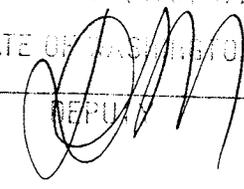


FILED  
COURT OF APPEALS  
DIVISION II

08 NOV -6 PM 12:01

STATE OF WASHINGTON

BY  REPUBLIC

No. 37549-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Jamara Humphrey,**

Appellant.

---

Grays Harbor County Superior Court Cause No. 07-1-00535-1

The Hon. Judge David Edwards

**Appellant's Opening Brief**

Jodi R. Backlund

Manek R. Mistry

Attorneys for Appellant

**BACKLUND & MISTRY**

203 East Fourth Avenue, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

P.M. 11-3-08

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3**

A. The trial judge admitted evidence that Ms. Humphrey had been arrested, handcuffed, and detained in the back of a police car in 2006, when she was given a trespass notice excluding her from Wal-Mart. .... 3

B. LaCombe testified that he saw Ms. Humphrey in the Aberdeen store on April 6, 2007..... 6

C. LaCombe testified that he saw Ms. Humphrey in the Aberdeen store on July 12, 2007..... 7

D. The court excluded Ms. Humphrey’s “other suspect” evidence. .... 8

E. Ms. Humphrey presented evidence that she was in Lakewood on July 12, 2007, and renewed her request for admission of “other suspect” evidence. .... 9

F. In closing argument, the state argued that Ms. Humphrey should have called her aunt to testify, telling the jury that the prosecutor “wears the white hat” and “seek[s] justice.” ..... 10

G. Ms. Humphrey was convicted and sentenced. .... 11

H. The trial court vacated Ms. Humphrey’s conviction on Count I (after the prosecutor verified that she was in custody in Puyallup on April 6, 2007), but refused to grant a new trial on Counts II and III. .... 11

**ARGUMENT..... 12**

**I. The trial judge erred by excluding Ms. Humphrey’s “other suspect” evidence. .... 12**

**II. The trial judge admitted irrelevant and prejudicial evidence..... 16**

A. The trial court admitted irrelevant and prejudicial evidence of prior misconduct in violation of ER 402 and ER 404(b)..... 16

B. The trial court erred by admitting evidence in violation of ER 403. .... 21

C. The trial judge’s erroneous evidentiary rulings prejudiced Ms. Humphrey. .... 23

**III. The prosecuting attorney committed misconduct requiring reversal..... 26**

A. The prosecuting attorney unconstitutionally shifted the burden of proof. .... 27

B. The prosecutor committed misconduct by arguing that the prosecution “wears the white hat” and “seek[s] justice.”  
29

**IV. The trial judge should have granted a new trial on Counts II and III after Ms. Humphrey demonstrated that she was in jail for driving with a suspended license on April 6, 2007. .... 30**

**CONCLUSION ..... 32**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	13
<i>Douglas v. Alabama</i> , 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) .....	13
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ...	27, 28
<i>United States v. Perlaza</i> , 439 F.3d 1149 (9th Cir., 2006).....	27
<i>United States v. Vaccaro</i> , 115 F.3d 1211 (5th Cir.,1997).....	29
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) .....	13

### WASHINGTON CASES

<i>State v. Ashby</i> , 141 Wn. App. 549, 170 P.3d 596 (2007) .....	30
<i>State v. Babcock</i> , 145 Wn. App. 157, 185 P.3d 1213 (2008) .....	23
<i>State v. Bebb</i> , 44 Wn.App. 803, 723 P.2d 512 (1986) .....	14
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	26
<i>State v. Boehning</i> , 127 Wn. App. 511, 111 P. 3d 899 (2005).....	26
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	26
<i>State v. Clark</i> , 78 Wn. App. 471, 898 P.2d 854 (1995) .....	14, 15
<i>State v. Cook</i> , 131 Wn. App. 845, 129 P.3d 834 (2006) .....	25
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003). 16, 17, 18, 19, 20	
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	26

<i>State v. Escalona</i> , 49 Wn. App. 251, 742 P.2d 190 (1987) .....	24
<i>State v. Gonzales</i> , 111 Wn.App. 276, 45 P.3d 205 (2002) .....	29, 30
<i>State v. Henderson</i> , 100 Wn.App. 794, 998 P.2d 907 (2000).....	26
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	13, 14
<i>State v. Jackson</i> , 102 Wn.2d 689, 689 P.2d 76 (1984) .....	17, 18
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998).....	21
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	13
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	27, 29
<i>State v. Moreno</i> , 132 Wn. App. 663, 132 P.3d 1137 (2006).....	27
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006) .....	26
<i>State v. Rehak</i> , 67 Wn.App. 157, 834 P.2d 651 (1992), <i>review denied</i> , 120 Wn.2d 1022, <i>cert. denied</i> , 508 U.S. 953 (1993).....	14
<i>State v. Rice</i> , 48 Wn.App. 7, 737 P.2d 726 (1987).....	14
<i>State v. Smith</i> , 101 Wn.2d 36, 677 P.2d 100 (1984) ( <i>Smith I</i> ).....	13
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986) ( <i>Smith II</i> )..	17, 18, 19, 20
<i>State v. Wilson</i> , 144 Wn. App. 166, 181 P.3d 887 (2008).....	31
<i>Subia v. Riveland</i> , 104 Wn. App. 105, 15 P.3d 658 (2001).....	21

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI .....	12, 13, 15
Wash. Const. Article I, Section 22.....	12, 13, 15

