No. 30738-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

SEBASTIAN CORTES AGUILAR,

Appellant.

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

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# REPLY BRIEF OF APPELLANT

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**Washington Supreme Court**

## I. ARGUMENT IN REPLY

### 1. EVIDENCE OF INTENT IS DIFFERENT FROM AND LESSER THAN EVIDENCE OF PREMEDITATION

There is no dispute that the jury heard sufficient evidence of Appellant's intent to assault his wife. There is no dispute that the jury heard evidence that he then broke contact and armed himself with a knife. Regardless of the Appellant's true intent, this evidence was legally sufficient to support a jury's finding that he intended to kill his wife. As made clear in Appellant's opening brief at page 9, intent is another necessary element of murder but intent alone falls short of premeditation. Respondent does not, because it cannot, point to evidence of this additional echelon of *mens rea*. Instead, Respondent points to evidence of intent and calls it sufficient to support a finding of premeditation.

Strangely, the Respondent cited evidence of "continued stabbing after the collapsing of the decedent to the floor." Brief of Respondent, page 24. But there is no citation to the record in support of this sentence. This event does not appear in the record and it is unknown what basis the Respondent uses to support this sentence. As far as Appellant can see, this event did not occur.

Appellant asks this Court to vacate his conviction, but because the jury was instructed on the lesser included charge of Murder in the Second Degree, this Court has the option to remand for resentencing on that count. See *In re Heidari*, 174 Wn.2d 288 (2012).

**2. THERE IS NO DISPUTE REGARDING THE LACK OF EVIDENCE TO SUPPORT A CONVICTION OF ASSAULT 2**

The argument on pages 24 through 26 of the Brief of Respondent simply fails to address the argument of Appellant that he was unlawfully convicted of assaulting Janeli Cortes. Respondent also missed the argument at the trial court level. Appellant argues that there was no evidence of his intent to injure Janeli and he cannot, therefore, be guilty of assaulting her. Respondent argues that he was convicted on a transferred intent theory – that his intent to injure Ortencia transferred to Janeli. If this were the case, Respondent needed to allege an assault against Ortencia which transferred to Janeli. Instead, the Court *crossed out* the intent element in the Second Amended Information which continued to name Janeli as the victim. As is fully laid out in the Appellant's Opening Brief, that was a fatal error and the conviction for Count II must be vacated.

### 3. THE TRIAL COURT WAS REQUIRED TO MAKE CERTAIN FINDINGS OF FACT BEFORE INTERFERING WITH APPELLANT'S FUNDAMENTAL RIGHT TO PARENT

The Respondent simply argues that the No Contact Order is appropriate given the trauma to the children from this horrible case. Whether the Respondent is correct or not, the trial Court was required to make findings consistent with the law as outlined in Appellant's Opening Brief. Because the Court did not, this Court must remand for further findings of fact as outlined in Appellant's Opening Brief.

## II. CONCLUSION

Based upon the foregoing, Appellant respectfully requests this court either vacate both convictions for a failure of proof and dismiss this action or vacate the conviction for Assault 2 and remand for resentencing on the lesser included crime of Murder in the Second Degree. Additionally, this Court must vacate the No Contact Orders protecting the children and remand for rehearing on the issue of the State's interest in protecting them versus the father's right to parent them.

Respectfully submitted this 19th day of December, 2012.

David R. Partovi, WSBA #30611
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington the on the 19th day of December, 2012, I mailed a true and correct copy of the foregoing Appellant's Reply Brief by depositing the same in the United States mail, postage prepaid, addressed as follows:

Douglas J. Shae
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SIGNED this 19th day of December, 2012, at Spokane, WA.

David R. Partovi