

No. 35490-0-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JASON L. FRAZIER,

Appellant.

DEPUTY  
STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

---

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge Toni A. Sheldon  
Cause No. 06-1-00023-4

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BRIEF OF RESPONDENT

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(A) “BACKHANDED” THE VICTIM WITH A LARGE, MAGLITE FLASHLIGHT AFTER;

(B) THE VICTIM ALLEGEDLY “LUNGED” AT HIM WHILE ARMED WITH;

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#### A. ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction No. 13, an acts on appearance instruction, and Instruction No. 14, the definition of great bodily harm, which both misstated the law of self defense by requiring that Frazier have reasonable grounds to believe he was facing “great bodily harm” where the law only requires that a defendant entitled to self defense instructions fear “bodily harm.”
2. The trial court erred in allowing Frazier to be represented by counsel who provided in effective assistance of counsel in failing to object to Instruction No. 13 as a misstatement of the law after having proposed a correct instruction.

#### B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by giving Instruction No. 13, the acts on appearance instruction, and Instruction No. 14, which defined “great bodily harm,” after Frazier testified that acted in self-defense when he (a) “backhanded” the victim with a large, Maglite flashlight after (b) the victim allegedly “lunged” at him while armed with (c) a four inch buck knife,” when either harm or great bodily harm could have occurred?
2. If the trial court did err by giving Instructions No. 13, the acts on appearance instruction, and No. 14, that defined “great bodily harm,” was that error harmless if it: (a) was not prejudicial to the substantial rights of the party assigning it (b) in no way affected the final outcome of Frazier’s case, especially as Instruction No. 12 correctly stated the law on self-defense?
3. Did Frazier receive ineffective assistance of counsel after his attorney: (a) moved repeatedly for either dismissal or a mistrial throughout the case; (b) proposed his own instructions on self-defense; when the record indicates that he (c) may have had strategic reasons for his actions regarding Instructions No. 13 and 14 based on the way Frazier’s case developed during trial?

### C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."  
The Clerk's Papers will be referred to as "CP."

### D. STATEMENT OF THE CASE

#### 1. Procedural History

The appellant, Jason L. Frazier, was arraigned on March 6, 2006, on two charges; assault in the second degree and felony harassment. RP 8: 25; 9: 1-11. On April 10, 2006, Frazier waived speedy trial through July 10, 2006. RP16: 12-14; 17: 20-25. Frazier's trial began on June 29, 2006, and concluded on July 17, 2006, when the jury returned with their decision. RP 23: 11-14; 447: 15-19. The jury found Frazier guilty of assault in the second degree as was charged in count I, and acquitted him of felony harassment, count II. RP 447: 22-25; 448: 1-7. Frazier was sentenced on October 9, 2006. RP 473: 12-25; 474: 1-25; 475: 1-25; 476: 1-25; 477: 1-9.

#### 2. Statement of Facts

On November 26, 2005, Luther D. Maners, the victim, drove his pickup truck to Ken Swanlund's property. RP 97: 10-12; 98: 12-13.

Maners talked with Swanlund in Swanlund's front yard for approximately

“20 minutes to half an hour.” RP 99: 15-20. While Maners and Swanlund were talking, Frazier and another individual, Aaron Martin, “came out from behind [a] camp trailer.” RP 104: 7-9. According to Maners, Frazier “had a bat in his hand,” was “thumping it,” and said to Maners, “it’s for you.” RP 104: 9-14. Maners also stated that Frazier said he was going to “F-ing kill” him. RP 104: 22-23. When Maners asked why Frazier had the bat for him, Swanlund “turned to [Maners] and said you’d just better shut-up.” RP 104: 18-20. While trying to “make it back [to] his vehicle,” Maners thought that “they were trying to keep [him] confined so they could have further conversation...” RP 108: 11-13. Maners further described the actions of Frazier, Martin and Swanlund as follows: “[t]hey were fanning out like they were trying to impede my areas of which way I could go.” RP 108: 17-18; 109: 8-12.

Maners observed that Frazier “had the bat in his hand like he was ready to swing it,” and that Martin had a handgun. RP 109: 16-17; 110: 3-4. Although Maners first thought about fighting these men, he “figured that [his] odds were gone” when he saw Martin with the handgun. RP 109: 22-25; 111: 1. Seeing Martin with the handgun also made Maners realize that this was “serious business,” and that these men were “not joking around about their threats.” RP 173: 13-16. When Maners reached his vehicle, he stated that “when I turned my back to go get in the driver’s

door...I got struck in the back of the head.” RP 108: 24-25; 109: 1-3.