**WASHINGTON STATUTES**

RCW 10.52.040 ..... 13

**OTHER AUTHORITIES**

CrR 6.12 ..... 13

CrR 7.8 ..... 12, 30, 32

ER 401 ..... 1, 2, 14, 16, 20, 25

ER 402 ..... ii, 1, 2, 14, 16, 20, 25

ER 403 ..... ii, 1, 2, 17, 20, 21, 23, 25

ER 404 ..... ii, 1, 2, 4, 16, 19, 20, 25

RAP 2.5 ..... 26

### **ASSIGNMENTS OF ERROR**

1. The trial court erred by excluding Ms. Humphrey's "other suspect" evidence.
2. The trial court erred by admitting evidence of Ms. Humphrey's alleged prior misconduct.
3. The trial court admitted irrelevant evidence in violation of ER 401 and ER 402.
4. The trial court admitted evidence in violation of ER 404(b).
5. The trial court admitted evidence in violation of ER 403.
6. The trial court erred by admonishing the jury that it could only consider uncharged misconduct as proof of identity or knowledge, without explaining how they were to accomplish this.
7. The prosecuting attorney committed reversible misconduct by shifting the burden of proof during closing arguments.
8. The prosecuting attorney committed reversible misconduct by wrapping a cloak of righteousness around the prosecution role.
9. The trial judge erred by denying Ms. Humphrey's Motion for Relief from Judgment.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person has a constitutional right to present a defense consisting of relevant and admissible evidence. Evidence that another person committed the charged crime is relevant and admissible if a train of facts or circumstances clearly point out someone besides the accused person as the guilty party. Did the trial court violate Ms. Humphrey's constitutional right to present a defense by excluding relevant and admissible evidence that her cousin Keisha committed the charged offenses?

2. Evidence of prior misconduct is inadmissible unless the prosecution meets its substantial burden of showing that the evidence is admissible to show (*inter alia*) identity or knowledge and has substantial probative value to outweigh its highly prejudicial effect. The trial judge presumed that Ms. Humphrey's alleged prior misconduct was admissible, did not require the state to meet its substantial burden, and did not properly weigh the probative value and prejudicial effect. Did the trial court's admission of alleged prior misconduct violate ER 401, ER 402, ER 403, and ER 404(b)?
3. A prosecuting attorney may not shift the burden of proof in closing argument. The prosecuting attorney shifted the burden of proof by arguing that Ms. Humphrey should have called another witness to testify on her behalf. Did the prosecuting attorney's misconduct violate Ms. Humphrey's constitutional right to a fair trial?
4. A prosecuting attorney may not pretend that she or he is above the adversarial process. In this case, the prosecutor committed misconduct by arguing that he wore a "white hat," and was seeking justice. Did the prosecuting attorney's misconduct violate Ms. Humphrey's constitutional right to a fair trial?
5. A trial judge abuses his discretion when he makes a decision that is manifestly unreasonable or based on untenable grounds or reasons. Ms. Humphrey established that she was in custody in another county on April 6, discrediting the testimony of an eyewitness who testified against her on all three charges. Did the trial judge abuse his discretion by denying her motion for a new trial on the July 12 charges?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

On April 6, 2007, a group of people went into Wal-Mart in Aberdeen, put DVDs into totes, and left the items in the store. RP (3/11/08) 111-115. Then on July 12, 2007, Priscilla Brager and two or three other people went into the Wal-Mart in Aberdeen, and threw items over the fence in the garden area. RP (3/11/08) 89, 92-94, 125-130.

On September 21, 2007, Jamara Humphrey was charged with two counts of Burglary in the Second Degree, and one count of Organized Retail Theft in the Second Degree. CP 1-3. She asserted that the state had charged the wrong person. RP (3/11/08) 33-36, 50-52, 71, 82, 95; RP (3/12/08) 16-17, 20-29, 48-100, 123-136.

- A. The trial judge admitted evidence that Ms. Humphrey had been arrested, handcuffed, and detained in the back of a police car in 2006, when she was given a trespass notice excluding her from Wal-Mart.

To support the burglary charge, the state introduced evidence that Ms. Humphrey had been “trespassed” from Wal-Mart, meaning she was given a notice excluding her from Wal-Mart stores. RP (3/11/08) 28-31. This occurred in November of 2006; at the time, she had been arrested, handcuffed, and detained in a police car. RP (3/11/08) 31. Defense counsel sought to limit the information surrounding the trespass notice.

He argued that the state's witnesses could identify Ms. Humphrey and describe the trespass notice without testifying that she had been arrested on suspicion of shoplifting, handcuffed, and detained in the back of a police car. RP (3/11/08) 31, 33-35. Defense counsel also urged the court to limit testimony alleging Ms. Humphrey had gone to Wal-Mart stores in other counties, and offered to stipulate that Ms. Humphrey had received the notice. RP (3/11/08) 33-34.

The court initially ruled that the arrest and detention in a police car could be admitted, but not the fact that she was handcuffed. RP (3/11/08) 31. According to the judge, since the main issue at trial would be the identification of Ms. Humphrey as the perpetrator of the Aberdeen crimes, the circumstances surrounding the trespass notice—including Ms. Humphrey's 2006 arrest on suspicion of shoplifting in Everett—added weight to the identification testimony. RP (3/11/08) 34. The court referenced ER 404(b)'s exception allowing proof of prior misconduct to show motive, opportunity, intent, etc, noted that all evidence is prejudicial to the defense, and declined to let the defense "stipulate away the State's evidence." RP (3/11/08) 35-37.

