

63737-1

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NO. 63737-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LINDY DEER,

Appellant.

2010 JUL 15 PM 4:28  
COURT OF APPEALS  
DIVISION ONE

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

    1. THIS COURT SHOULD ACCEPT THE STATE’S  
       CONCESSION OF ERROR ON THE *PELKEY* ISSUE. .... 1

    2. THE TRIAL COURT VIOLATED MS. DEER’S RIGHT TO  
       DUE PROCESS BY DENYING HER REQUEST TO  
       INSTRUCT THE JURY THAT THE STATE MUST  
       PROVE BEYOND A REASONABLE DOUBT SHE  
       COMMITTED A VOLITIONAL ACT ..... 2

B. CONCLUSION..... 7

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>State v. Eaton</u> , 168 Wn.2d 476, 229 P.3d 704 (2010).....	3, 4
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987) .....	1
<u>State v. Quismundo</u> , 164 Wn.2d 499, 192 P.3d 342 (2008).....	2
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	1

### **Washington Court of Appeals Decisions**

<u>State v. Utter</u> , 4 Wn. App. 137, 479 P.2d 946 (1971).....	2, 3
--	------

### **Decisions of Other Jurisdictions**

<u>Brown v. State</u> , 955 S.W.2d 276 (Tex. Crim. App. 1997) .....	5, 6
<u>State v. Baird</u> , 604 N.E.2d 1170 (Ind. 1992).....	5
<u>State v. Lara</u> , 183 Ariz. 233, 902 P.2d 1337 (Ariz. 1995).....	5

### **Other Authorities**

R. Anderson, 1 Wharton's Criminal Law and Procedure (1957).....	3
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A. ARGUMENT

1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR ON THE PELKEY ISSUE.

As explained in both the Brief of Appellant and Brief of Respondent, State v. Pelkey establishes a bright-line rule whereby the State may not amend a constitutionally defective information after resting its case. App. Br. at 9; Resp. Br. at 10 (both citing State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987)). The information in this case was constitutionally defective because it misstated the elements of the crimes. Resp. Br. at 11; App. Br. at 10. The trial court violated Pelkey's bright-line rule by allowing the State to amend the information after resting its case to cure the constitutional defect. Resp. Br. at 14; App. Br. at 11. The remedy is reversal of the convictions and dismissal of the charges without prejudice to the State's ability to refile. Resp. Br. at 11; App. Br. at 13 (both citing State v. Vangerpen, 125 Wn.2d 782, 791-93, 888 P.2d 1177 (1995)).

This Court should accept the State's concession of error, reverse Ms. Deer's convictions, and remand with instructions to dismiss the charges without prejudice to the State's ability to refile.

Resp. Br. at 9-14; App. Br. at 8-13; State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

2. THE TRIAL COURT VIOLATED MS. DEER'S RIGHT TO DUE PROCESS BY DENYING HER REQUEST TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT SHE COMMITTED A VOLITIONAL ACT.

In her opening brief, Ms. Deer argued that the trial court violated her right to due process by refusing to instruct the jury that it must find beyond a reasonable doubt she committed a volitional act in order to convict. Regardless of whether a crime has a mens rea, every crime includes an actus reus and that act must be voluntary in order to be sanctionable. Because both Ms. Deer and the State presented evidence that Ms. Deer was asleep when R.R. had sex with her, the jury should have been instructed on the State's burden to prove a volitional act. App. Br. at 13-19.

Even for crimes like rape of a child which do not include an element of specific intent, there is "a certain minimal mental element required in order to establish the actus reus itself." State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). "An 'act' involves an exercise of the will. It signifies something done voluntarily." Id. at 140. "An 'act' committed while one is unconscious is in reality no act at all." Id. at 143.

If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.

Id. at 142 (quoting R. Anderson, 1 Wharton's Criminal Law and Procedure § 50 (1957)); accord State v. Eaton, 168 Wn.2d 476, 229 P.3d 704 (2010).

