

68033-1

68033-1

NO. 68033-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LYDIA TAMAS,
aka DIANA JOHNSON,
aka DIANA SMITH, Appellant.

BRIEF OF APPELLANT

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STATE OF WASHINGTON
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ORIGINAL

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 II. The trial court erred where it denied Appellant’s motion to vacate her record on the basis of the “seriousness” of the offense, RP 13, misstating the law where the conviction for attempted assault 2nd degree is neither a “violent offense” nor a “serious violent offense” under law.1

 III. Where attempted assault 2nd degree is not a “violent offense” or a “serious violent offense” by statute but is incongruously classified as a “most serious offense” by statute, the trial court erred in denying Appellant’s motion to vacate where it failed to recognize the conflict and ambiguity in statutory definitions and thus should have applied the rule of lenity in its analysis to rule in favor of Appellant.1

 IV. The trial court erred in denying Appellant’s motion to vacate her record of conviction where the court made no findings of fact or conclusions of law to explain the court’s use of “discretion.”1

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A. ASSIGNMENTS OF ERROR

I. The trial court erred in refusing to vacate on the sole basis that the offense at issue was “serious,” RP 13, an untenable ground where legally attempted assault 2nd degree is not a “serious” offense as defined by statute in R.C.W. 9.94A.030.

II. The trial court erred where it denied Appellant’s motion to vacate her record on the basis of the “seriousness” of the offense, RP 13, misstating the law where the conviction for attempted assault 2nd degree is neither a “violent offense” nor a “serious violent offense” under law.

III. Where attempted assault 2nd degree is not a “violent offense” or a “serious violent offense” by statute but is incongruously classified as a “most serious offense” by statute, the trial court erred in denying Appellant’s motion to vacate where it failed to recognize the conflict and ambiguity in statutory definitions and thus should have applied the rule of lenity in its analysis to rule in favor of Appellant.

IV. The trial court erred in denying Appellant’s motion to vacate her record of conviction where the court made no findings of fact or conclusions of law to explain the court’s use of “discretion.”

V. The trial court abused its discretion and erred in refusing to vacate without meaningful explanation with only a categorical statement that the court was exercising its “discretion,” a manifestly unreasonable action.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. Is it reversible error for a trial court to deny a motion to vacate on the sole basis that the conviction at issue was “serious,” where that term has no legal applicability to the conviction of attempted assault 2nd degree? (Assignment of Error I)

II. Is it reversible error for a trial court to deny a motion to vacate an otherwise eligible conviction on the basis that the conviction was “serious,” where attempted assault 2nd degree is not categorized by statute as either a “violent offense” or a “serious violent offense?” (Assignment of Error II)

III. Should the rule of lenity have been applied by the trial court in a situation where attempted assault 2nd degree is not a “violent offense” or a “serious violent offense” in R.C.W. 9.94A.030 but is incongruously classified as a “most serious offense” in that same section? (Assignment of Error III)

IV. Does a trial court have the duty to announce orally or in writing the grounds for the decision in deciding a motion to vacate? (Assignment of Error IV)

V. Is it “manifestly unreasonable” under the abuse of discretion standard for a trial court to deny a motion to vacate without any meaningful explanation? (Assignment of Error IV and V)

C. STATEMENT OF THE CASE

I. Nature of Action

Appellant, Lydia Tamas (now known as Diana Johnson) appeals to the Court of Appeals from a decision of the King County Superior Court, the Honorable Hollis Hill, J., denying Appellant’s Motion to Vacate Record of Conviction on November 9, 2011.

II. Statement of Facts

On November 2, 2001, Diana Johnson was sentenced by King County Superior Court Judge Douglas McBroom on two guilty pleas.¹ The first plea and sentence, King County Superior Court

1. The second of the two pleas, a conviction for unlawful issuance of bank checks, King County Superior Court No. 01-1-03071-6, is not on appeal.

No. 01-1-05495-0 (and the subject of this appeal), was for attempted assault 2nd degree, a class C felony. Her sentence imposed by Judge McBroom for this conviction was 27 months imprisonment, fines and 36 months community supervision. See Judgment and Sentence, CP 24-30. Ms. Johnson successfully completed all the sentence requirements imposed by the court. Ms. Johnson never received a Certificate of Discharge at the time she completed all her sentence requirements. Rather, Judge McBroom signed an Order Terminating Supervision on September 28, 2005. CP 32.