After Frazier struck Maners, Maners “jumped in his truck and drove away.” RP 111: 23-24.

According to Frazier, he “backhanded” Maners with a “large Maglite” flashlight after Maners allegedly “produced about a four-inch buck knife, with the wood and the gold...the brass end” and “went for” him. RP 301: 12-18. The Maglite that Frazier said he struck Maners with was “the biggest Maglite...they have...[a] red... six cell.” RP 305: 11-16. Frazier stated that Maners “missed” with the knife because he [Frazier] “turned to his right” when Maners “lunged” at him. RP 304: 5-14.

After Maners drove away from Frazier, Maners “knew that [his] head was split open” because he “could feel the blood going down the back of his neck and was light headed.” RP 112: 23-25. Maners drove to the Shafers residence and “sat on his front porch” to wait for the ambulance because he “didn’t want to get blood on [Shafers’] carpet.” RP 115: 9-12. A total of eight staples were need to close the wound in Maners' head. RP 121: 6-10.

Pamela Shafer called 911 for Maners and saw that Maners’ head “was split open.” RP 187: 25; 188: 1-2. Pamela Shafer also saw that Maners was “upset,” “in pain,” and that “[t]here was blood everywhere.” RP 188: 9-18. David Shafer not only witnessed Maners “bleeding

profusely out the back of his head,” but also saw Frazier ride by his residence a short time later in a “dark red ‘80s Blazer with his friend Aaron [Martin].” RP 201: 1; 202: 6-8. When Frazier rode by, David Shafer saw that “Jason [Frazier] had a red metallic baseball bat, and he was looking at me like he was gonna do the same thing to me.” RP 202: 10-14. Deputy Philpott from the Mason County Sheriff’s Department responded to the Shafers’ residence and saw that “towards the back of [Maners’] head...he had a pretty sizeable gash that was bleeding” while he was there. RP 52: 22-25; 53: 1.

### 3. Summary of Argument

The trial court did not err in giving Instructions No. 13, the acts on appearance instruction, and No. 14 that defined “great bodily harm” because either harm or great bodily harm could have occurred under the two different version of the facts provided. If error did occur it was harmless, because it did not prejudice Frazier and in no way affected the final outcome of the case. In addition, Instruction No. 12 correctly stated the law on self-defense, and therefore rendered Instructions No. 13 and 14 superfluous. Lastly, Frazier received effective assistance of counsel because the record demonstrates that his attorney actively represented him and employed a variety of strategies in defense; strategies that ultimately

resulted in Frazier being acquitted of one of the two felony charges. The judgment and sentence of the trial court is correct and should be affirmed.

#### E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY GIVING INSTRUCTION NO. 13, THE ACTS-ON APPEARANCE INSTRUCTION AND INSTRUCTION NO. 14 WHICH DEFINED "GREAT BODILY HARM," AFTER FRAZIER TESTIFIED THAT HE ACTED IN SELF-DEFENSE WHEN HE:
  - (A) "BACKHANDED" THE VICTIM WITH A LARGE, MAGLITE FLASHLIGHT AFTER;
  - (B) THE VICTIM ALLEGEDLY "LUNGED" AT HIM WHILE ARMED WITH;
  - (C) A FOUR-INCH BUCK KNIFE BECAUSE EITHER BODILY HARM OR GREAT BODILY HARM COULD HAVE OCCURRED.

The trial court did not err by giving Instruction No. 13, the acts on appearance instruction and Instruction No. 14 which defined "great bodily harm" after Frazier testified that he acted in self-defense when he: (a) "backhanded" the victim with a large, Maglite flashlight after; (b) the victim allegedly lunged at him while armed with; (c) a four-inch buck knife because either bodily harm or great bodily harm could have occurred.

The State must prove every element of the crime charged beyond a reasonable doubt. *State v. L.B.*, 132 Wash.App. 948, 952, 135 P.3d 508 (2006). When the defendant raises the issue of self-defense, the absence

of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. *L.B.* at 952; *see State v. Acosta*, 101 Wash.2d 612, 615-616, 683 P.2d 1069 (1984). It is constitutional error to relieve the State of its burden of proving the absence of self-defense. *L.B.* at 952; *see State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).

