

65432-2

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NO. 65432-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

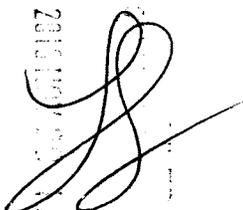
STATE OF WASHINGTON,

Respondent,

v.

David Elliot Jefferson,

Appellant.

2011 JUN 21 11:01 AM

11-01

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

The Honorable James E. Rogers, Judge

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

David Jefferson moved to have his pretrial statement to police suppressed at trial for felony violation of a no contact order. In the statement, Mr. Jefferson told the officer that he and his wife (the protected person under the no contact order) were taking a shortcut to a bus shelter. The statement was the result of interrogation because it was elicited after the police officer told Mr. Jefferson he had been trespassing in a restricted area and asked him "What are you doing here?" The interrogation was custodial because it took place in a narrow passageway where two uniformed officers had corralled Mr. Jefferson and his wife off to the side of the choke point. One of the officers focused on Mr. Jefferson, told him he was trespassing in a dangerous, restricted area and seized his identification.

Nonetheless, the trial court denied Mr. Jefferson's motion to suppress because it found the statement was not the result of custodial interrogation. The State admitted the statement during its case-in-chief. The jury convicted Mr. Jefferson.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Jefferson's CrR 3.5 motion to suppress and admitted his pretrial statement to police officers, which was elicited during custodial interrogation.

2. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact b.¹

3. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact c.

4. In the absence of substantial evidence in the record, the trial court erred in entering Finding of Fact d.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

An incriminating statement that results from custodial interrogation cannot be admitted at the suspect's trial unless Miranda warnings were given and the suspect knowingly, intelligently, and voluntarily waived his rights.² A suspect is subject to custodial interrogation when his freedom of action is curtailed in any significant way and he is subject to express questioning. Where Mr. Jefferson was cornered in the narrow "choke point" of an

¹ A copy of the court's written findings of fact and conclusions of law on the CrR 3.5 motion to suppress is attached as Appendix A.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

access way by two police officers in uniform who seized his identification, testified he would not have been free to leave, and expressly questioned him on the topic of the suspected offense, did the trial court err by allowing the State to admit Mr. Jefferson's incriminating response?

D. STATEMENT OF THE CASE

An order entered in 2006 barred contact between Mr. Jefferson, the respondent, and his wife, Wafa McDaniel, the protected person. 2/17/10RP 38-39. Under the terms of the order, contact of any kind is prohibited until June 21, 2016. Id. Mr. Jefferson and Ms. McDaniel have been married over ten years and share children and grandchildren. 2/17/10RP 53.

Mr. Jefferson was scheduled to go fishing with his brother-in-law on the afternoon of August 27, 2009. 2/17/10RP 52. Mr. Jefferson and his brother-in-law go fishing together three times each week. Id. As was his custom, Mr. Jefferson bought tackle and worms at an Outdoor Emporium store in Seattle, Washington. 2/17/10RP 51-52. To Mr. Jefferson's surprise, as he left the store to return to the transit station and meet his brother-in-law, Ms. McDaniel appeared. 2/17/10RP 53. Ms. McDaniel relayed information to Mr. Jefferson about their daughter. 2/17/10RP 54.

Aware of the no contact order in place, Mr. Jefferson tried to move away from his wife and proceeded to walk toward the transit station. 2/17/10RP 55. He took a shortcut through an area reserved for Metro transit buses and off limits to pedestrians. Id. Though Mr. Jefferson planned to take the train to his brother-in-law's home, Ms. McDaniel's bus left from the same station. 2/17/10RP 56.

Mr. Jefferson testified that Ms. McDaniel was walking behind him and continued to say "a few things" to him when two police officers in uniform stopped them on foot. 2/17/10RP 55. The officers testified that Mr. Jefferson and Ms. McDaniel were walking close together. 2/17/10RP 33-34, 48.