Wal-Mart Asset Protection Coordinator Cohen testified that he saw Ms. Humphrey in the Everett store and recognized her from Wal-Mart security alerts he'd received. RP (3/11/08) 42. Defense counsel objected,

but the court, instead of sustaining the objection and striking the testimony, gave the following cautionary instruction:

Ladies and gentlemen, you may now hear testimony of prior contacts between one or more of the defendants and Wal-Mart security personnel or law enforcement officers on dates not alleged in the information that's been filed in this case. Such testimony should not be considered by you to prove the character of the defendants, or either of them, or to show that they acted in conformity with some character trait. You may consider such evidence to determine whether the defendants knew that they were not licensed or privileged to enter Wal-Mart premises at later times, or to establish a basis for identification of the defendants on the dates of the crimes alleged in the information, okay?  
RP (3/11/08) 42-43.

Cohen testified that he gave Ms. Humphrey a trespass notice in 2006, while she was under arrest at the Everett store. RP (3/11/08) 43.

The trespass notice was admitted into evidence as Exhibit 6. RP (3/11/08) 62; Supp CP, Notification of Restriction from Property. The signature line on the notice reads "cuffed," instead of showing Ms. Humphrey's signature. Reversing his earlier ruling, the judge held that codefendant Brager's attorney had "opened the door" by asking the witness to look at the signature line. RP (3/11/08) 58-60. The question that opened the door was as follows:

Q. And you have handed forward – we have an exhibit of these trespass notices? Yes. Okay. Now, the one thing – can I draw your attention to that line that says signature; could we talk about that?

MR. CLAPPERTON: I am going to object, Your Honor.  
THE COURT: Grounds?

MR. FULLER: Your Honor, we are getting – we are getting on tenuous ground here in light of the Court’s ruling. RP (3/11/08) 56.

Brager’s attorney didn’t ask any further questions on the issue. RP (3/11/08) 56. On the state’s redirect examination, the witness was allowed to testify that Ms. Humphrey had been handcuffed at the time she was arrested and given the notice of trespass. RP (3/11/08) 58-62.

Ms. Humphrey sought to establish that charges from her 2006 arrest in Everett had been dismissed. RP (3/11/08) 50, 63. The state’s objections to this testimony were sustained.<sup>1</sup> RP (3/11/08) 50, 63.

B. LaCombe testified that he saw Ms. Humphrey in the Aberdeen store on April 6, 2007.

On April 6, 2007, an employee at the Aberdeen Wal-Mart noticed large totes filled with DVDs that were out of their area. RP (3/11/08) 65-70. He notified his supervisor, and returned the items to their proper locations. RP (3/11/08) 67-70. Asset Protection Coordinator LaCombe testified (after the court repeated its cautionary instruction) that he saw Ms. Humphrey in the Aberdeen store with Brager on that day.<sup>2</sup> RP

---

<sup>1</sup> Ms. Humphrey later testified that the charges were dismissed. RP (3/12/08) 104.

<sup>2</sup> LaCombe’s April 6 identification of Ms. Humphrey later turned out to be demonstrably false.

(3/11/08) 108-112. The state introduced a security video from Wal-Mart's surveillance system, as well as still photos taken from the video. RP

(3/11/08) 113-115. LaCombe told the jury that he recognized Ms. Humphrey when he saw her in person in the aisle and that he also recognized her on the surveillance videos. RP (3/11/08) 111-115. He told the jury that he had seen her in 2005 while working at the Lacey store, twice. RP (3/11/08) 109.

C. LaCombe testified that he saw Ms. Humphrey in the Aberdeen store on July 12, 2007.

On July 12, 2007, an employee at the Lacey Wal-Mart saw Brager in his store and recognized her from photos he'd seen. RP (3/11/08) 77, 79. He called the Aberdeen Wal-Mart and warned LaCombe that Brager might be coming to Aberdeen. RP (3/11/08) 82. He later reviewed a surveillance video from the Aberdeen store, and identified Brager as the person he'd seen in Lacey. RP (3/11/08) 89.

LaCombe told the jury that he saw Ms. Humphrey in the Aberdeen store later in the day, from a distance of three feet. RP (3/11/08) 121. He also identified her in the surveillance video, which was introduced as an exhibit and reviewed by the jury. RP (3/11/08) 124-130. The video showed people throwing bags of DVDs over a fence in the outer garden area of the store. RP (3/11/08) 130.

The state also introduced still photos taken from the video; the still photos included captions describing and naming Ms. Humphrey as one of the people depicted. Defense counsel objected, and the prosecutor indicated that he had intended to redact the photos. RP (3/11/08) 137-139. The court, however, ruled the photos admissible, even with their incriminating labels, since the words on the photos were consistent with LaCombe's testimony.<sup>3</sup> RP (3/11/08) 139-140.

D. The court excluded Ms. Humphrey's "other suspect" evidence.

The defense theory of the case was that Ms. Humphrey was mistakenly identified as the person in the Aberdeen Wal-Mart on both occasions. During the state's case, the court admitted a photo of Keisha Humphrey (Ms. Humphrey's cousin), whom the defense believed was the person depicted in the images from both shoplifting incidents. RP (3/12/08) 19. Testimony established that Keisha was with Brager on July 12 and on July 19. RP (3/11/08) 104-105. The court did not allow Ms. Humphrey to present evidence that that Keisha had been arrested on at least one other occasion for shoplifting from Wal-Mart, nor that Wal-Mart security alerts named Keisha as a person who had shoplifted. RP

---

<sup>3</sup> Despite this ruling, the state later redacted the already admitted photos. RP (3/12/08) 13, 147.