According to the plain language of RCW 9A.16.020(3), a person has a right to use force [to] defend himself against danger of injury, ‘in case the force is not more than is necessary.’ *L.B.* at 953. The term “great bodily harm” places too high of a standard for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury. “Great bodily harm” means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. WPIC 2.04.

Even in homicide cases, the defendant does not have to establish that he reasonably feared great bodily harm. *State v. Woods*, 156 P.3d 309, 313 (2007); *see Walden* at 475, n. 3 (the instruction defining justifiable homicide as well as the ‘act on appearances instruction’ must use the term ‘great personal injury’ and not ‘great bodily harm.’)

Evidence of self-defense is evaluated from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing

all the defendant sees. *Walden* at 474; citing *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her. The objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. Deadly force may be used only in self-defense if the defendant reasonably believes that he or she is threatened with death or 'great personal injury.' If it appears to a person that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner. *Walden* at 475.

The facts of *Walden* are relevant to Frazier's case because they illustrate how the two-prong objective/subjective test addressing the reasonable use of force was applied in a case involving an assault with a knife. In 1993, defendant Walden left a tavern in Arlington, WA, and got on his bicycle. *Walden* at 471. When riding past the video arcade where several teenagers including the three victims were standing outside,

Walden was either pushed or fell off his bicycle. According to the teens, Walden first fell off his bicycle, became angry when they laughed at him, and then came after them with a knife. Conversely, Walden testified that the teens pushed him off his bicycle and were then looking to beat him up.

At some point during the altercation, Walden produced and opened a folding knife with a 3 ½ inch locking blade. *Walden* at 472. The teens and several witnesses testified that Walden attempted to use the knife. Walden, however, testified that he only produced the knife to scare the teens off, and that he did not actually try to use it. No evidence or testimony was offered by either side that the three teens were armed. However, there was testimony that Walden and these same three teens had been involved in an altercation on at least one previous occasion.

Following the close of Walden's case, Walden objected to the definition of 'great bodily injury,' arguing that it improperly required the jury to use a purely objective standard regarding the reasonable use of force in self defense. The Washington State Supreme Court held that under the facts in this case, 'great bodily injury' as defined could have impermissibly restricted the jury from considering Walden's subjective beliefs about the possible consequence of an assault by the teens.

The distinction to be made between the facts of *Walden* and those in *Frazier's* case is that if the jury considered either version of the facts, an

instruction on either harm or great bodily harm would not have made any difference. Unlike the facts of *Walden*, where it was never alleged that the teens were armed, Frazier testified that victim Maners “lunged” at him with a four-inch buck knife. Conversely, victim Maners testified that Frazier struck him with a baseball bat, that Martin had a handgun, and that Frazier, Martin and Swanlund tried to trap him. The expectation under either fact pattern was that deadly force was at issue in Frazier’s case, and not mere bodily harm.

The instructions that were ultimately given to the jury in Frazier’s case allowed them deliberate the self-defense claim using both subjective and objective analysis. Standing in Frazier’s shoes, a reasonably prudent person could conclude that someone “lunging” at another with a four-inch buck knife could well result in “great bodily harm,” namely death, as well as mere bodily harm. As the trier of fact, the jury had the discretion to determine which version of the facts was correct, and here, they were properly instructed on the law regarding self-defense.

2. IF THE TRIAL COURT DID ERR BY GIVING INSTRUCTIONS NO. 13, THE ACTS ON APPEARANCE INSTRUCTION AND NO. 14, THAT DEFINED “GREAT BODILY HARM,” THAT ERROR WAS HARMLESS BECAUSE:
  - (A) IT WAS NOT PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE PARTY ASSIGNING IT; AND
  - (B) (B) IN NO WAY AFFECTED THE FINAL OUTCOME OF FRAZIER’S CASE, ESPECIALLY AS INSTRUCTION NO. 12 CORRECTLY STATED THE LAW ON SELF-DEFENSE.

If the trial court did err by giving Instructions No. 13, the acts on appearance instruction, and No. 14, that defined “great bodily harm,” that error was harmless because: (a) it was not prejudicial to the substantial rights of the party assigning it, and (b) in no way affected the final outcome of Frazier’s case, especially as Instruction No. 12 correctly stated the law on self-defense.

An instructional error is harmless only if it ‘is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. *Walden* at 478. It is the State’s burden to prove the error was harmless beyond a reasonable doubt. *L.B.* at 954; *see Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed. 705 (1967); *State v. Eaker*, 113 Wash.App. 111, 113, 53 P.3d 37 (2002).