The two officers spotted the two pedestrians in the restricted bus area on a routine patrol in a fully-marked King County Sheriff's vehicle. 2/17/10RP 31. They parked the vehicle off to the side of the passageway and approached Mr. Jefferson and Ms. McDaniel on foot. 2/17/10RP 33. The officers were in uniform. 2/17/10RP 31. At that point, the officers were prepared to arrest Mr. Jefferson and Ms. McDaniel for trespassing or give them citations or warnings. See 2/17/10RP 10-11. One officer told Mr. Jefferson "you are not supposed to be walking here. It's trespassing. This is

a dangerous area. [He then a]sked them, you know, what are you doing? Why are they here?" 2/17/10RP 34. Mr. Jefferson responded to the officer's question of what they were doing in the area by stating "they were taking a short cut to the bus shelter on Royal Brougham." 2/17/10RP 35.

The officer had seized Mr. Jefferson's identification and used his portable radio to check whether Mr. Jefferson had any outstanding warrants or was listed on the Metro suspension list. 2/17/10RP 26-37. He learned that Mr. Jefferson was the respondent to a no contact order that had been served on him. Id. The no contact order listed Ms. McDaniel as the protected person. 2/17/10RP 38. Mr. Jefferson was arrested for violating the no contact order. 2/17/10RP 43.

Prior to trial, the court held a CrR 3.5 hearing to determine whether Mr. Jefferson's statement to the police that "they were taking a shortcut" should be suppressed. 2/17/10RP 8. The State intended to admit the statement, which showed that Mr. Jefferson and Ms. McDaniel were in contact at the time of Mr. Jefferson's arrest. 2/17/10RP 11-12.

Deputy Escobar, the arresting officer with primary contact with Mr. Jefferson, testified at the hearing. 2/17/10RP 4. Deputy

Escobar testified that on a routine check of a Metro bus way on August 27, 2009, he observed two pedestrians. 2/17/10RP 6-7. He and his partner parked the marked patrol car they were driving and approached the individuals on foot because they had violated the law in front of him. 2/17/10RP 7, 9. He was either going to arrest them for trespass and transport them to the police station or cite them. 2/17/10RP 10-11.

The passage way was a narrow, confined area barely large enough for bus traffic; the area is "like a choke point." 2/17/10RP 7. Deputy Escobar "guided [Mr. Jefferson and Ms. McDaniel] off to the side." Id. Deputy Escobar seized Mr. Jefferson's identification and held onto it. 2/17/10RP 11. Standing "very close" to Mr. Jefferson, Deputy Escobar asked him, "what are you doing here?" 2/17/10RP 8. Mr. Jefferson responded that "they were taking a shortcut to the bus shelter at Royal Brougham Street." Id. Deputy Escobar testified that if Mr. Jefferson or Ms. McDaniel had started walking away from him, which they did not, he would have stopped them. Id. at 10-11.

Mr. Jefferson did not testify at the CrR 3.5 hearing. 2/17/10RP 14.

The trial court ruled admissible at trial Mr. Jefferson's statement that "they were walking to the bus stop" and entered written findings of fact. 2/17/10RP 18-20; CP 22-24. The court found Mr. Jefferson's statement was not the product of custodial interrogation. Id.

At the jury trial, Deputy Escobar testified Mr. Jefferson told him "they were taking a short cut to the bus shelter on Royal Brougham." 2/17/10RP 35. After the statement was admitted in the State's case, Mr. Jefferson testified in his own defense. 2/17/10RP 50. He admitted that he and Ms. McDaniel had been in contact prior to the arrest. 2/17/10RP 59. However, he maintained that Ms. McDaniel had unexpectedly approached him, told him news about their daughter, and then followed behind him as they walked toward the same transit station. 2/17/10RP 55-58.

The jury convicted Mr. Jefferson of felony violation of a no contact order. CP 7.

E. ARGUMENT

THE TRIAL COURT VIOLATED MR. JEFFERSON'S CONSTITUTIONAL RIGHT TO REMAIN SILENT BY ADMITTING HIS SELF-INCRIMINATORY STATEMENT GIVEN TO LAW ENFORCEMENT OFFICERS DURING A CUSTODIAL INTERROGATION WITHOUT THE BENEFIT OF *MIRANDA* WARNINGS.

