

74233-7

74233-7

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Mar 01, 2016
Court of Appeals
Division I
State of Washington

NO. 74233-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

E.B.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN P. ERLICK

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in Finding of Fact 3 by finding that “the respondent [did not] contemplate that his conduct would cause or threaten to cause serious bodily injury to the victim.”

2. The trial court erred in Finding of Fact 13 in finding that “the Respondent’s conduct during this offense neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his conduct would cause or threaten serious bodily injury...”

3. The court erred in Conclusion of Law 2 by concluding that the standard range disposition would cause a manifest injustice.

4. The court erred in Conclusions of Law 3, 6 and 7 by concluding that a 65 week suspended disposition would sufficiently protect the community.

5. The court erred in Conclusion of Law 7 by suspending a manifest injustice disposition.

6. The court erred in Conclusion of Law 8 by concluding that the manifest injustice disposition was supported by clear and convincing evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Juvenile Justice Act, suspended dispositions are authorized under only limited circumstances and they are expressly forbidden as to an offender adjudicated of robbery in the second degree, and as to manifest injustice sentences. The court suspended a manifest injustice disposition on E.B.'s offense of robbery in the second degree. Was the suspended disposition precluded by statute as a matter of law?

2. The failure to cause substantial bodily harm may be a mitigating factor in some circumstances, but is irrelevant where the crime in question does not require proof of injury. The court found that E.B. did not intend or cause substantial bodily injury to the woman he punched. Did the court err by relying on a mitigating circumstance that was irrelevant to the crime?

3. A manifest injustice disposition is inappropriate if there are insufficient facts in the record to support the conclusion that an injustice will be done without the departure from the standard range. E.B. benefitted from confinement following his earlier commitment at the Juvenile Rehabilitation Administration (JRA) and struggled when he was placed in the community. Were

there insufficient facts in the record to suggest that the standard range would be manifestly unjust?

4. A manifest injustice disposition may be appropriate where the juvenile did not intend to harm his victim but there must be evidence of intent in the record. Here, there was no direct evidence in the record of E.B.'s intent when he punched his robbery victim, but the circumstantial evidence suggests that he intended harm. Did the record fail to support the court's finding that E.B. did not intend to cause serious injury?

C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

A woman laid her purse on the floor at a public library in Bellevue while making copies. E.B. came up behind the woman, grabbed her purse, and fled. The woman chased E.B., caught him near an elevator, and took hold of his backpack and her purse to prevent his escape. E.B. dragged the woman towards an exit door. In the struggle, the woman fell to one knee. E.B. then struck her in the side of the head with his fist, took the purse, and fled. He was caught and detained just outside the library by a witness. Police arrested E.B. after he was positively identified by the woman and

the witness. He admitted that he had taken the woman's purse.

CP 4-6.

The woman robbed and assaulted by E.B. spoke very little English but she was accompanied by her daughter who translated for her. CP 5. She commented after the robbery that her head was hurting "like it was too full." CP 5; RP (10/14) 21. She later went to the hospital and through an interpreter provided the following medical history:

This patient is a 45 y.o. female who presents after being assaulted. Was at the library just prior to arrival when someone took her purse and phone. When she pursued him, he hit her with his fist on the right side of her head. She fell to the ground. No LOC. Pain is located in the right arm, right knee, and dull right headache, 8/10 in severity. No vomiting. Some neck pain as well. Her legs and arms feel generally weak and tingly, and muscles in arms and legs are aching.

Exhibit 2 at 2. The medical diagnoses was as follows: Sprain of neck, sprain and strain of unspecified tile of shoulder and upper arm, head injury, unspecified (no loss of consciousness), hip, thigh, leg, and ankle, abrasion or friction burn. Id. at 1.

2. PROSECUTION, PLEA AND DISPOSITION.

E.B. was charged with robbery in the second degree. CP 3. Based on his criminal history, his standard range was 52-65 weeks at the JRA. E.B. pled guilty as charged. CP 31-39; RP (10/14) 20.

