

68061-7

68061-7

COA No. 68061-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

MOHAMAUD SULDAN MOHAMED,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF KING COUNTY

The Honorable Steven Gonzalez

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APPELLANT'S OPENING BRIEF

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OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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**A. ASSIGNMENTS OF ERROR**

1. The charging document did not allege the essential element of indecent liberties that the defendant must have knowledge that the person with whom he caused sexual contact was physically helpless.

2. The trial court violated Mr. Mohamed’s right to due process by entering judgment on his conviction for indecent liberties in the absence of sufficient evidence to support the jury’s verdict.

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Is it an essential element of the crime of indecent liberties charged pursuant to RCW 9A.44.100(1)(b) that the defendant must know that the person with whom he caused sexual contact was “physically helpless”?

2. Did the charging document fail to allege the essential element of indecent liberties that the defendant must have knowledge that the person with whom he caused sexual contact was physically helpless?

3. Was there insufficient evidence that the complainant M.M. was “physically helpless” and incapable of consent by reason of unconsciousness, where she testified that she was either awake or waking up when the defendant had sexual contact with her?

3. Where the complainant retracts and corrects her initial trial testimony and indicates that she was in fact awake during the sexual activity with the defendant, is her testimony simply conflicting, or is there insufficient evidence that she was sleeping during the incident and therefore no proof she was helpless and incapable of expressing non-consent, as is required for conviction?

### **C. STATEMENT OF THE CASE**

**1. Charging.** Mohamaud Mohamed attended a party with other young men and women his age at a home near Seward Park, where alcohol and marijuana were being consumed. Numerous guests remained in the house overnight to sleep. Sometime after 5 a.m., a next-door neighbor telephoned police after seeing a white male and a black male fighting in the upstairs portion of the house. The white male, Nolan Milgate, told responding officers that Mr. Mohamed had “raped” his girlfriend. CP 3-5.

According to the affidavit of probable cause, M.M. told police that she was awoken by realizing the defendant was in her and Mr. Milgate’s bed. He was touching her by putting his fingers inside her mouth, and “then [she] felt somebody forcing their penis inside her.” (Emphasis added.) CP 3. Mr. Mohamed was initially charged with

third degree rape, the information alleging that he had sexual intercourse with M.M. under circumstances where her non-consent was clearly expressed by words or conduct. CP 1; see RCW 9A.44.060(1)(a).

However, the information was amended to charge Mr. Mohamed with indecent liberties per RCW 9A.44.100(1)(b), the prosecutor now claiming that Mr. Mohamed had sexual contact with M.M. when she was sleeping, and thus incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless. CP 7; see also CP 10, 13 (State's trial brief stating charge based on claim M.M. was sleeping at the time of contact).<sup>1</sup>

**2. Trial.** At trial, Mr. Milgate stated that his girlfriend M.M. woke him up on the night in question, crying and stating that "Mo" had raped her. 9/22/11RP at 35-37. Mr. Mohamed was in their bed and initially refused to get out when confronted. A physical fight followed. 9/22/11RP at 40.

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<sup>1</sup> At sentencing, the prosecutor stated that the original rape charge (alleging sexual intercourse and vocally or physically-expressed non-consent) was changed to indecent liberties (sexual contact with a sleeping person) because of the defendant's age, the fact that a number of participants were under the influence of alcohol, and the concern that an indeterminate sentence for rape would be "too harsh." 12/9/11RP at 5-6.

M.M. made the same accusation against Mr. Mohamed to friends who were also present in the home, and later spoke to a sexual assault nurse at Harborview Medical Center. 9/22/11RP at 109, 120, 9/21/11RP at 9-10, 28, 48-49. M.M. told the nurse, Johanna Hulick, that she had awoken with a man's hand or fingers in her mouth, and he was vaginally penetrating her with his penis. 9/21/11RP at 9-10. M.M. had consumed five beers and one mixed drink over the course of the night. 9/21/11RP at 10. She had engaged in intercourse approximately a day before. 9/21/11RP at 23.