1. Police Officers Must Provide *Miranda* Warnings Prior to Subjecting a Suspect to a Custodial Interrogation.

An individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amend. V; Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Our state constitution article I, section 9 is equivalent to the Fifth Amendment and "should receive the same definition and interpretation as that which has been given to" the Fifth Amendment by the United States Supreme Court. City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966) (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

To protect this right, police must inform a person placed under custodial arrest that he has the right to remain silent, that anything he says can be used against him in court, and he has the right to have an attorney present during questioning. Miranda, 384 U.S. at 479. Miranda safeguards apply as soon as a suspect's

freedom of action is restricted to a degree associated with formal arrest. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350, rev. denied, 132 Wn. 2d 1015, 943 P.2d 662 (1997). In determining whether an individual was in custody, the reviewing court uses an objective standard: whether a reasonable person in the suspect's position would believe he was in police custody to the degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

An appellate court reviews a trial court's determination of a custodial interrogation de novo. State v. Solomon, 114 Wn. App. 781, 788-89, 60 P.3d 1215 (2002), rev. denied, 149 Wn.2d 1025, 72 P.3d 763 (2003).

2. Mr. Jefferson Was Subject to Interrogation Because the Questioning Was Reasonably Likely to Elicit an Incriminating Response.

"Interrogation" refers to any words or actions on the part of police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response (that is, any response, whether inculpatory or exculpatory, that the prosecution seeks to introduce at trial) from the suspect. Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d, 297 (1980). The officer's "words and

actions and requests for more detail” must be viewed in context to determine whether “the responses sought would in all likelihood be incriminating.” State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992).

The definition of “interrogation” in this context focuses primarily on the perceptions of the suspect rather than the intent of the police. Innis, 446 U.S. at 301. The intent of the police is not irrelevant, however, as it may have a bearing on whether the police should have known their words or actions were reasonably likely to elicit an incriminating response. Id. at 301-02. Where a police practice is designed to elicit such a response, it is likely the practice will also be one the police should have known was reasonably likely to have that effect. Id.

Here, the question to Mr. Jefferson was intended to elicit an incriminating response. Deputy Escobar had seen Mr. Jefferson and Ms. McDaniel in plain sight walking in the bus way and stopped them, leading them to the side of the narrow “choke point.” 2/17/10RP 6-7. The officer stopped Mr. Jefferson for trespassing in a restricted area. Id. at 6-7, 10. Standing “easily within 10 feet” of Mr. Jefferson on the side of the marked, non-pedestrian area, Deputy Escobar told Mr. Jefferson he was trespassing in a

dangerous, restricted area and asked him, “what are you doing here?” 2/17/10RP 8.

First, Deputy Escobar’s statement was plainly express questioning. See Innis, 446 U.S. at 300-301, 302. Second, because Deputy Escobar had stopped Mr. Jefferson for trespassing in the restricted area, the question “what are you doing here” was reasonably likely to evoke an inculpatory or exculpatory statement. State v. Shuffelen, 150 Wn. App. 244, 257, 208 P.3d 1167 (2009) (“The relationship of the question asked to the crime suspected is highly relevant.”); see Innis, 446 U.S. at 300-01 & n.8; Willis, 64 Wn. App. at 637. From the perspective of the suspect, Mr. Jefferson, moreover, the express questioning would have seemed intended to elicit evidence. See Innis, 446 U.S. at 301.

3. Mr. Jefferson Was in Custody Because a Reasonable Person in His Position Would Not Have Felt Free to Terminate the Interrogation.

An individual is considered to be in custody for purposes of Miranda not only when he is formally arrested, but any time “the defendant’s movement was restricted at the time of questioning.” State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Warnings are required when the suspect is “in custody at the station or otherwise deprived of his freedom of action in any significant way.”

Orozco v. Texas, 394 U.S. 324, 327, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969) (quoting Miranda, 384 U.S. at 477) (emphasis in original).