On disposition, the State and the juvenile probation officer recommended a standard range disposition. RP (10/14) 20-24. E.B.'s counsel recommended that the Court impose local sanctions as a manifest injustice downward departure from the standard range. CP 10-21; RP (10/14) 25-32. The Court initially ordered that a disposition of 52-65 weeks at JRA be suspended for one year. RP (10/14) 46. The State objected and the probation officer pointed out that a manifest injustice sentence must be determinate. RP (10/14) 47. The court acknowledged that the sentence "was not expressly authorized by the statute." RP (10/14) 48. It said, however, that a manifest injustice sentence was appropriate because "I don't think [E.B.] intended on committing bodily injury." RP (10/14) 48. When the probation officer noted that a manifest injustice sentence must be outside the standard range, the court (at defense counsel's urging) decided to impose a "range" of 65-65 weeks. RP (10/14) 49-50; CP 71. Thus, the court imposed a "mitigated" sentence in the sense that it was suspended, but

“aggravated” in the sense that the ultimate term of confinement was longer. The court believed that a higher term of potential confinement would give E.B. greater incentive to successfully complete probation. RP (10/14) 50; Supp. CP ____ (Appendix A – Conclusions of Law 6 and 7).

The State sought reconsideration of the disposition order on multiple bases, including that the Court’s findings regarding amenability to treatment and counseling in the community were not supported by the record, and that RCW 13.40.0357 does not authorize the Court to suspend a JRA commitment where a respondent is otherwise ineligible for an “Option B,” or other alternative sentence. CP 59-68. Ten exhibits were filed in support of the motion. CP 46-47 (List of Exhibits).¹ The court denied the motion to reconsider. CP 45. Findings of fact and conclusions of law were entered. Supp. CP ____ (attached as Appendix A). The State filed a timely notice of appeal.

¹ The exhibits are summarized at RP (11/3) 69-74.

3. BACKGROUND FACTS RELEVANT TO MANIFEST INJUSTICE DISPOSITION.

E.B. has multiple recent adjudications that included some success following confinement, but included repeated failed attempts at community-based parole.

On December 11, 2013, E.B. committed an assault in the fourth degree (King County cause 14-8-00382-1). He was adjudicated guilty of this offense on May 28, 2014. Exhibit 3.

On May 23, 2014, E.B. stabbed his mother in the hand with a set of car keys and kicked in the door to his mother's house. Exhibit 4 (Police Report). He was charged with assault in the fourth degree (DV) and malicious mischief in the third degree (DV) (King County cause 14-8-00689-8). He entered a deferred disposition on this case on July 16, 2014. Exhibit 4. He had multiple violations for noncompliance with supervision conditions.² The deferred disposition was ultimately revoked on April 24, 2015 for noncompliance with supervision and commission of new crimes. Exhibit 4.

² Notices of violations were sent on three dates: 7/23/14 (two violations alleged); 9/15/14 (four violations alleged); 9/29/14 (six violations alleged). E.B. had run away so he failed to appear in court and a warrant was issued on December 19, 2014. Exhibit 4.

On October 12, 2014, E.B. committed another malicious mischief in the third degree (DV) against his mother (King County cause 14-8-01699-1). This offense was adjudicated and disposition was entered on October 22, 2014. Exhibit 5.

On March 18, 2015, while on the deferred disposition, E.B. committed robberies (King County cause 14-8-02086-6) involving two victims, at least one of which was committed with the threat of an apparent firearm (a pellet gun). E.B. entered a plea to a single count of robbery in the second degree, thus avoiding multiple charges of robbery in the first degree and a significantly longer standard range commitment. He served about 15 weeks at JRA and began to show some improvement in behavior before his release to parole. Once on parole, however, the respondent was in repeated violation of parole conditions and he committed this new robbery in the second degree. Exhibit 6.

D. ARGUMENT

The legislature has established a determinate disposition scheme for juveniles under which a judge has a number of carefully defined options. Suspended dispositions are authorized only in limited circumstances. None of those circumstances applied to

E.B. The dispositional court essentially created a hybrid option not found in the statute in order to give a suspended disposition where such a disposition was expressly forbidden by law. The disposition should be reversed for that reason alone.

