WPIC that did not accurately state the law, Mr. Butler is entitled to a new trial on the remaining convictions.

Dated this 9th day of March, 2011.

GEMBERLING & DOORIS, P.S.


Julia A. Dooris #22907
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29187-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
THOMAS A. BUTLER,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on March 9, 2011, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Mark E. Lindsey
mlindsey@spokanecounty.org

I certify under penalty of perjury under the laws of the State of Washington that on March 9, 2011, I mailed a copy of the Appellant's Brief in this matter to:

Thomas A. Butler
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Signed at Spokane, Washington on March 9, 2011.


Julia A. Dooris #22907