A person is in custody if, under the totality of the circumstances, a reasonable person would “have felt he or she was not at liberty to terminate the interrogation and leave.” United States v. Craighead, 539 F.3d 1073 (9th Cir. 2008) (citing Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)). In other words, the question is “whether a reasonable person in [Mr. Jefferson’s] position would have felt deprived of his freedom of action in any significant way, such that he would not have felt free to terminate the interrogation.” Id.

Generally, a reasonable person would not feel free to terminate the interrogation and leave if his “freedom of action is curtailed.” Berkemer, 468 U.S. at 440. The “critical inquiry,” therefore, is whether the suspect’s “freedom of movement was restricted.” State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). The defendant must point to “objective facts indicating his . . . freedom of movement [or action] was restricted [or curtailed].” State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, amended by 118 Wn.2d 596, 837 P.3d 599 (1992). By focusing on the restraints

placed on a suspect's freedom of movement, the Berkemer Court "rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone." State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (quoting Heinemann v. Whitman County, 105 Wn.2d 796, 807, 718 P.2d 789 (1986) (citing Berkemer, 468 U.S. at 435 n.22)). The Berkemer test is designed to identify those situations that have the potential to induce the person questioned "to speak where he would not otherwise do so freely." Berkemer, 468 U.S. at 437 (quoting Miranda, 384 U.S. at 467).

Here, the totality of the circumstances indicates that Mr. Jefferson was in custody. As he was on his way to the transit center, he was approached by two police officers in uniform. 2/17/10RP 55. Deputy Escobar corralled him to the side of the narrow choke point, seized Mr. Jefferson's identification, and started questioning him about the basis for his presence in the restricted area. Id. at 7-8. Deputy Escobar remained "very close to" Mr. Jefferson. Id. at 8. The area was not only restricted to the general public, but no one else was around. Id. at 48; see Berkemer, 468 U.S. at 438 (where passersby are present it can

alleviate a suspect's sense of vulnerability). Though the record does not show whether Mr. Jefferson was separated from Ms. McDaniel, Deputy Escobar focused on him as he told him "You are trespassing" and questioned his basis for being in the area. 2/17/10RP 8. Confirming that a reasonable person would not feel free to terminate the interrogation and leave, Deputy Escobar testified that Mr. Jefferson was in fact not free to leave. Deputy Escobar testified that, if Mr. Jefferson had started to walk away from him, he would have stopped him. 2/17/10RP 10-11. A reasonable person in Mr. Jefferson's situation, where two uniformed police officers had cornered him in a narrow area, alleged he had committed a crime, held onto his identification and questioned him about his presence, would not have felt free to leave.

4. The Error in Admitting Mr. Jefferson's Statement Was Not Harmless Beyond a Reasonable Doubt.

Miranda is a constitutional requirement. Dickerson v. United States, 530 U.S. 428, 438, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). As such, the State bears the burden of proving that the admission of a statement obtained in violation of Miranda was harmless beyond a reasonable doubt. See Arizona v. Fulminante,

499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the confession did not contribute to the conviction. Fulminante, 499 U.S. at 296 (citing Chapman, 386 U.S. at 26). An error is not harmless beyond a reasonable doubt when there is a reasonable possibility that the outcome of the trial would have been different if the error had not occurred. Id. In Fulminante, the Court noted that a confession has a profound impact on the jury, and that the “defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.” Id. at 296 (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)).

In Mr. Jefferson’s jury trial on felony violation of a no contact order, the State introduced Mr. Jefferson’s statement that he and the protected person were walking together to the bus shelter. This confession of contact, once placed before the jury, poisoned the well of Mr. Jefferson’s case. See Fulminante, 499 U.S. at 296. The damaging nature of a self-incriminating statement renders it entirely uncertain that the State would have secured a conviction absent its admission. See id. Additionally, Mr. Jefferson’s defense was no

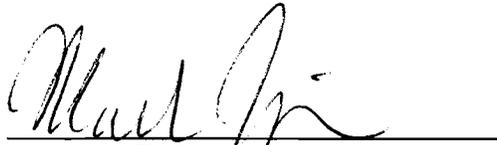
longer his own to craft. The State, accordingly, cannot demonstrate beyond a reasonable doubt that the confession had no effect on the conviction. Id. The trial court's admission of Mr. Jefferson's statement to Deputy Escobar was not harmless error.