The disposition court also erred in several ways when it found a basis for a manifest injustice sentence: it misapplied the “injury” mitigating factor; there was not clear and convincing evidence that suspended disposition was needed to avoid manifest injustice; and there was not substantial evidence in the record to find that E.B. did not intend to cause injury.

1. THE COURT DID NOT HAVE AUTHORITY TO SUSPEND A STANDARD RANGE DISPOSITION.

RCW 13.40.160(1) provides that “[t]he standard range disposition for a juvenile adjudicated of an offense is determined according to RCW 13.40.0357.” RCW 13.40.0357 establishes “juvenile offender sentencing standards” and the section begins by dividing crimes in the criminal code into offense categories. Robbery in the second degree is placed in category B+ of the “juvenile disposition offense category.”

The next part of the section is entitled "Juvenile Sentencing Standards" and it contains a grid much like the grid in the Sentencing Reform Act. The section provides: "This schedule *must* be used for juvenile offenders. The court may select sentencing option A, B, C, D, *or* RCW 13.40.167." RCW 13.40.0357 (italics added). By directing the court to "select" among "options," and by use of the word "or," the legislature clearly intends the items to be read in the disjunctive, so that courts will choose one of the listed options.

Under option A, imposition of confinement, a juvenile with two prior adjudications who is facing disposition of a robbery in the second degree (B+ category) will have a standard disposition range of 52-65 weeks. "When the court sentences an offender to a term of confinement exceeding thirty days, commitment *shall* be to the department for the standard range of confinement, except as provided in subsection (2), (3), (4), (5), or (6) of this section." RCW 13.40.160(1)(b) (italics added).³

"Trial courts lack inherent authority to suspend a sentence, [so] a trial court's authority to suspend a sentence is limited to the

³ Subsection (3) pertains to sex offenses, subsection (4) pertains to chemical dependency, subsection (5) pertains to mentally ill offenders. RCW 13.40.160(3), (4), (5). There is no argument that E.B. falls into any of those categories.

manner provided by the legislature.” State v. Rodriguez, 183 Wn. App. 947, 958-59, 335 P.3d 448 (2014), review denied, 182 Wn.2d 1022 (2015).⁴

There are several limits on suspended sentences in the JJA. A disposition court may impose a suspended sentence under option B. RCW 13.40.0357 (option B (1)). However, the legislature forbade a suspended sentence if the juvenile was over the age of fourteen and adjudicated of robbery in the second degree and the victim was injured. RCW 13.40.0357 (option B (3)(b)(iii)).

The court below recognized this limit, RP (11/3) 75-76, but believed the restriction could be circumvented by imposing a manifest injustice sentence. The court was mistaken. The JJA contains a broad limit on the use of suspended sentences. It provides:

Except as provided under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357 or RCW 13.40.127, the court shall not suspend or defer the imposition or the execution of the disposition.

⁴ Rodriguez dealt with a sentencing under the Sentencing Reform Act. However, in the absence of conflicting juvenile authority, courts apply the same reasoning employed in the interpretation of chapter 9.94A RCW when interpreting the JJA. State v. Ashbaker, 82 Wn. App. 630, 632, 919 P.2d 619 (1996); State v. Donahoe, 105 Wn. App. 97, 103, 18 P.3d 618, 621 (2001). There is no special rule in the JJA granting court broader authority to suspend a sentence.

RCW 13.40.160(10). Subsection (10) is a clear mandate that suspended sentences not be allowed except under specific provisions. Subsection (2), pertaining to manifest injustice dispositions, is not included on the list of approved circumstances. Thus, it is clear that the legislature intended that a suspended disposition not be imposed pursuant to a manifest injustice disposition.