On November 9, 2011, Ms. Johnson moved the King County Superior Court to issue a Certificate of Discharge *nunc pro tunc* to September 28, 2005, the date of the Order Terminating Supervision. Ms. Johnson also moved the Court to vacate the record of her conviction. CP 35. In support of her motion, Ms. Johnson submitted a Declaration with attachments, CP 45-58, as well as a Memorandum of Law in Support. CP 37-44. At the hearing on November 9, 2011, Ms. Johnson also provided opposing counsel and the Court a letter of recommendation from her therapist at Compass Health. This letter was reviewed by the Court prior to ruling on the motion, and is attached to this Brief as Appendix I.

Judge Hill granted Ms. Johnson's motion for a Certificate of Discharge, and granted the request that the Certificate be *nunc pro tunc* as of September, 2005. However, the Court denied Ms. Johnson's motion to vacate the record of her attempted assault 2nd degree conviction with prejudice, making no findings of fact² and only stating that she was "exercising [her] discretion based on the seriousness of that case." RP 13. CP 62-63.

Ms. Johnson timely appealed on December 6, 2011. CP 64-66. Ms. Johnson is represented on appeal and below by Derek Conom of the Conom Law Firm.

D. ARGUMENT

Standard of Review

1. The proper standard of review is *de novo*.

Appellant contends that the trial court below relied (albeit implicitly³) on an improper interpretation of R.C.W. 9.94A.030 in

2 The trial court's failure to make oral findings of fact does not preclude *de novo* review and/or reversal by this Court. RAP 2.5(a)(2).

3 No written findings of fact were entered, and in the trial court's oral ruling no findings were made to justify denying Appellant's motion other than the charge at issue was "serious." The term "serious" carries special legal significance under R.C.W. 9.94A.030 and elsewhere.

coming to its decision denying Appellant’s motion to vacate. Issues of statutory construction are reviewed *de novo*. State v. Smith, 158 Wn.App. 501, 246 P.3d 812 (2010); State v. Hahn, 83 Wn.App. 825, 924 P.2d 392 (1996). “The court’s duty is to ascertain and give effect to the intent and purpose of the Legislature. ... In doing so, the court should avoid unlikely, absurd, or strained results.” Hahn, 83 Wn.App. at 831 (citations omitted). Because the statutory construction of the classification of attempted assault 2nd degree is ambiguous in R.C.W. 9.94A.030, this case turns on issues of statutory construction, and therefore it is proper for this court to decide this case under the *de novo* standard. See Parts I and II, *infra*.

2. Even where this case involves the discretion of the trial court, the *de novo* standard is proper.

Typically appellate review of matters solely within the discretion of the trial court, involving simple questions of fact, use the “abuse of discretion” standard. State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999). A trial court abuses its discretion where “‘a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.’ State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); State ex rel. Carroll v. Junker, 79

Wn.2d 12, 26, 482 P.2d 775 (1971).” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Appellate courts have a “duty to determine the extent of appellate review.” Barnett v. Hicks, 119 Wn.2d 151, 154, 829 P.2d 1087 (1992). In cases that involve both questions of statutory construction as well as questions of fact (so-called “mixed” questions of law and fact), the proper standard of review is the “error of law” standard. Department of Revenue v. Boeing Co., 85 Wn.2d 663, 667, 538 P.2d 505 (1975). Under the “error of law” standard of review, “the court here will exercise its ‘inherent and statutory authority to make a de novo review independent of the [[trial court's]] decision.’” Weyerhaeuser Co. v. Department of Revenue, 16 Wn. App. 112, 115, 553 P.2d 1349 (1976).” Daily Herald v. Employment Security, 91 Wn.2d 559, 562, 588 P.2d 1157 (1979) (modified).

Because the proper resolution of the issues in this appeal turn not only on the actual decision of the trial court in denying Appellant’s motion using the court’s “discretion,” but also the (Appellant contends) flawed statutory analysis utilized by the trial court in coming to its decision, the issues on appeal here involve mixed questions of law and fact and therefore ought to be decided

under the “error of law” standard requiring *de novo* review. Daily Herald, supra.⁴ An error of law resulting from a discretionary ruling also automatically constitutes an abuse of discretion. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

I. Attempted Assault 2nd Degree is not a “serious” offense under R.C.W. 9.94A.030 and it was error for the trial court to deny Appellant’s motion as if it were.

In preparing the Appellant’s motion to vacate, counsel submitted extensive documentation and briefing in order to demonstrate that Appellant’s conviction for attempted assault 2nd degree qualified under R.C.W. 9.94A.640 as an offense eligible for vacation. CP 35, 45-58, 37-44.

At the motion hearing on November 9, 2011, however (and after acknowledging that the conviction was in fact eligible to be vacated), the trial court elected to base its decision denying the motion on the “seriousness” of the conviction.