F. CONCLUSION

The trial court erred by admitting Mr. Jefferson's statement, which was the result of custodial interrogation absent any warnings. Because the error was not harmless beyond a reasonable doubt, the conviction must be reversed.

DATED this 29th day of November, 2010.

Respectfully submitted,



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APPENDIX A

FILED
KING COUNTY

FEB 18 2010

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-1-05944-2 SEA

vs.

DAVID E. JEFFERSON,

Defendant.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statements was held on February 17, 2010 before the Honorable Judge James E. Rogers.

The court informed the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant did not testify at the hearing.

After considering the evidence submitted by the parties, to wit: the testimony of King County Sheriff's Office Detective Jason Escobar, and hearing argument, the court enters the following findings of fact and conclusions of law as required by CrR 3.5.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney
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1 1. THE UNDISPUTED FACTS:

- 2 a. On August 27, 2009 at 3:22 p.m., Deputy Jason Escobar and Deputy Thomas Collins
3 were on patrol. They were driving northbound on a Metro "bus way" between
4 Holgate Street and Royal Brougham in Seattle, Washington. The bus way is a
5 restricted area for Metro transit vehicles only. Pedestrians and non-Metro vehicles
6 are not allowed on the bus way.
- 7 b. Deputy Escobar and Deputy Collins saw a man and a woman walking together near
8 the Ryerson Base. This area is a chokepoint for bus traffic. There are no sidewalks,
9 and it is a dangerous area for pedestrians. Deputy Escobar parked the patrol vehicle
10 out of the way of oncoming traffic. Deputy Escobar and Deputy Collins exited the
11 vehicle and contacted the two individuals (later identified as the defendant David
12 Jefferson and Wafa McDaniel). The deputies did not have their weapons drawn.
- 13 c. Deputy Escobar asked the defendant why he was walking in this area. Deputy
14 Escobar told the defendant that this was a dangerous area due to the passing bus
15 traffic. The defendant said that they were taking a shortcut to a bus shelter at Royal
16 Brougham. Deputy Escobar told the defendant that he was not permitted to be there.
- 17 d. At that point, Deputy Escobar had not decided whether he was going to arrest the
18 defendant for trespassing or transport him out of the restricted area.

13 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
14 STATEMENTS:

15 ADMISSIBLE IN STATE'S CASE-IN-CHIEF

16 The following statement of the defendant is admissible in the State's case-in-chief:

17 The defendant's statement that they were taking a shortcut to a bus shelter at
18 Royal Brougham is admissible because Miranda was not applicable. The
19 defendant was detained at the time he made the statement; however he was not
20 under arrest, and his detention was not custodial. Berkemer v. McCarthy, 468
21 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984). No coercion was used to
22 obtain the defendant's statement.

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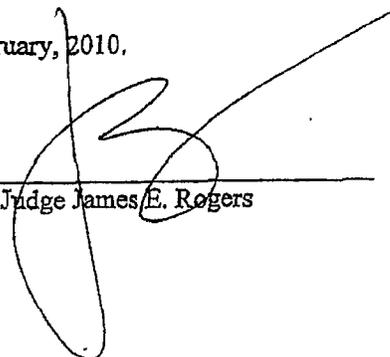
24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

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In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 18 day of February, 2010.

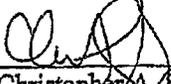


Judge James E. Rogers

Presented by:



Christopher L. Bell, WSBA #32736
Deputy Prosecuting Attorney

 30293 AS TO FORM

Christopher A. Swaby, WSBA #30239
Attorney for Defendant

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65432-2-I
v.)	
)	
DAVID JEFFERSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] DAVID JEFFERSON 895765 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF NOVEMBER, 2010.

X _____ 

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