Credibility determinations are for the trier of fact and cannot be reviewed on appeal. *L.B.* at 954; *see State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

The facts of *State v. Freeburg* are analogous to Frazier's case, because the Court of Appeals held that regardless of whether the jury was instructed on "great personal injury" or "great bodily harm," there was no likelihood that the ultimate outcome would have been affected because the facts satisfied both definitions.

In *Freeburg*, Jose Rodriguez, the victim, was shot and killed in his apartment where he lived with his girlfriend, Darlene Martinez. *State v. Freeburg*, 105 Wash.App. 492, 495, 20 P.3d 984 (2001). According to Martinez, Freeburg pounded on the apartment door until Rodriguez got out of bed and opened it. *Freeburg* at 495. Martinez testified that Freeburg had come to collect money owed to him by Martine Gomez, who had lived in the apartment for a time. After a heated discussion, Freeburg barged into the apartment brandishing a gun. Martinez tried to call the police, but Freeburg grabbed her, threw her on the couch, held the gun to her head, and told her to shut-up or he would kill her.

At this point, Rodriguez struck Freeburg on the head with some kind of object. Freeburg began to wrestle with Rodriguez, and Martinez headed toward the door. Martinez heard a gunshot, then a second shot,

and saw Rodriguez' body go limp. Freeburg then opened the door and Martinez saw Lawrence Kuhn in the hall holding a gun. Freeburg pushed Martinez against the wall and Kuhn entered the apartment. Freeburg told Kuhn, "if she moves, shoot her." Freeburg then went into the bedroom looking for money and Martinez ran. Kuhn fired a shot at her, but missed. Freeburg and Kuhn then fled.

Freeburg's account of the shooting differed markedly from Martinez' version stated above. Freeburg testified that he and Kuhn went to see Rodriguez about an automobile trade. Rodriguez invited him and Kuhn into the apartment. Kuhn and Rodriguez began to argue about money and drugs. The altercation escalated into a fight, and Freeburg separated them.

As Freeburg turned to admonish Kuhn for his aggression Rodriguez smashed Freeburg in the back of the head with an unknown object. *Freeburg* at 495-496. The impact knocked Freeburg to his knees. *Freeburg* at 496. he was struck again in the ear. Dazed, he looked up to see Rodriguez pointing a gun at him at close range. Freeburg rushed at Rodriguez. As they wrestled, the gun fired once, but Freeburg got control of the gun. Rodriguez then kned Freeburg and grabbed his crotch, "squeezing as hard as he could." Freeburg fired the gun without looking

or thinking. Rodriguez fell to the couch. Kuhn grabbed the gun, and he and Freeburg left in Freeburg's truck.

The Court agreed with Freeburg that the act on appearances instruction should have used the great personal injury language, but that given the facts as stated, that no likelihood whatsoever that its use affected the outcome. Freeburg's theory at trial was that he was faced with a threat of gunshot at close range, which easily and obviously satisfies both definitions; the threat of great personal injury and/or great bodily harm.

In Frazier, a very similar fact pattern occurred, in that Frazier's theory of self defense was that the victim "lunged" at him with a four-inch buck knife; an act that easily could have caused either bodily harm, great personal injury, and/or great bodily harm, just as the court in *Freeburg* reasoned. The jury in Frazier had the discretion to determine the credibility of any testimony presented. Regardless of which instruction the jury received under the facts in Frazier's case, the ultimate outcome would not have been affected.

In addition, Instruction No. 12 correctly stated the law on self-defense, and thereby rendered Instructions No. 13 and 14 superfluous.

Instruction No. 12 reads as follows:

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the (sic) state has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty. CP 43.1.

As can be seen from this jury instruction, the law of self-defense in Washington State is very fact-specific. Had Maners waved a toy knife made of flexible rubber at Frazier, then Instructions No. 13 and 14 would apply because then there would have been no actual potential for injury. The facts are different here, because Frazier explicitly testified that Maners "lunged" at him with a four-inch buck knife that by his account was decidedly real, thereby placing Frazier in actual danger. Instruction No. 12, and not Instruction No. 13, is controlling on the law of self-defense under these facts. Arguably, if the trial court did err, then that error was harmless for the reasons stated.