⁴ Should this Court deem the appropriate standard of review to be abuse of discretion, Appellant addresses the Assignments of Error under that standard, infra, in Part III.

“The Court: I am not going to vacate the conviction in that case. I’m exercising my discretion based on the *seriousness* of that case. And, Ms. Johnson, I want you to understand this is no reflection on how you have conducted yourself, your life at the present time. But I find it appropriate not to vacate that particular conviction.”

RP 13 (emph. added).

This decision was rendered without any additional findings or comment by the Court. But the term used by the Court (“seriousness”) carries legal connotations for its use in a number of penal statutes.

One such statute, R.C.W. 9.94A.030, the “definitions” section of the Sentencing Reform Act of 1981 (R.C.W. 9.94A *et seq.*) (Hereinafter “SRA”) has fifty-seven subsections, defining relevant terms in the SRA. The term “serious” alone is not defined, but is used in R.C.W. 9.94A.030(45). That subsection defines a “serious violent offense” as:

“... a subcategory of violent offense and means:
(a)(i) Murder in the first degree;
(ii) Homicide by abuse;
(iii) Murder in the second degree;
(iv) Manslaughter in the first degree;
(v) Assault in the first degree;
(vi) Kidnapping in the first degree;
(vii) Rape in the first degree;
(viii) Assault of a child in the first degree; or

(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.”

(Emph. Added).

“Violent offense,” in turn, is defined as:

“(a) Any of the following felonies:

- (i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;**
- (ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;
- (iii) Manslaughter in the first degree;
- (iv) Manslaughter in the second degree;
- (v) Indecent liberties if committed by forcible compulsion;
- (vi) Kidnapping in the second degree;
- (vii) Arson in the second degree;
- (viii) Assault in the second degree;**
- (ix) Assault of a child in the second degree;
- (x) Extortion in the first degree;
- (xi) Robbery in the second degree;
- (xii) Drive-by shooting;
- (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
- (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection; and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection.”

R.C.W. 9.94A.030(54) (emph. added).

In other words, attempted assault 2nd degree is not a “violent offense” because it is neither a class A felony nor is it assault 2nd degree. And, attempted assault 2nd degree is not a “serious violent offense” because it is neither assault 1st degree nor is it attempted assault 1st degree. It follows, then, that attempted assault 2nd degree (a class C felony) is not “serious” as that term is used under the statute.

How was the trial court using the term “serious?” If the court below was using the term to mean a “serious violent offense,” then the court decided the motion relying on an incorrect understanding of the law. In such case, the court below committed an “error of law” and thereby abused its discretion that warrants review and reversal by this Court. Daily Herald, supra. Because the trial court did not elaborate on its reasons for denying Appellant’s motion, we are left with only the paucity of language provided.

If, on the other hand, the trial court used the term “serious” in a more colloquial sense, the basis of the trial court’s ruling is thrown much more into doubt. One dictionary definition defines “serious” as:

“1. Of, showing, or characterized by deep thought. 2. Of grave or somber disposition, character or manner... 3. Being in earnest; sincere; not trifling... 4. Requiring thought, concentration, or application... 5. Weighty or important... 6. Giving cause for apprehension; critical... 7. That which is of importance, grave, critical, or somber... .”

Random House Dictionary of the English Language 1303, (Unabridged Ed. 1967).

By these varied definitions, one could assume any criminal conviction at all would be perceived as “serious.” Thus, given the ambiguity of language and the lack of any further explanation from the court below, any speculations into the intent or musings of the court are unproductive.

Appellant’s position is that the trial court, tasked with making a legal determination on a motion to vacate a conviction, was using the term “serious” in its legal sense. If that is the case, then, the court was mistaken in denying the motion to vacate on the basis that the conviction is a serious offense. If the conviction is not a violent offense, nor a serious violent offense, then the only logical category

for this conviction is that it must be a non-serious, non-violent offense.

II. The inclusion of attempted assault 2nd degree as a “most serious offense” renders the entire statute in conflict and warrants the rule of lenity be applied to Appellant.

Paradoxically, while attempted assault 2nd degree is neither a “violent offense” under R.C.W. 9.94A.030(54) nor a “serious violent offense” under R.C.W. 9.94A.030(45), it appears that the charge has fallen under the ambit of “most serious offense” under R.C.W. 9.94A.030(32). That statute, in relevant part, states:

“... ‘Most serious offense’ means any of the following felonies **or a felony attempt to commit any of the following felonies:**

- (a) Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
- (b) Assault in the second degree;**
- (c) Assault of a child in the second degree;
- (d) Child molestation in the second degree;
- (e) Controlled substance homicide;
- (f) Extortion in the first degree;
- (g) Incest when committed against a child under age fourteen;
- (h) Indecent liberties;
- (i) Kidnapping in the second degree;
- (j) Leading organized crime;
- (k) Manslaughter in the first degree;
- (l) Manslaughter in the second degree;
- (m) Promoting prostitution in the first degree;

- (n) Rape in the third degree;
- (o) Robbery in the second degree;
- (p) Sexual Exploitation;”

(Emph. Added).