There is still another indication that the legislature did not intend that manifest injustice sentences be suspended. Option D creates the manifest injustice alternative. It provides: "If the court determines that a disposition under option A, B, or C would effectuate a manifest injustice, the court shall impose a disposition outside the standard range under RCW 13.40.160(2)." RCW 13.40.0357. However, the legislature also expressly said that "[a] disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof." RCW 13.40.160(2). A suspended disposition is necessarily indeterminate because no fixed period of time of confinement will be served; indeed, it is possible that no time will be served at all. Thus, under options A, or B, or D of this statutory scheme, E.B. was definitively forbidden from obtaining a

suspended disposition, whether or not the disposition was imposed pursuant to the manifest injustice provisions.

E.B. will likely argue that State v. Crabtree, 116 Wn. App. 536, 66 P.3d 695 (2003), supports the court's disposition. This argument should be rejected. Crabtree held that a disposition court was permitted to impose a chemical dependency disposition alternative (RCW 13.40.165) even though such a sentence was ordinarily limited to standard range dispositions. The court held that

once a manifest injustice is declared, and the court elects to depart from the standard range, the sentencing scheme of the juvenile justice act no longer applies. The court is vested with 'broad discretion' to craft disposition that will meet the needs both of the juvenile and of the community.

Crabtree, 116 Wn. App. at 545 (citing State v. Duncan, 90 Wn. App. 808, 815, 960 P.2d 941 (1998) and State v. Tauala, 54 Wn. App. 81, 86, 771 P.2d 1188 (1989)).

The cited cases do not support the court's broad assertion. In State v. Duncan, the court held that "[o]nce a trial court has legitimately decided to depart from the standard range, it has broad discretion to determine the *length* of a manifest injustice disposition." Duncan, 90 Wn. App. at 815. Similarly, the only issue in State v. Tauala was whether a four-year disposition above the

standard range was clearly excessive. Tauala, 54 Wn. App. at 86. The holdings in Duncan and Tauala are consistent with the JJA. The whole point of granting a manifest injustice sentence is to alter the length of the sentence. Thus, it stands to reason that a judge altering the length would have broad discretion to do so. However, the issue in Crabtree was not simply the “length” of the sentence, it was the very availability of a chemical dependency-type disposition in the context of a manifest injustice. Neither Duncan nor Tauala support the assertion that once a court decides to impose a manifest injustice disposition, the court can impose any type of sentence it sees fit. Thus, the reasoning in Crabtree is questionable, and should not be extended.

However, Crabtree is also distinguishable, so its holding is not binding in this context. The dispositional court in Crabtree did not purport to impose a chemical dependency sentence pursuant to RCW 13.40.165. Thus, the court was not technically bound by the terms of that separate section. Here, however, the court imposed a manifest injustice disposition but suspended the disposition. This conflicts with the express language of the very statute that authorizes the disposition. As argued above, the manifest injustice statute expressly requires imposition of a determinate sentence,

and a suspended sentence is necessarily indeterminate. RCW 13.40.160(2). Further, RCW 13.40.160(10) expressly forbids suspended sentences except for several listed alternatives; option D manifest injustice sentences are not listed.

A dispositional court does not have authority to ignore all provisions in the juvenile justice act simply because it has elected to impose a manifest injustice disposition. More particularly, it may not ignore other language in the very section that authorizes manifest injustice statutes. To hold otherwise would be to render useless the carefully crafted limits on suspended sentences.

For these reasons, the disposition court erred by suspending disposition pursuant to a manifest injustice disposition where the disposition was not among those approved for suspension.

2. A MANIFEST INJUSTICE DISPOSITION WAS UNWARRANTED.

A “manifest injustice” disposition below the standard range may be granted when a standard range disposition would “impose an excessive penalty on the juvenile.” RCW 13.40.020(19). To affirm a manifest injustice disposition the reviewing court must find that (1) the reasons supplied by the disposition court are supported

by the record; (2) those reasons clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice; and (3) the sentence imposed was neither clearly excessive nor clearly too lenient.” State v. Moro, 117 Wn. App. 913, 73 P.3d 1029 (2003). The disposition imposed in this case fails the first two prongs of this test. The second prong will be discussed first.

a. The Court’s Reasons Do Not Clearly And Convincingly Support The Conclusion That A Manifest Injustice Would Result From A Standard Range Disposition.