(3/12/08) 19-25. The court admonished defense counsel, stating that the proffered evidence was not relevant because the issue of identification had not been raised. This rebuke occurred after the prosecutor had already introduced Keisha Humphrey's photo the day before, and after the prosecutor had agreed that identification was at issue in the trial. RP (3/11/08) 104-105; RP (3/12/08) 21-25.

E. Ms. Humphrey presented evidence that she was in Lakewood on July 12, 2007, and renewed her request for admission of "other suspect" evidence.

Ms. Humphrey testified that she was in Lakewood at a candle party with several family members on July 12, 2007. RP (3/12/08) 48-105. Her boyfriend, cousin, and mother all verified that Ms. Humphrey attended the candle party at her aunt's house in Lakewood. RP (3/12/08) 51, 53, 63, 75-76. Ms. Humphrey also testified that she had been told (in 2006) not to go into any Wal-Mart stores, and that she was not in Grays Harbor county on July 12, 2007. RP (3/12/08) 87, 89.

Defense counsel again sought to introduce evidence of Keisha Humphrey's thefts from Wal-Mart, including evidence that she had been with Brager during prior shoplifting sojourns. RP (3/12/08) 107. The judge refused to allow the evidence, holding that it had only slight relevance and would prejudice the state. RP (3/12/08) 109, 110-111.

- F. In closing argument, the state argued that Ms. Humphrey should have called her aunt to testify, telling the jury that the prosecutor “wears the white hat” and “seek[s] justice.”

During closing, the prosecutor argued that Ms. Humphrey didn’t present the testimony of her aunt, who hosted the candle party:

But here’s the significance. The sister-in-law is the one who is friends with the mom, sees her every day, and she wasn’t here. The sister-in-law is the one who’s selling candles. And, you know, I know that some of you at least have been to this kind of a party where you go to somebody’s house and they have goods that they show you and then – you know, and they give you the receipt and then you come back and you pay the money and then in a week or two you get your goods. And you know the person who’s selling them is ordering them from some business somewhere else. The Avon lady, same kind of deal. All right?  
RP (3/12/08) 122.

In rebuttal closing, the prosecutor made the following argument:

You know, I like to think that the prosecution wears the white hat and that the prosecution is here, and I believe it sincerely, to seek justice, to get the right answer to this question, and to get the right answer for the right question. Because you have taken the time to look at all of the evidence, consider all the possibilities and taken your time, been diligent, been careful, considered the proper evidence and not being drawn off by accusations against Walmart [sic] or accusations that somehow the prosecution was trying to mislead you.

Because you are here to seek the truth, and I’m here to tell you that the truth is that these two defendants, you will find after looking at all of the evidence, committed crimes.  
RP (3/12/08) 143.

Defense counsel did not object to these arguments. RP (3/12/08)

122, 143.

G. Ms. Humphrey was convicted and sentenced.

The jury convicted Ms. Humphrey as charged. CP 4. Although Ms. Humphrey had no felony history and was eligible for the First Time Offender Sentencing Option, the court gave her the high end of her standard range—one year in the local jail. He further refused to allow her to serve her time in Pierce County, despite the fact that her newborn infant and other family members lived there. RP (3/24/08) 151-157. Ms. Humphrey appealed. CP 13-14.

H. The trial court vacated Ms. Humphrey's conviction on Count I (after the prosecutor verified that she was in custody in Puyallup on April 6, 2007), but refused to grant a new trial on Counts II and III.

Two months after Ms. Humphrey was sentenced, the prosecutor (at defense counsel's request) verified that Ms. Humphrey was not the person who had been seen in the Aberdeen Wal-Mart on April 6, 2007. Supp. CP, Motion and Affidavit/Declaration. In fact, on that date, Ms. Humphrey was in jail in Puyallup, after an arrest for Driving While License Suspended. Supp. CP, Motion and Affidavit/Declaration. The prosecutor verified that Ms. Humphrey was the same person who was in jail on that date using fingerprint comparisons. Supp. CP, Motion and Affidavit/Declaration.

The trial judge pointed out that this information was not newly discovered evidence and was not cause to set aside the verdict, but relented when the prosecutor stated that he sincerely believed that Ms. Humphrey was innocent of the April 6 charge. RP (5/23/08) 4-6. The judge vacated the conviction in Count I, but denied Ms. Humphrey's motion for a new trial as to Counts II and III. He again sentenced Ms. Humphrey to the high end of her standard range (now 8 months in the county jail), and again refused to allow her to serve her time in Pierce County. RP (5/23/08) 7-10.

Ms. Humphrey filed a written motion asking the court to reconsider its ruling, and arguing that CrR 7.8(b)(5) required vacation of the Judgment and Sentence. Supp. CP, Motion and Affidavit for Reconsideration. Following a hearing, the court entered a written order denying the motion. RP (6/9/08) 2-6; Supp CP, Order (dated 06/08/2008).

Ms. Humphrey filed an amended notice of appeal. Notice of Appeal (filed 06/16/2008), Supp. CP.