A simple review of this statute leads to confusing questions with absurd answers. For instance, why is attempted assault 2nd degree a “most serious offense” when criminal conspiracy or solicitation to commit assault 2nd degree is not? Especially when one considers that in the definition of “violent offense” the statute classifies “criminal solicitation of or criminal conspiracy to commit a class A felony” on the same level as an attempt to commit a class A felony. The same can be said of the statute defining a “serious violent offense” which states that “an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies” is treated just as seriously as if the crime was completed.

The logic, or lack thereof, in the “most serious offense” statute continues, when one considers that the analysis described above in part I, supra, shows that attempted assault 2nd degree cannot be considered “serious.” And yet R.C.W. 9.94A.030(32) states that it is “most serious.” How can a crime be simultaneously not serious and

also the most serious? The answer is that the two provisions conflict with one another.

Judge Hill of the court below was presumably aware of this conflict prior to making her decision. In the Memorandum in Support of Appellant's motion to vacate, CP 43-44, Appellant advised the trial court that:

“Attempted Assault 2nd Degree is not a violent offense. R.C.W. 9.94A.030(5[4])(a)(i) defines any Class A felony or attempted Class A felony as a violent offense. But Assault 2 is a Class B felony offense, and Attempted Assault 2 is a Class C offense. Additionally, R.C.W. 9.94A.030(5[4])(a)(viii) states that Assault 2 is a violent offense, but says nothing about an *attempted* Assault 2. The bottom line from a careful reading of this statute is that an Attempted Assault 2 is not a violent offense sufficient to disqualify it from vacation.”

Thus, this Memorandum advised the court that the conviction at issue was not a violent offense (and therefore could not be a serious violent offense either). The State supplied the other half of the conflict, in its Objection to Defendant's Motion to Vacate Conviction, CP 60, where it wrote “...an Attempted Assault in the Second Degree **is a most serious** ‘strike offense’ under RCW 9.94A.030(32)... .” (Emph. Added). Despite being aware of the

conflict, the trial court did not address the “seriousness” issue at all on the record.

Where, as here, a penal statute cannot be reconciled, the statute is ambiguous, and thus, the rule of lenity applies. “Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).” State v. McGee, 122 Wn.2d 783, 864 P.2d 912 (1993). A statute is ambiguous if it is subject to two or more reasonable interpretations. State v. Garrison, 46 Wn. App. 52, 54, 728 P.2d 1102 (1986).

Here, the statutory definition of “serious” is clearly subject to at least two reasonable interpretations. One interpretation takes the view that attempted assault 2nd degree is not a “serious” offense because it is neither violent nor seriously violent as defined by R.C.W. 9.94A.030(45) and (54). The other interpretation of the statute is that attempted assault 2nd degree is a most serious offense due to its inclusion in R.C.W. 9.94A.030(32). Both may be reasonable interpretations, and this Court has no guidance as to how to determine the Legislature’s intent in crafting this statute. Perhaps the inclusion of the crime as a most serious offense was purely

legislative oversight, but it is impossible to know based on simply reading the statute. The two interpretations cannot be harmonized. “Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.” Ockerman v. King County, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000).

In such cases the rule of lenity applies, and should have been applied by the trial court. The rule of lenity would require the trial court to adopt the interpretation most favorable to the Appellant. That interpretation would be the one to suggest that attempted assault 2nd degree is not a violent or a serious offense. Since the explicit and entire basis for denying Appellant’s motion was the “seriousness” of the offense, the court should have determined that the conviction was not for a “serious” offense as defined by law and granted the motion to vacate. See State v. Roberts, supra (using rule of lenity to reverse lower court’s determination of a higher offender score where multiple interpretations of the law offered a lower score and a higher score).