3. FRAZIER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY:
- (A) REPEATEDLY MOVED FOR EITHER DISMISSAL OR MISTRIAL THROUGHOUT THE CASE;
  - (B) PROPOSED HIS OWN INSTRUCTIONS ON SELF-DEFENSE; WHEN
  - (C) THE RECORD INDICATES THAT MAY HAVE HAD STRATEGIC REASONS FOR HIS ACTIONS REGARDING INSTRUCTIONS NO. 13 AND 14 BASED ON THE WAY FRAZIER'S CASE DEVELOPED DURING TRIAL.

Frazier did not receive ineffective assistance of counsel because his attorney: (a) repeatedly moved for either dismissal or mistrial throughout the case; (b) proposed his own instructions on self-defense; when the record indicates that the (c) may have had strategic reasons for his actions regarding Instructions No. 13 and 14 based on the way Frazier's case developed during trial.

We start with the strong presumption that counsel's representation was effective. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); *see State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *Rodriguez* at 184; *see State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). The defendant must show that his lawyer's performance was deficient and that this deficiency prejudiced him. *Rodriguez* at 184; *see State v.*

*Thomas*, 109 Wash.2d 222, 225-226, 743 P.2d 816 (1987).

Deficient performance is performance ‘below an objective standard of reasonableness based on consideration of all the circumstances’.

*Rodriguez* at 184; *citing Studd* at 551(citations omitted). Prejudice means that there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. *McFarland* at 334-335.

Effective assistance of counsel does not mean ‘successful assistance of counsel.’ *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969). An attorney “actively” represents a defendant when he [or she] enters an appearance on behalf of a criminal defendant, consults with him [or her] for the purpose of preparing a defense investigates his [or her] case...confers with co-counsel on strategy [and/or] offers the defendant legal advice. *Dorsey v. King County*, 151 Wash.App. 664, 672, 754 P.2d 1255 (1988).

The record reflects that court-appointed counsel for Frazier actively represented his client by repeatedly moving for dismissal and/or mistrial repeatedly throughout the trial, and by making a variety of relevant objections. Defense counsel also proposed his own set of jury instructions that included ones on self-defense and bodily harm. CP 35. Given that Frazier testified on his own behalf and gave a very different

version of facts, his attorney may well have thought that it would make little difference whether the court instructed the jury on “bodily” or “great bodily harm” in terms of self-defense, given the weapons that were involved. Frazier’s attorney also knew that the jury would ultimately decide the credibility of the testimony and evidence presented.

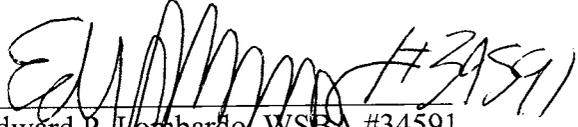
Depending on whether the jury believed Maners' version that had Frazier with a baseball bat and Martin with a handgun, or Frazier’s version that had Maners lunging at him with a four-inch buck knife, the probability of great bodily harm under either set of facts was far more probable than mere bodily harm. Evidence that the defense attorney’s possible strategy was successful is that the jury ultimately acquitted Frazier of one of the two felony charges; felony harassment. RP 448: 4-7. The performance of Frazier’s court-appointed counsel was not deficient, and the record does not show that he made any unprofessional errors that would have changed the result of Frazier’s trial.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 9<sup>th</sup> day of July, 2007

Respectfully submitted by:

  
Edward P. Lombardo, WSBA #34591  
Attorney for Respondent

07 JUL 2007 PM 2:53

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

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 JASON L. FRAZIER, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

No. 35490-0-II  
DECLARATION OF  
FILING/MAILING  
PROOF OF SERVICE

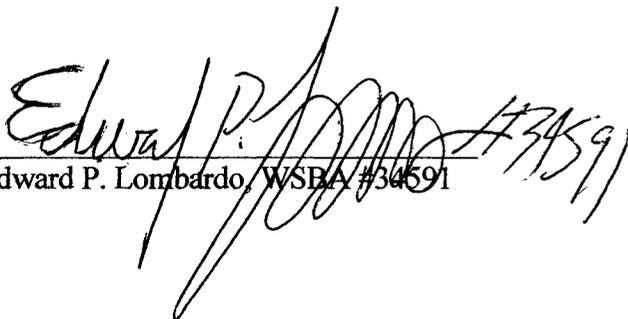
I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, JULY 9, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Patricia A. Pethick  
PO Box 7269  
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 9<sup>TH</sup> day of JULY, 2007, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591