The manifest injustice disposition was inappropriate because the court’s reasoning was improper in two ways: the “lack of serious bodily injury” rationale does not distinguish this robbery in the second degree from others, and there was mixed evidence, at best, as to whether the standard range would cause a manifest justice in this case.

- i. The “lack of serious bodily injury” mitigating circumstance relied upon by the court does not apply to a crime where injury need not be proved.

The disposition court here imposed a manifest injustice sentence because E.B. did not “contemplate that his conduct would cause or threaten to cause serious bodily injury to the victim.” Supp. CP ___ (Appendix A – Finding of Fact 3). This was error. The lack of injury mitigating factor is inapposite where the crime does not require proof of bodily harm. Robbery in the second degree is committed when a person takes property from another, “against her will, by the use or threatened use of immediate force, violence and fear of injury to such person.” CP 3; RCW 9A.56.190 and .210. The State need not prove actual injury. Thus, whether *serious* bodily injury was intended or caused does not serve to distinguish between people convicted for this crime. The mitigating factor might have been relevant had E.B. been before the court for disposition on robbery in the first degree, because that crime requires proof of injury. RCW 9A.56.200. The fact that the respondent’s conduct did not cause injury is already a part of the sentencing scheme for robbery in the first and second degrees, since harm is one of the things that distinguishes the two crimes.

See State v. Payne, 58 Wn. App. 215, 805 P.2d 247 (1990) (fact that juvenile found guilty of first-degree murder inflicted serious bodily injury on victim could not be used as aggravating factor in sentencing in that it logically was already part of sentencing scheme for murder in the first degree).

Mitigating and aggravating factors serve to distinguish a juvenile from others adjudicated of the same crime. If applied as the disposition court did here, however, the factor does not meaningfully distinguish this juvenile from others similarly situated. Most juveniles convicted of robbery in the second degree could not have been convicted of robbery in the first degree, and would qualify for the mitigator. Thus, the disposition court erred in treating a lack of serious bodily harm as a mitigating circumstance.

- ii. The reasons supplied by the court do not clearly and convincingly support the conclusion that a manifest injustice would result from a standard range disposition because the evidence showed that E.B. did very poorly on parole but made some progress while confined.

The standard range establishes the appropriate means and period for rehabilitating offenders in most cases. State v. K.E., 97

Wn. App. 273, 282, 982 P.2d 1212 (1999). Washington courts have repeatedly held that “the ‘clear and convincing’ standard as applied to a manifest injustice disposition is a demanding standard that has long been equated with ‘beyond a reasonable doubt.’”

State v. Tai N., 127 Wn. App. 733, 741, 113 P.3d 19 (2005).

E.B. had the burden to show that this presumption was incorrect in his case. He cannot do so.

E.B. had failed numerous times on community-based treatment. He committed two serious crimes while on a deferred prosecution and had multiple other violations during that time. He made some progress while under the structure of the JRA, but once he was released, he continued to struggle with the most basic conditions, including attendance at school.

The court below recognized that there were both aggravating and mitigating circumstances in this case, but instead of taking that divergent information as a basis to impose the standard range disposition, the court imposed a disposition at the top of the confinement range, but suspended actual confinement. RP (10/14) 43, 45 (“There are some substantial risks involved with having

[E.B.] stay in the community.”); Exhibits 7, 8, 9.⁵ As argued above, this hybrid sentence was illegal. But the structure of the disposition, with its higher potential confinement, but suspended, also illustrates that it cannot withstand scrutiny in a different way. It simply cannot be said where there is such divergent evidence about a juvenile’s ability to conform to community-based treatment that a standard range disposition of confinement would “clearly and convincingly support the conclusion that the usual sentence would be an injustice.” In other words, a checkered history that suggests both serious struggles and some modest success in community-based programs does not establish that a standard range disposition is manifestly unjust.

b. There Was Insufficient Evidence Regarding E.B.’s Intent To Conclude That He Did Not Intend To Injure The Victim.