III. The trial court abused its discretion in this case.

The entirety of this case is on the record before this Court. There was no testimony given to the trial court. A *de novo* review is ideally suited to this case. However, even under an abuse of

discretion standard, the trial court's decision was both manifestly unreasonable and based on untenable grounds. Where a discretionary ruling is based on error of law, there is an abuse of discretion. Fisons, supra. As this Court cogently stated over two decades ago, "it can safely be said that abuse of judicial discretion is not shown unless the discretion has been exercised upon grounds, or to an extent, clearly untenable or manifestly unreasonable." Coggle v. Snow, 56 Wn.App. 499, 505, 784 P.2d 554 (1990) (quoting State ex rel. Beffa v. Superior Court, 3 Wn.2d 184, 190, 100 P.2d 6 (1940)). The abuse of discretion standard has been a steady bulwark in Washington jurisprudence for well over 100 years. See State ex rel. Port Blakely Mill v. Superior Court of Skagit County, 9 Wash. 673, 38 P. 155 (1894).

Just because a court has discretion does not mean it can act on a whim. The Coggle court went to lengths to describe the parameters of judicial discretion, engaging in a thorough analysis of the contours of discretion that included quoting the writings of Justice Benjamin Cardozo. ("The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure.") Coggle, 56 Wn.App. at 504 (quoting Cardozo, The Nature of the Judicial Process 141 (1921)).

Holding that a trial court had abused its discretion in denying a motion to continue, the Coggle court analyzed the law controlling judicial discretion. Judicial “discretion... is never arbitrary. It must, like discretion in other matters, be based on reason.” Coggle, 56 Wn.App. at 505 (quoting State ex rel. Ross v. Superior Court, 132 Wash. 102, 107, 231 P. 453 (1924)). As the Coggle court stated, the discretion of a court “**requires decisionmaking founded upon principle and reason.**” Coggle, 56 Wn.App. at 505 (emph. added).

The discussion in Parts I and II, supra, details exactly why the trial court’s grounds for deciding against Appellant were untenable. The court considered the conviction of Appellant “serious” when at best it was neither serious or violent, and at worst, it was impossible to resolve a statutory conflict in the language. Deciding the matter using only the “seriousness” of the crime and giving essentially no insight or guidance into the basis for the decision (besides offering a cursory “I did think a lot about it. I thought about it for quite some time after reading everything.”) was manifestly unreasonable. RP 15. Where the sole ground underlying the decision was legally flawed and no other grounds for the decision were provided, the decision was unreasonable as a matter of law. Analyzing this case using the

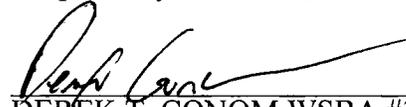
rationale eloquently explained in Coggle, the trial court committed an error of law and therefore abused its discretion in this case. Fisons, supra. Similar results under this standard were found by courts in the cases of State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)(holding trial court abused discretion in granting order allowing college students to view mental health patient confidential files for purpose of school study without properly weighing competing interests at stake) superseded by statute, Seattle Times Co. v. Benton County, 99 Wn.2d 251, 661 P.2d 964 (1983), as well as Bay v. Jensen, 147 Wn.App. 641, 196 P.3d 753 (2008) (holding trial court abused discretion in allowing ex-wife of petitioner to relocate children out of state without conducting statutory analysis).

E. CONCLUSION

For the reasons stated, this Court should REVERSE the court below and VACATE the record of conviction in this case.

DATED THIS 29th day of MARCH, 2012.

Respectfully submitted,



DEREK T. CONOM WSBA #36781
Attorney for Appellant

F. APPENDIX



To Whom It May Concern:

11-3-11

This letter is in reference to Diana Johnson. I have been seeing Mrs. Johnson at Compass Health since February 22nd 2011. On most weeks I see her twice a week. I have diagnosed her with depression and posttraumatic stress disorder. Her diagnosis are consistent with the traumatic experiences she gone through. At the present time her depressive and PTSD symptoms have decreased consistently. In the time I have been seeing her she has grown tremendously. She is doing very well and her prognosis is full recovery. Her mental health is excellent.

In the time I have seen her she has made progress in all aspects of her life. She has completed Certified Nursing Assistant classes and plans to complete her Registered Nursing license. Her plan is to open an adult home care facility and care for elderly fragile clients.

Mrs. Johnson has also married to a loving and supportive man. Together they're building a stable life. She is also very close to her three daughters. She sees them weekly and is of great support to them.

It is my opinion Mrs. Johnson has worked very hard to put her past behind her and is becoming a productive, contributing member of her community. Her goal is to give back to her community by helping care for the elderly. My hope is that she is given a second chance to give back and show her community she is as fine a citizen as there is anywhere. I have great faith in her resolve, discipline, diligence and moral strength to continue growing and being productive.

For more information feel free to contact me at your convenience.

Respectfully & Sincerely,

A handwritten signature in black ink that reads "Ramon Ledesma". The signature is written in a cursive style with a large, prominent initial "R".

Ramon Ledesma, M.Ed., LMHC
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