Right after the incident, Mr. Mohamed told Jason Bergerson that he had "made a mistake," and told Elizabeth Maunsell that Mr. Milgate had "got it all wrong." 9/22/11RP at 146, 9/21/11RP at 50-51. A friend of Mr. Milgate's stated that Mr. Mohamed told him repeatedly that he had not done anything. 9/21/11RP at 106.

The forensic scientist from the Washington State Patrol Crime Laboratory stated that she tested samples collected from the front area of Mr. Mohamed's underpants, and located DNA attributable to M.M. 9/21/11RP at 84-94.

M.M. stated at trial that she had been in bed sleeping, and she was touched without her consent. 9/22/11RP at 88. However, she

clarified that she had started waking up, and “then the fingers and the penetration kind of happened at the same time.” (Emphasis added.) 9/22/11RP at 104.

According to defense witness Rafael Samael, who was also at the house party, M.M. was flirting with Mr. Mohamed during the evening, and “Mo” later arm-wrestled with Mr. Milgate. 9/26/11RP at 70, 75.

Mr. Mohamed stated that he and M.M. had “made out” during the party, and described how this included kissing and putting each other’s hands down their respective pants. 9/26/11RP at 23, 45. He admitted telling police at the scene that he had briefly been in bed with M.M. 9/26/11RP at 54; see 9/26/11RP at 2 (testimony of SPD Detective Jeffrey Spoong).

However, Mr. Mohamed testified that during the night, he awoke and was looking for the bathroom in the house, with which he was unfamiliar. 9/26/11RP at 39-40. When he opened a door to see if it was the bathroom, he was suddenly confronted by M.M.’s boyfriend Mr. Milgate, who hit him for no reason. 9/26/11RP at 39-42.

**3. Verdict and sentencing.** The jury was told that indecent liberties is committed when a person knowingly has sexual contact with

a person not his spouse, and that contact was with a person who was incapable of consent by reason of being physically helpless. CP 57-58. The jury found Mr. Mohamed guilty. CP 61; 9/28/11RP at 3-5.

Following the verdict, Mr. Mohamed, who had no prior offenses and an offender score of zero, was ordered to serve a standard range term of 18 months incarceration. CP 65-75.

Mr. Mohamed appeals. CP 76.

#### **D. ARGUMENT**

##### **1. THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF KNOWLEDGE THAT THE PERSON WAS INCAPABLE OF CONSENT BY REASON OF BEING PHYSICALLY HELPLESS.**

a. **It is an essential element of indecent liberties that the defendant must know of the other person's incapacity to consent because of physical helplessness.** The indecent liberties statute, section (1)(b), provides, in pertinent part, that a person is guilty of the offense where he knowingly causes a person incapable of consent who was not his spouse to have sexual contact with him ("another"):

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

\* \* \*

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless[.]

RCW 9A.44.100(1)(b).<sup>2</sup> The Court of Appeals has made clear that the defendant, to be guilty under this statute, must know that the person is incapable of consent by physical helplessness. State v. Lough, 70 Wn. App. 302, 325-26, 853 P.2d 920 (1993) (evidence of prior acts of

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<sup>2</sup> The current statute reads as follows in its entirety:

**RCW 9A.44.100. Indecent liberties**

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

drugging women into physical helplessness for sexual purposes was relevant in defendant's current prosecution for indecent liberties by drugging victims with knowing plan to render helpless), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995).

In Lough, the defendant, like Mr. Mohamed here, had been charged with violation of RCW 9A.44.100(1)(b), which provides that a person is guilty of indecent liberties when he "knowingly causes another person who is not his spouse to have sexual contact with him . . . [w]hen the other person is incapable of consent by reason of being . . . physically helpless." Lough, 70 Wn. App. at 325 (citing statute). The Lough Court, in assessing the relevance of evidence of prior similar acts by the defendant, stated:

In order to be guilty of indecent liberties upon an adult non-spouse in violation of RCW 9A.44.100(1)(b), a defendant must knowingly cause "sexual contact" and he must "knowingly" cause such contact with a person who is "physically helpless". " 'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5).