In response, the State attacks a straw man: it argues that the crime of rape of a child does not have a mens rea. Resp. Br. at 14-20. But Ms. Deer does not claim the crime has a mens rea; as discussed in her opening brief, the requirement of voluntariness goes to the actus reus. See Utter, 4 Wn. App. at 142-43; Brief of Appellant at 14-19.

The State then dismisses Eaton as inapposite. Resp. Br. at 18-19. But it does so on the grounds that "the child rape statute at issue in this case has already been interpreted as a strict liability offense." Resp. Br. at 19. Again, the State confuses the mens rea with the actus reus. Ms. Deer does not claim that child rape has a mens rea; she argues that the State must prove volition as part of the actus reus. Volition is part of the actus reus of every crime, regardless of the mens rea. Utter, 4 Wn. App. at 142-43.

The Eaton Court explained that even strict-liability crimes require a voluntary act:

Although most criminal laws since codified still adhere to this general principle [that there must be a “vicious will”], we now recognize that the legislature has the authority to create a crime without a mens rea element. Though they are disfavored, these “strict liability” crimes criminalize unlawful conduct regardless of whether the actor possesses a culpable mental state.

...

As these principles suggest, although an individual need not possess a culpable mental state in order to commit a crime, there is ‘a certain minimal mental element required in order to establish the actus reus itself. ... To punish an individual for an involuntary act would run counter to the principle that a person cannot be morally responsible for an outcome unless the outcome is a consequence of that person’s action. Unless there is a requirement of voluntariness, situational offenses are at odds with the deepest presuppositions of the criminal law.

Eaton, 168 Wn.2d at 481-82 (internal citations omitted).

The State in its response brief here makes the same mistake it made in Eaton:

The State appears to be under the misapprehension that requiring volition is the same as requiring intent. But nothing in our opinion should be read as requiring that the State prove a defendant intended to be in the enhancement zone or even that she knew she was in the enhancement zone. The State must simply demonstrate that the defendant took some voluntary action that placed him in the zone.

Id. at 485 n. 5. Similarly here, the State is under the misapprehension that requiring volition is the same as requiring intent. But that is not Ms. Deer's argument. Ms. Deer argues that "[t]he State must simply demonstrate that the defendant took some voluntary action" when R.R. had sex with her. Id.

The State makes the same mistake when discussing cases from other jurisdictions. According to the State, "all of these cases involve crimes that clearly include a mens rea element, and thus, they are not on point." Resp. Br. at 20. But as the Texas Court of Criminal Appeals explained, "[t]he issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state." Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997); accord State v. Lara, 183 Ariz. 233, 902 P.2d 1337, 1338 (Ariz. 1995) ("a bodily movement while unconscious, asleep, under hypnosis, or during an epileptic fit, is not a voluntary act"); State v. Baird, 604 N.E.2d 1170, 1176 (Ind. 1992) (describing a voluntary act as part of the actus reus requirement, not the mens rea).

Thus, even though the trial court in Brown had given an instruction on intent and knowledge (the mens rea), it erred in refusing to give an instruction on the issues of voluntariness (the

actus reus). Brown, 955 S.W.2d at 280. Here, Ms. Deer does not claim there should have been an instruction requiring the State to prove intent or knowledge, because unlike the crime at issue in Brown, there is no mens rea here. However, just as in Brown, an instruction should have been given on the actus reus, stating “a defendant should be acquitted if there is a reasonable doubt as to whether [s]he voluntarily engaged in the conduct of which [s]he is accused.” Id. at 279.

In sum, this Court should hold that trial courts must instruct the jury on the State’s burden to prove a volitional act once evidence of involuntariness is presented.

**B. CONCLUSION**

This Court should accept the State's concession of error, reverse the convictions, and remand for dismissal of the charges without prejudice. This Court should further hold that the trial court must instruct the jury on the State's burden to prove a volitional act if evidence of involuntariness is presented.

DATED this 14<sup>th</sup> day of July, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] ANDREA VITALICH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] LINDY DEER 329862 MISSION CREEK CC FOR WOMEN 3420 NE SAND HILL RD BELFOUR, WA 98528</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF JULY, 2010.

X \_\_\_\_\_  
*grv*

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