### **ARGUMENT**

#### **I. THE TRIAL JUDGE ERRED BY EXCLUDING MS. HUMPHREY'S "OTHER SUSPECT" EVIDENCE.**

The Sixth Amendment and Article I, Section 22 of the Washington State Constitution provide that an accused has the right to compel the

attendance of witnesses and present a defense. U.S. Const. Amend. VI; Wash. Const. Article I, Section 22; *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); *see also* RCW 10.52.040; CrR 6.12. Under the Sixth Amendment and Article I, Section 22, an accused person has the right to present her or his version of the facts to the jury so that it may decide “where the truth lies.” *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (*quoting Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The United States Supreme Court has described the importance of this right:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, at 19, *cited with approval in State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (*Smith I*).

An accused person thus has a constitutional right to present a defense consisting of relevant, admissible evidence. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022,

*cert. denied*, 508 U.S. 953 (1993); *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (“Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case.”).

To be relevant, evidence must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is generally admissible. ER 402. Only minimal relevance is necessary to warrant admission. *State v. Bebb*, 44 Wn.App. 803, 814, 723 P.2d 512 (1986). The right to present admissible evidence “may be counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the factfinding process.” *State v. Hudlow*, at 15.

Evidence connecting another person with the charged crime is admissible if there is “a train of facts or circumstances [that] clearly point out someone besides the accused as the guilty party.” *State v. Clark*, 78 Wn. App. 471, 477, 898 P.2d 854 (1995) (internal quotation marks and citations omitted). This must include “evidence tending to connect such other person with the actual commission of the crime charged.” *Clark*, at 478.

Through Asset Protection Officer Kinder, the evidence showed that Ms. Humphrey's cousin Keisha, who resembled her, was with Brager on July 12 and July 19. RP (3/11/08) 104-105. In addition, Ms. Humphrey wanted to establish that Keisha had previously been arrested for shoplifting at Wal-Mart, had been suspected of other shoplifting incidents at Wal-Mart (as evidenced by the security alerts relating to Keisha), and had stolen from Wal-Mart with Brager on other occasions. RP (3/11/08) 104-105; RP(3/12/08) 19-25.

This evidence was sufficient to establish Keisha as a viable suspect in the commission of the charged offenses. The trial judge violated Ms. Humphrey's constitutional right to present a defense by excluding the evidence. U.S. Const. Amend. VI; Wash. Const. Article I, Section 22; *Clark, supra*. This is especially true given that Ms. Humphrey was subsequently able to demonstrate that she was in custody on April 6, and could not have shoplifted at the Aberdeen Wal-Mart. Supp. CP, Motion and Declaration/Affidavit. Accordingly, her convictions must be reversed and the case remanded for a new trial, with instructions to allow her to present the evidence upon retrial.

**II. THE TRIAL JUDGE ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.**

- A. The trial court admitted irrelevant and prejudicial evidence of prior misconduct in violation of ER 402 and ER 404(b).

ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Irrelevant evidence is inadmissible under ER 402.

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). ER 404(b)’s *raison d’etre* is to exclude propensity evidence. Where the state seeks to introduce evidence of prior bad acts, it bears a “substantial burden” of showing admission is appropriate for a purpose other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *DeVincentis*, at 18-19.

Even where the state meets its substantial burden of establishing a purpose other than propensity, the trial court must weigh the probative

value of the evidence against its prejudicial effect. *DeVincentis*, at 18-19. Evidence of prior misconduct must have “substantial probative value” in order to outweigh its highly prejudicial effect.<sup>4</sup> *DeVincentis*, at 23.

The trial court must perform this balancing on the record. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (*Smith II*). Failure to do so “precludes the trial court’s ‘thoughtful consideration of the issue,’ and frustrates effective appellate review.” *Smith II*, 776 (*quoting State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)).

Here, the trial court admitted three allegations of uncharged misconduct: Ms. Humphrey’s allegedly suspicious presence at the Lacey Wal-Mart in 2004 or 2005, her arrest at the Everett Wal-Mart in 2006, and testimony suggesting that she’d been at the Lacey Wal-Mart on July 12, 2007. RP (3/11/08) 109-110, 42, 61-62, 79-91.

In addition, the court admitted irrelevant details relating to these alleged incidents. This “detail evidence” included (1) Asset Protection Coordinator Cohen’s testimony that he recognized Ms. Humphrey from Wal-Mart security alerts, (2) Cohen’s testimony that Ms. Humphrey had

---

<sup>4</sup>This test differs from the test outlined in ER 403, which requires exclusion of evidence only “if its probative value is *substantially outweighed* by the danger of unfair prejudice...” ER 403 (emphasis added).

been arrested, handcuffed, and held in a police car in 2006,<sup>5</sup> (3) Asset Protection Coordinator Kinder's claim that he saw Brager and three others (possibly including Ms. Humphrey) at the Lacey Wal-Mart on July 12, 2007, and (4) Asset Protection Coordinator LaCombe's claim that he first saw Ms. Humphrey in the Lacey Wal-Mart in 2004 or 2005, and recognized her at that time from Wal-Mart security alerts. RP (3/11/08) 40-42, 43, 58-62, 77-78, 89-91, 109; RP (3/12/08) 16-17.

The trial judge did not weigh the evidence on the record in the manner required by *Smith II* and *Jackson*. First, although the court identified a purpose (proving knowledge and identity) for some of the evidence, the court did not cover all the evidence described above. For example, the fact that Ms. Humphrey was arrested, handcuffed, and detained in a police car was not relevant to prove her knowledge or identity; the court initially recognized this (in part), but later admitted the evidence. RP (3/11/08) 35-38, 58-63.