(Footnotes omitted.) Lough, 70 Wn. App. at 325-26. In footnote 14, the Lough Court stated:

That "knowingly" modifies both "causes another person . . . to have sexual contact" and "when the other person is . . . physically helpless" is apparent from the sentence

structure and punctuation of the statute. It is also apparent from RCW 9A.44.030(1) which allows a defendant to negate culpability by interposing the affirmative defense that he reasonably believed the victim was not physically helpless.

Lough, 70 Wn. App. at 325 n. 14.

The sentence structure and punctuation of the indecent liberties statute support the Court's decision.<sup>3</sup> The statute begins with a requirement of "knowingly" followed by a colon and then multiple alternative means of committing the crime, each separated by semicolons. RCW 9A.44.100 [see note 2, supra]; see State v. Shipp, 93 Wn.2d 510, 519, 610 P.2d 1322 (1980) ("in the promoting prostitution statute [RCW 9A.88.070(1)], the legislature has specifically included the requirement of knowledge. The word "knowingly" precedes a colon and modifies everything which follows the colon.").

Knowledge is an element. As the Lough Court reiterated: The two crucial elements which the State was required to prove beyond a reasonable doubt were (1) P.A. lacked capacity to consent by reason of being physically helpless; and (2) Lough knew it, and had sexual contact with her, notwithstanding such knowledge.

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<sup>3</sup> There are no material structural, language or punctuation differences between the indecent liberties statute as interpreted by the Lough Court in 1993 and the version of the statute in effect at the time of Mr. Mohamed's alleged offense. See RCWA 9A.44.100, Laws 1993 c 477 § 3; Laws 1988 c 146 § 2.

(Emphasis added.) Lough, 70 Wn. App. at 326; see State v. Lough, 125 Wn.2d 847, 861-62, 889 P.2d 487 (1995) (prior act evidence showed plan to render current victim physically helpless) (affirming Court of Appeals).

**b. Mr. Mohamed's conviction must be reversed without any requirement of showing prejudice, because the information entirely failed to allege the requisite element of knowledge of M.M.'s incapacity.** All of the essential elements of a crime must be alleged in the information. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); CrR 2.1(a)(1); U.S. Const. amend. 6; Wash. Const. art. I, § 22. Where, as here, Mr. Mohamed is challenging the sufficiency of the information for the first time on appeal, this Court construes the document liberally in favor of validity. Kjorsvik, 117 Wn.2d at 102.

However, where even a liberal reading of the information indicates that an essential element is wholly missing, reversal of the conviction is required, without any requirement that the defendant must show he was prejudiced in his defense by the absence of the element in the charging document. State v. Marcum, 116 Wn. App. 526, 536, 66 P.3d 690 (2003) (prejudice need not be shown if charge cannot be saved by liberal construction).

Here, the information stated that the Prosecuting Attorney for King County accused Mr. Mohamed of Indecent Liberties “committed as follows:”

That the defendant MOHAMAUD SULDAN MOHAMED in King County, Washington, on or about April 16, 2011, did knowingly cause M.M. (DOB 12/2/90), who was not the spouse of the Defendant and who was incapable of consent by reason of being (a) mentally defective, (b) mentally incapacitated, and (c) physically helpless, to have sexual contact with the Defendant.

Contrary to RCW 9A.44.100(1)(b), and against the peace and dignity of the State of Washington.

CP 7. The information in Mr. Mohamed’s case employed the word knowingly to refer to the causing of sexual contact, using two commas to set off the language “who was incapable of consent . . .” as a parenthetical phrase that modified and further described “M.M.” CP 7. This language does not indicate the requisite element of knowledge that she was incapable of consent.

Using simple rules of sentence structure and punctuation, the information must be written in such a manner as to enable persons of common understanding to know what elements are charged. State v. Simon, 120 Wn.2d 196, 198-99, 840 P.2d 172 (1992) (finding that “knowingly” language in information did not apply to alternative means of advancing prostitution of person under 18, because means

were separated by semicolons and “knowingly” was used only within first separated phrase) (citing Kjorsvik, 117 Wn.2d at 110; and RCW 10.37.050(6)) (to be sufficient, information must clearly and distinctly set forth the acts charged as the crime “in such a manner as to enable a person of common understanding to know what is intended”).