The disposition court ruled that E.B. did not intend to injure his victim. The record does not support this conclusion. The court erred by focusing on the fact that E.B. initially attempted to steal the victim’s purse through stealth. But the facts before the court plainly showed that once the victim pursued E.B. and attempted to recover

⁵ These exhibits show E.B.’s repeated and serious difficulties with community-based parole and his difficulties in attending school.

her purse, he did not abandon his effort to steal from her. Rather, he dragged her towards the exit to the library and then, when she had fallen to one knee and was in a particularly vulnerable position facing the floor, he hammered her on the side of her head with his fist. E.B. never gave a statement to police or testified in court that his intent was simply to discourage his victim. The most natural inference from his conduct and the victim's injuries was that out of anger, frustration, or determination, E.B. intended to seriously harm his victim in order to escape with her purse. The record simply does not support the conclusion that he lacked the intent to harm.

E. CONCLUSION

For these reasons, the court's imposition of a suspended sentence should be reversed and the matter should be remanded to the juvenile court for a standard range disposition.

DATED this 1st day of March, 2016.

Respectfully submitted,

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APPENDIX A

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FILED
KING COUNTY, WASHINGTON

NOV 24 2015
SUPERIOR COURT CLERK
BY MARY TOWNSEND
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN THE COUNTY OF KING, JUVENILE DIVISION

STATE OF WASHINGTON)	CAUSE NO. 15-8-01386-8
)	
<i>Plaintiff,</i>)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW FOR
v.)	MANIFEST INJUSTICE DISPOSITION
)	
E' B.)	
)	
D.O.B. 3/3/00)	
<i>Respondent.</i>)	

This matter came before the undersigned Judge of the above-entitled court on October 14, 2015, and the Court having considered the legal memoranda submitted by the Defense, as well as the disposition report submitted by the Juvenile Probation Counselor Kelly DePhelps, the letter from Bellevue High School Special Education Teacher Brittany Craig, and having considered oral argument by Deputy Prosecuting Attorney Benjamin Carr, Defense Counsel Jennifer Beard, and having further considered the records and files in this case now, furthermore, the Court hereby makes the following findings of fact and conclusions of law.

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a specific program to address his needs for this school year. The respondent was showing improvement in his attendance and behavior this year. School is now an anchor for respondent to provide stability in his community behaviors.

10. Team Child assisted the Respondent and his family is setting up an appropriate education program and will continue to be available to assist respondent in these matters.

11. A referral can be made for a wrap team to provide additional support for the respondent and his family.

12. The Respondent has resources in place upon his release to protect the community and continue his progress in his behavioral improvement.

13. The Respondent's conduct during this offense neither caused nor threatened serious bodily injury or the Respondent did not contemplate that his conduct would cause or threaten serious bodily injury pursuant to RCW 13.40.150(3)(h)(i),

14. The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement pursuant to RCW 13.40.150(3)(i)(iv).

15. The Respondent historically has had significant conflict with his mother since his release from JRA, the relationship has improved significantly and Given's mother is strongly supportive of his receiving a reinstated injustice downward.

II. CONCLUSIONS OF LAW

- 1. The Court has jurisdiction over the parties and the subject matter of this action.
- 2. That imposition of a standard range sentence would effectuate a manifest injustice.
- 3. A disposition of 65-65 weeks with the time suspended is the appropriate disposition to protect ~~society~~ *the community.*

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Sentence and disposition should be entered in accordance with these findings of fact and conclusions of law, which also incorporate by reference the briefing and supporting documents provided by the respective parties and the oral findings of the Court.

DONE IN OPEN COURT THIS 23RD day of ~~October~~ ^{November}, 2015.

John P. Erlick
for _____
The Honorable Judge John Erlick

Presented by:
Jill Beard

Jennifer Beard WSBA 19753
Attorney for Respondent

Approved for entry by:
Benjamin Carr

Benjamin Carr WSBA 40778
Attorney for the State

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Washington Appellate Project at wapofficemail@washapp.org, containing a copy of the Brief of Appellant, in STATE V. E. B., DOB: 3/3/2000, Cause No. 74233-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

3/1/16
Date 3/1/16