Second, the court improperly presumed the evidence of alleged prior misconduct admissible, in violation of *DeVincentis, supra*. RP (3/11/08) 36.

---

<sup>5</sup> The judge initially excluded evidence that charges against Ms. Humphrey had been dismissed; however, the information was admitted during her testimony. RP (3/11/08) 50, 63; RP(3/12/08) 104.

Third, the court did not find that the evidence had substantial probative value, as required to outweigh its highly prejudicial effect. *DeVincentis*, at 23. Instead, the judge commented that relevant evidence is always prejudicial, found the prejudicial effect “slight,” and described the probative value as “significant.” RP (3/11/08) 38. Even assuming “significant” is equivalent to “substantial”, the trial court abused its discretion in making this finding. As defense counsel suggested, the state could have presented testimony that witnesses saw or met with Ms. Humphrey and advised her not to return to Wal-Mart. RP (3/11/08) 34-35. There was no reason to refer to any of the Wal-Mart security alerts, Ms. Humphrey’s 2006 arrest, the fact that she’d been handcuffed and detained in a police car, or her (possible) presence at the Lacey Wal-Mart on July 12, 2007. Furthermore, any evidence suggesting that Ms. Humphrey had previously shoplifted at Wal-Mart was highly prejudicial; the court’s finding that prejudice was “slight” is unsupported. *See DeVincentis*, at 23.

The court’s failure to properly review and weigh the evidence of prior misconduct on the record requires reversal. *Smith II*. The evidence was directed at Ms. Humphrey’s alleged propensity to shoplift, and should have been excluded under ER 404(b). There is a great risk that the jury improperly relied on the evidence as propensity evidence.

In addition, the “detail evidence” outlined above was not relevant, because it did not make any fact of consequence in this case more or less probable. ER 401. Accordingly, the testimony regarding the details should have been excluded under ER 402. The testimony did not help establish identity; nor did it show Ms. Humphrey’s knowledge, especially in light of her willingness to stipulate that she knew she was not supposed to go into Wal-Mart, and her subsequent testimony to that effect. RP (3/11/08) 34; RP (3/12/08) 91.

Finally, even if the “detail evidence” had some marginal value in demonstrating identity or knowledge, it did not have the “substantial probative value” required to outweigh its prejudicial effect.<sup>6</sup> *DeVincentis*, at 23.

The trial judge failed to properly weigh the evidence in accordance with ER 404(b) and *Smith II, supra*. The testimony alleging prior misconduct and detailing the circumstances thereof should not have been admitted at trial. Ms. Humphrey’s convictions must be reversed and her case remanded to the superior court for a new trial, with instructions to exclude the evidence on remand.

---

<sup>6</sup> The evidence should also have been excluded under the ER 403 balancing test set forth in the next section.

B. The trial court erred by admitting evidence in violation of ER 403.

Under ER 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” A trial court’s decision under ER 403 is reviewed for an abuse of discretion. *Subia v. Riveland*, 104 Wn. App. 105, 113-114, 15 P.3d 658 (2001). The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence. *State v. Johnson*, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

The trial judge erroneously allowed Asset Protection Coordinator LaCombe to testify that Ms. Humphrey was one of the people shown in the Wal-Mart security videos and still photographs from April 6 and July 12, 2007.<sup>7</sup> RP (3/11/08) 113-115, 126-130, 136-139; RP (3/12/08) 12, 16, 40-42. This was an abuse of discretion.

First (as defense counsel noted in his objection), the images spoke for themselves. The jury should have had the opportunity to compare the

---

<sup>7</sup> His testimony regarding the April 6, 2007 charge turned out to be demonstrably false, as Ms. Humphrey was in jail for driving with a suspended license on that day. Supp. CP, Motion and Affidavit/Declaration.

images with Ms. Humphrey's appearance and decide whether or not she was the person depicted.

Second, LaCombe's testimony had negligible probative value—he had no special expertise in identifying people in photographs (and, in fact, his testimony as to the April 6 incident was later shown to be demonstrably false). Supp. CP, Motion and Affidavit/Declaration.

Third, LaCombe's testimony was highly prejudicial. By allowing him to testify without qualification that Ms. Humphrey was the person depicted, the court created a risk that jurors would not carefully examine the images or compare them with Ms. Humphrey's appearance. And, in fact, the jurors did not subject the images to sufficient scrutiny, as they concluded that Ms. Humphrey was depicted in the April 6, 2007 images, despite the fact that she was later shown to be in jail on that date. Supp. CP, Motion and Affidavit/Declaration.

The trial judge also erroneously admitted images that were labeled with captions identifying Ms. Humphrey as the person depicted, despite the fact that identity was the main issue in Ms. Humphrey's trial. RP (3/11/08) 33-36, 50-52, 71, 82, 95; RP (3/12/08) 16-17, 20-29, 48-100, 123-136. This, too, was an abuse of discretion. As with LaCombe's testimony, the images should have been allowed to speak for themselves. The captions had even less probative value than LaCombe's testimony,

since the state did not even establish how or by whom the captions were added. The captions were highly prejudicial, as they suggested to the jury that the shoplifter's identity—the central question at trial—had somehow been confirmed.