Here, the information in Mr. Mohamed’s case enclosed the language “incapable of consent” within a phrase set off by commas. CP 7. Reading the document in a common sense lay manner, the word “knowingly” plainly did not relate to the complainant’s incapacity, but instead applied only to causing sexual contact. No notice was given of the knowledge element as to the victim being physically unable to express any non-consent to the defendant.

The information entirely failed to apprise Mr. Mohamed of the essential element of knowledge of M.M.’s incapacity (a defense he did not raise at trial). When an information wholly omits an element of the crime, the remedy is to reverse the conviction and without prejudice to the State refile the charge. State v. Guzman, 119 Wn. App. 176, 186, 79 P.3d 990 (2003).

**c. If the information did manage to allege the requisite element of knowledge of the person's incapacity, but only by questionable or unartful language, reversal is still required because Mr. Mohamed was prejudiced.** Where an essential element of a crime is alleged in the information, but only by unartful or questionable language, the defendant is still entitled to reversal if he can show he was prejudiced in his defense. State v. Kjorsvik, 117 Wn.2d at 105-06.

Here, Mr. Mohamed was prejudiced. Assuming *arguendo* that the information (liberally construed now) contained the requisite knowledge element of the crime being charged against him, it is plainly apparent that the language used was inadequate to make him or his counsel aware of the element at the time. Mr. Mohamed did not raise the statutory defense that he reasonably believed that M.M. was not sleeping and physically helpless. See RCW 9A.44.030(1); see e.g., State v. Powell, 150 Wn. App. 139, 155-56, 206 P.3d 703 (2009) (ineffective to not request instruction on statutory defense where defendant thought victim was not helpless).

Further, Mr. Mohamed's defense counsel very unfortunately submitted a "to-convict" instruction for indecent liberties that, like the State's which was used by the court, failed to include the essential

element of knowledge that the person was incapable of consent. CP 43-44 (Defendant's proposed instructions). This invitation of error by counsel originated in the absence of clear or cogent notice in the information that the crime in fact required proof of such knowledge. Reversal would be required on the basis of prejudice, if the knowledge element was not entirely missing from the charging document.

Kjorsvik, 117 Wn.2d at 102, 105-06.

**2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. MOHAMED HAD SEXUAL CONTACT WITH A PERSON WHO WAS INCAPABLE OF CONSENT BECAUSE "PHYSICALLY HELPLESS" BY REASON OF BEING UNCONSCIOUS.**

**a. No criminal conviction may stand where the defendant's jury verdict of guilty rest on constitutionally insufficient evidence.**

In every criminal prosecution, the State must prove all elements of the charged crimes beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

On appeal, a reviewing court should reverse any conviction (and dismiss the prosecution on that charge) for insufficient evidence where no rational trier of fact could find that all the essential elements of the

crime were proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**b. Conviction for the crime charged against Mr. Mohamed required proof of M.M. having an incapacity to communicate non-consent by reason of unconsciousness.** Mr. Mohamed's jury was instructed that conviction for indecent liberties required proof that the defendant knowingly had sexual contact with a person, and that person was incapable of consent by reason of being physically helpless. CP 57-58 (Instructions nos. 6,7); see RCW 9A.44.100(1)(b); see also CP 43-44 (Defendant's proposed instructions). The jury was properly instructed that

[a] person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

CP 58 (Instruction no. 9); see RCW 9A.44.010(5). If a person is sleeping at the time the sexual contact occurs, they are incapable of communicating non-consent to that contact. In the case of State v. Puapuaga, 54 Wn. App. 857, 776 P.2d 170 (1989), the Court of Appeals concluded that evidence that a complainant was sleeping was adequate to establish the element of incapacity to consent to sexual activity because of physical helplessness, where he or she was incapable of communicating unwillingness. State v. Puapuaga, 54 Wn. App. at 859-60.

However, the grogginess of a recent, but past state of sleep does not establish lack of capacity to communicate non-consent. See State v. Bucknell, 144 Wn. App. 524, 529-30, 183 P.3d 1078 (2008) (person paralyzed from chest down failed to meet RCW 9A.44.010(5) standard where person was able to orally communicate although incapable of other means of objection or manifestation of unwillingness) (citing People v. Huurre, 603 N.Y.S.2d 179, 182, 193 A.D.2d 305 (1993) (retarded woman who could grunt and mumble was not “physically

helpless” under communication standard), aff’d, 84 N.Y.2d 930, 621 N.Y.S.2d 511, 645 N.E.2d 1210 (1994)).

Here, M.M. was not sleeping or unconscious at the time of the alleged sexual activity. Trial witnesses often contradict themselves, sometimes making statements that conflict with other testimony satisfying the required elements of the crime at issue, and this in and of itself does not establish evidentiary insufficiency.

In this case, however, M.M.’s testimony was not merely inconsistent, it was inadequate to convict under the “physically helpless” element. M.M. initially testified that the defendant’s hand was in her mouth, and he was forcing himself in side of her with his penis. 9/22/11RP at 81. Later she stated that the first thing she felt was somebody touching her vagina, and she thought it was her boyfriend. 9/22/11RP at 82.

However, M.M. stated that the vaginal activity only lasted for a few seconds, indicating she was aware of when it began. 9/22/11RP at 83. The prosecutor’s direct examination delved only superficially into this important question.

Then, on cross-examination, M.M. further clarified that when she awoke, it was Mr. Mohamed’s fingers in her mouth that she felt.

9/22/11RP at 100. She made clear that the vaginal activity came thereafter – subsequent to her awakening:

Q: All right. And, once again, you were – you were woken by the finger in your mouth, not the penetration.

A: Yes.

9/22/11RP at 103.

All of this is inadequate. It is true that assessing discrepancies in trial testimony and the weighing of evidence are within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). However, M.M. effectively retracted her earlier testimonial claim that the sexual activity involving her vagina had already commenced before she awoke, stating she had been confused in answering the questions:

Q: And how much time elapsed between the two?

A: Well, so there was confusion earlier. He was touching me, and I was half awake, and I thought it was Nolan, and then the fingers were in my mouth and then the penetration

Q: Okay. So when the fingers went into your mouth and you weren't asleep, you were half awake, right?

A: Yes.

Q: So during this episode, you were not asleep.

A: I was half asleep.

Q: Okay. Well, I'm asking, let's assume that half asleep does not equal being asleep.

A: Okay, then, yes, I was awake.

Q: Okay, so during this entire episode, you were awake.

A: Yes.

MR. ELSNER: Objection, argumentative.

THE COURT: Jury will decide.

9/22/11RP at 103. This evidence is insufficient. When facing a challenge to the sufficiency of the evidence, the reviewing court asks whether, after viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. Green, 94 Wn.2d at 220–21; Salinas, 119 Wn.2d at 201; State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

However, even viewed in that generous light, there was no evidence of incapacity to express non-consent to the sexual activity.

The defendant's conviction must be reversed with prejudice.

State v. Spruell, 57 Wn. App. 383, 387, 788 P.2d 21 (1990); U.S.

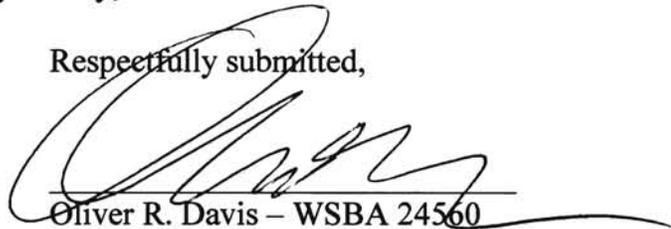
Const. amend. 14.

**E. CONCLUSION**

Mr. Mohamed respectfully contends that his judgment of guilty should be reversed for insufficiency of the evidence, or in the alternative, that the conviction be reversed for inadequacy of the charging document.

Dated this 25 day of July, 2012.

Respectfully submitted,



Oliver R. Davis – WSBA 24560  
Washington Appellate Project  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68061-7-I
v.	)	
	)	
MOHAMAUD MOHAMED,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JULY, 2012, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> MOHAMAUD MOHAMED 3207 SW MORGAN ST SEATTLE, WA 98126	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

JUL 25 4:11 PM '12  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WASHINGTON

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JULY, 2012.

X \_\_\_\_\_ *Grud*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710