Accordingly, the trial judge abused his discretion by admitting the testimony and the captions identifying Ms. Humphrey as one of the people depicted in the images. The negligible probative value was substantially outweighed by the prejudicial effect of the evidence, and it should have been excluded under ER 403. Ms. Humphrey's convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence on remand.

C. The trial judge's erroneous evidentiary rulings prejudiced Ms. Humphrey.

1. The trial court's cautionary instruction was inadequate to cure the prejudice caused by admission of irrelevant and prejudicial evidence.

While jurors are presumed to "follow court instructions to disregard testimony...no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" *State v. Babcock*, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (some internal

citations and quotation marks omitted) (*quoting State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

Here, the court instructed the jury not to consider prior misconduct as proof of character; instead, the judge told the jurors they were to use the evidence to determine “whether the defendants knew that they were not licensed or privileged to enter Wal-Mart premises at later times, or to establish a basis for identification of the defendants on the dates of the crimes alleged.” RP (3/11/08) 42-43. This admonition did not explain how the jury could consider the “detail” evidence—that Ms. Humphrey was pictured in Wal-Mart security alerts, that she had been arrested, handcuffed, and detained in a police car, and that she had been observed with suspicion in other Wal-Mart stores—to prove identity or knowledge without crossing the line and considering the testimony as propensity evidence. RP (3/11/08) 42-43.

Under these circumstances, no instruction would prevent a jury from considering the evidence of prior misconduct as proof that Ms. Humphrey went into Wal-Mart with intent to shoplift. Even if the court had instructed jurors to disregard the evidence altogether, the “jury undoubtedly would use it for its most improper purpose, that is, to conclude that [Ms. Humphrey] acted on this occasion in conformity with” her alleged propensity to shoplift. *Escalona*, at 256.

2. The trial court's errors were not harmless.

The erroneous admission of prejudicial material requires reversal if “within reasonable probability, the evidence materially affected the outcome of the trial.” *State v. Cook*, 131 Wn. App. 845, 854, 129 P.3d 834 (2006). A reviewing court must be able to say with confidence that the jury would have reached the same result even without the wrongly admitted evidence. *Cook*, at 854.

In this case, the trial court's admission of testimony in violation of ER 401, 402, 403, and 404(b) was not harmless. The state's evidence connecting Ms. Humphrey to the July 12 crime was slim, consisting primarily of Asset Protection Coordinator LaCombe's questionable identification testimony and his “interpretation” of the video images. The erroneously admitted evidence—(1) that Ms. Humphrey had previously been arrested, handcuffed, and detained in a police car, (2) that she was the subject of Wal-Mart security alerts, and (3) that she had somehow been identified as the person depicted in the security video and still images—materially affected the jury's verdict. Without this evidence, the jury likely would have acquitted her based on her alibi testimony. Because of this, the convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence upon retrial. *Cook, supra*.

### III. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused's right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.<sup>8</sup> *See, e.g., State v. Easter*, 130 Wn.2d 228 at 242, 922 P.2d 1285 (1996).

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794, 804-805, 998 P.2d 907 (2000).

---

<sup>8</sup> Misconduct may be reviewed absent an objection from defense counsel if it creates a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907, 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

- A. The prosecuting attorney unconstitutionally shifted the burden of proof.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149, 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663, 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

Due process limits use of the ‘missing witness’ doctrine in criminal cases. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). The doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the accused, (3) the witness's absence is not satisfactorily explained. *Montgomery*, at 598-599.

In addition, the argument may not be used under circumstances where it shifts the burden of proof. *Montgomery*, at 599. Finally, “[t]he missing witness doctrine must be raised early enough in the proceedings to provide an opportunity for rebuttal or explanation.” *Montgomery*, at 599.

Here, the prosecutor argued that Ms. Humphrey should have presented the testimony of her aunt, the hostess of the “candle party,” to confirm that Ms. Humphrey was at her house on July 12, 2007. RP (3/12/08) 122. This comment constituted misconduct and unconstitutionally shifted the burden of proof.

The state failed to establish the requirements of the missing witness doctrine. First, any testimony offered by the aunt would have been cumulative, because Ms. Humphrey and three other witnesses (including her cousin who lived at the residence) testified about the candle party. RP (3/12/08) 48-105. Second, the state did not show that the missing witness—Ms. Humphrey’s aunt—was particularly under Ms. Humphrey’s control. Third, the state did not raise the missing witness argument until after both parties had rested; this denied Ms. Humphrey an opportunity to explain or rebut the argument.

The state bore the burden of establishing identity by proof beyond a reasonable doubt. *Winship, supra*. Ms. Humphrey sought to raise a reasonable doubt as to whether or not she was the person at Wal-Mart on both April 6 and July 12, 2007.<sup>9</sup> By arguing that Ms. Humphrey should have called her aunt to testify, the prosecutor shifted the burden of proof.

---

<sup>9</sup> She was later able to demonstrate that she was in jail on April 6, 2007 at the time of the offense.

The prosecutor's misconduct went to the heart of and undermined Ms. Humphrey's defense. Because of this, the error cannot be shown to be harmless beyond a reasonable doubt. The prosecution's case was weak, consisting primarily of Asset Protection Coordinator LaCombe's questionable identification testimony and his "interpretation" of the video images. A reasonable jury could have acquitted Ms. Humphrey based on her alibi testimony. By improperly shifting attention away from the weakness of its own case and onto Ms. Humphrey's failure to present additional testimony, the state unfairly increased the likelihood of conviction. The conviction must be reversed and the case remanded for a new trial. *Montgomery, supra*.

B. The prosecutor committed misconduct by arguing that the prosecution "wears the white hat" and "seek[s] justice."

It is misconduct for a prosecutor to draw a "cloak of righteousness" around himself or herself in closing. *See, e.g., State v. Gonzales*, 111 Wn.App. 276, 283, 45 P.3d 205 (2002); *United States v. Vaccaro*, 115 F.3d 1211 (5th Cir.,1997). Here, the prosecutor committed misconduct that was flagrant and ill-intentioned when he made the following comments:

You know, I like to think that the prosecution wears the white hat and that the prosecution is here, and I believe it sincerely, to seek justice, to get the right answer to this question, and to get the right answer for the right reason... Because you are here to seek the

truth, and I'm here to tell you that the truth is that these two defendants, you will find after looking at all of the evidence, committed crimes.

RP (3/12/08) 143.

By claiming to be above the adversarial role of a litigant, the prosecutor violated Ms. Humphrey's right to a fair trial. Accordingly, the convictions must be reversed, and the case remanded to the superior court for a new trial. *Gonzales, supra*.

**IV. THE TRIAL JUDGE SHOULD HAVE GRANTED A NEW TRIAL ON COUNTS II AND III AFTER MS. HUMPHREY DEMONSTRATED THAT SHE WAS IN JAIL FOR DRIVING WITH A SUSPENDED LICENSE ON APRIL 6, 2007.**

Under CrR 7.8 (captioned "Relief from judgment or order"), a trial court "may relieve a party from a final judgment" for any reason "justifying relief from the operation of the judgment." CrR 7.8(b)(5). A trial court's decision under CrR 7.8(b) will be reversed for an abuse of discretion. *State v. Ashby*, 141 Wn. App. 549, 555, 170 P.3d 596 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds or reasons, or founded upon an erroneous interpretation of the law. *Ashby*, at 555 n. 10.

The trial judge abused his discretion by refusing to grant a new trial on Counts II and III. First, the April 6 evidence should not have been admitted against Ms. Humphrey at trial (since it was evidence of prior misconduct wholly irrelevant to her July 12 charge). Like erroneously

admitted 404(b) evidence, the April 6 evidence requires reversal if, within reasonable probabilities, admission of the evidence affected the outcome of the trial. *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008). The April 6 misconduct evidence—including LaCombe’s demonstrably false testimony that he saw Ms. Humphrey on that date, and his “interpretation” of the security videos and still photographs from April 6—was a significant portion of the evidence introduced at trial. It is highly likely that the April 6 misconduct evidence influenced the jury as it considered whether or not Ms. Humphrey was involved in the July 12<sup>th</sup> incident.

Second, the fact that Ms. Humphrey was in custody on April 6 significantly undermines the credibility of Asset Protection Coordinator LaCombe. LaCombe testified that Ms. Humphrey was at the Aberdeen Wal-Mart on April 6. Since LaCombe was also the state’s primary witness for the July 12<sup>th</sup> charge, his credibility was essential to the prosecution’s case. It is highly likely that this valuable impeachment evidence would have affected the outcome of the trial. For these reasons, the trial judge erred by refusing to grant Ms. Humphrey’s CrR 7.8(b)(5)<sup>10</sup>

---

<sup>10</sup> The trial court initially denied defense counsel’s request for a new trial on the grounds that the evidence was not newly discovered evidence. RP (6/9/08) 4-6. This ruling was also erroneous, because defense counsel had no reason to believe that Ms. Humphrey

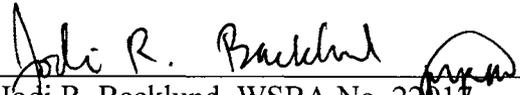
motion. The Judgment and Sentence must be vacated and the case remanded to the superior court for a new trial.

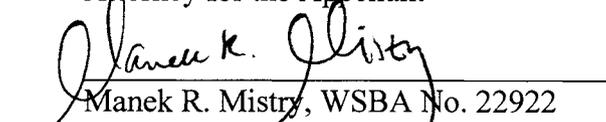
**CONCLUSION**

For the foregoing reasons, Ms. Humphrey's convictions must be reversed and the case remanded to the superior court for a new trial, with instructions to (1) allow the defense to present "other suspect" evidence, (2) exclude any irrelevant and prejudicial evidence relating to Ms. Humphrey's alleged prior contacts with Wal-Mart, and (3) require the prosecutor to refrain from misconduct.

Respectfully submitted on November 3, 2008.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

---

was in custody on April 6, 2007. *See, e.g., State v. Roche*, 114 Wn. App. 424, 59 P.3d 682 (2002).

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jamara Humphrey  
1214 S. A St.  
Tacoma, WA 98408

and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

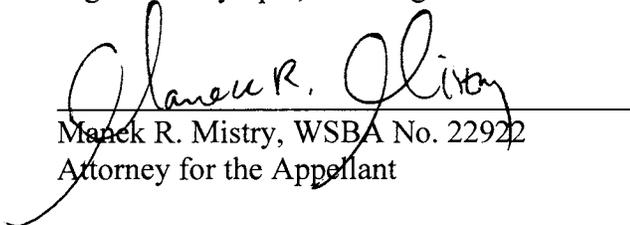
FILED  
COURT OF APPEALS  
DIVISION II  
09 NOV -4 PM 12:01  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 3, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 3, 2008.

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant