

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

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

ARGUMENT..... 6

I. Mr. Hayward’s conviction violated his Fourteenth Amendment right to due process because the court’s instruction defining recklessness created a mandatory presumption and relieved the state of its burden to prove that Mr. Hayward recklessly inflicted substantial bodily harm..... 6

II. Dr. Wallace’s opinion that Baar suffered a “substantial loss or impairment of the function of a bodily part” violated Mr. Hayward’s constitutional right to a jury trial under the Sixth and Fourteenth Amendments and under Wash. Const. Article I, Sections 21 and 22..... 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Carella v. California</i> , 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989).....	13
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	15
<i>Estelle v. McGuire</i> , 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991)	11
<i>Francis v. Franklin</i> , 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).....	13
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	6
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).....	7, 13
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	7, 13
<i>Yates v. Evatt</i> , 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)11, 12, 13, 14	

WASHINGTON CASES

<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000). 10, 14, 15	
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 768 P.2d 470 (1989)	7
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	15
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)	6
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	11, 16
<i>State v. Deal</i> , 128 Wn.2d 693, 911 P.2d 996 (1996)	7, 12

<i>State v. Gerdts</i> , 136 Wn. App. 720, 150 P.3d 627 (2007)	9
<i>State v. Goble</i> , 131 Wn.App. 194, 126 P.3d 821 (2005)	8, 9, 10
<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	6
<i>State v. Keend</i> , 140 Wn. App. 858, 166 P.3d 1268 (2007).....	10
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	15
<i>State v. Mertens</i> , 148 Wn.2d 820, 64 P.3d 633 (2003).....	7
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	6
<i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	7
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI	15
U.S. Const. Amend. XIV	6, 14, 15

WASHINGTON STATUTES

RCW 9A.08.010.....	7, 8, 10
RCW 9A.36.021.....	8

ASSIGNMENTS OF ERROR

1. The trial court provided an erroneous definition of recklessness.
2. The trial court erred by giving Instruction No. 10, which reads as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally.

Instruction No. 10, Supp. CP.

3. The trial court's instruction defining recklessness contained an improper mandatory presumption.
4. The court's instruction defining recklessness impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.
5. Dr. Wallace invaded the province of the jury by expressing an explicit opinion on Mr. Hayward's guilt.
6. Dr. Wallace's opinion testimony on an ultimate issue violated Mr. Hayward's constitutional right to a jury trial.
7. Dr. Wallace should not have been permitted to testify that Baar suffered substantial loss or impairment of the function of a bodily part.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Assault in the Second Degree requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. The trial court instructed the jury that recklessness "is established if a person acts intentionally," without limiting the intentional acts that could be used as proof of recklessness. Did the trial court's instruction misstate the law and relieve the state of its burden of proof?

2. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that “Recklessness...is established if a person acts intentionally.” Did the court’s instruction defining recklessness create an unconstitutional mandatory presumption?

3. A “nearly explicit” or “almost explicit” opinion on an ultimate issue violates an accused person’s constitutional right to a jury trial. Dr. Wallace expressed his opinion that Mr. Hayward caused substantial loss or impairment of the function of a bodily part, which is one definition of substantial bodily harm. Did Dr. Wallace’s opinion invade the province of the jury and violate Mr. Hayward’s constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joshua Hayward and his girlfriend went to a party at their friend Brandon Vaughan's house. RP (4/7/08) 33; RP (4/8/08) 121, 148. At the party, a very intoxicated Tyson Baar argued with Hayward's friend Shawn Mellott about money Baar believed he was owed. RP (4/7/08) 35, 58-59, 73, 106-107, 121. Baar then argued with Mellott's wife about the issue. RP (4/7/08) 108-109; RP (4/8/08) 73. Baar described himself as "intoxicated," while others characterized him as "hammered," "angry," "really drunk," "talking tough," and "belligerent." RP (4/7/08) 35-37, 47, 58, 70; RP (4/8/08) 82, 100, 151.

Vaughan, the party's host, did not allow Baar into the house, and asked Hayward to tell Baar to leave. RP (4/8/08) 151-154. Hayward went outside and the two exchanged words. A group gathered around them. RP (4/7/08) 121, 126; RP (4/8/08) 51, 100. Hayward was pushed into Baar by the crowd, and Baar pushed him back. RP (4/7/08) 110-113, 126-127, 129; RP (4/8/08) 84-85. Baar swung at Hayward, but only achieved a glancing blow. RP (4/8/08) 85-86, 107. Hayward hit Baar in the side of the head. RP (4/7/08) 37-39, 42, 61-62; RP (4/8/08) 86, 110.

Both stayed at the party for some time after the altercation. RP (4/7/08) 43, 62, 79; RP (4/8/08) 88-89, 157. The friend who brought Baar

home that night did not think he needed medical attention. RP (4-7-08) 42-44.

The next day, Baar went to the hospital with pain in his jaw. RP (4/7/08) 64, 91. Dr. Wallace diagnosed a broken jaw. RP (4/8/08) 33. The state charged Mr. Hayward with Assault in the Second Degree, and the case was tried to a jury. CP 17, 5.

At trial, the state offered the testimony of Dr. Wallace. Over defense objection, he opined that Baar's injury was a "temporary but substantial loss or impairment of the function of a bodily part[.]" RP 4/8/08) 39-41.

Hayward argued that the contact he made with Baar's head could not have caused as much damage as claimed. RP (4/8/08) 89-92, 108-110, 210-221. Mellott had testified that the punch did not seem hard enough to do all the damage described, and that after being hit Baar kept talking like nothing had happened. RP (4/7/08) 113-115, 125, 133. Hayward said that he was moving back when he swung with his non-dominant hand. RP (4/8/08) 85-87. He indicated that Baar did not fall or stagger back, and that his speech was unchanged after the altercation. RP (4/8/08) 89-90.

Hayward also maintained that he had only struck out in self-defense. RP (4/8/08) 113, 120, 210-221. He testified that upon arriving at the party, before he had even parked, Baar slapped him hard across the

face for no reason. RP (4/8/08) 74-75, 94. Kashia Thurman confirmed this assault. RP (4/8/08) 161, 163. Hayward was also told that Baar had pushed Mellott's wife. RP (4/8/08) 78-80, 98. He said that in this context, with Baar so intoxicated, he didn't know what Baar would do. RP (4/8/08) 128.

The court instructed the jury on the definition of recklessness:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally.

Instruction No. 10, Supp. CP.

The court also instructed the jury that substantial bodily injury was defined as a bodily injury that involves a "temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." Instruction No. 8, Supp. CP.

The jury found Mr. Hayward guilty as charged. RP (4/9/08) 3-5.

This timely appeal followed. CP 3.

ARGUMENT

I. MR. HAYWARD’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTION DEFINING RECKLESSNESS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. HAYWARD RECKLESSLY INFLICTED SUBSTANTIAL BODILY HARM.

Under the Fourteenth Amendment’s Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the

presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.” RCW

9A.08.010(2). Assault Two requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. RCW 9A.36.021. Applying the substitution provisions of RCW 9A.08.010, a person can be convicted of Assault Two if she or he “[i]ntentionally assaults another and thereby [intentionally, knowingly, or recklessly] inflicts substantial bodily harm.” RCW 9A.36.021, *modified*.

Here, the trial court’s instruction defining recklessness included the following language: “Recklessness also is established if a person acts intentionally.”¹ Instruction No. 10, Supp. CP. The instruction did not place any limitation on the intentional acts that could establish the recklessness required by RCW 9A.36.021. Thus the jury could have interpreted Instruction No. 10 to mean that any intentional act (including the assault itself) conclusively established Mr. Hayward’s recklessness.

Similar language in an instruction defining “knowledge” has previously been found to require reversal. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.² The

¹ This language was (presumably) intended to convey to jurors that they could convict Mr. Hayward not only if he recklessly inflicted substantial bodily harm, but also if he intentionally inflicted substantial bodily harm, in accordance with RCW 9A.08.010(2).

² Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the “to

trial court's "knowledge" instruction informed the jury that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.

Goble, at 203.

The rule set forth in *Goble* has been limited to crimes (such as the Assault Two charged in this case) that include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007).³ Furthermore, the problem created by the ambiguous language can be corrected by instructions that are "clear,

convict" instruction and thus became an element under the law of the case in *Goble*. *Goble*, at 201.

³ Interestingly, under *Gerdts*, Mr. Goble's conviction would not have been reversed, since he was charged with assaulting another whom he knew to be a police officer; he was not charged with "intentionally" assaulting another whom he knew to be a police officer. *See Goble*, at 200-201.

accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).⁴

The flawed language first criticized in *Goble* requires reversal in this case. If interpreted correctly, Instruction No. 10 allowed the jury to convict for intentional, knowing, or reckless infliction of substantial bodily harm, as permitted under the substitution provisions of RCW 9A.08.010(2). However, a reasonable juror might interpret the language as creating a mandatory presumption, permitting conviction upon proof of any intentional act, even in the absence of recklessness. Since juries lack the tools of statutory construction, the trial court’s failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing

⁴ The instructions in *Keend*, which were upheld by this Court, did not differ significantly from those in *Goble*, which led this Court to reverse. Compare *Goble*, at 200-202 with *Keend*, at 863-864, 867. Thus *Keend* appears to have overruled *Goble sub silentio*.

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).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was “unimportant in relation to everything else the jury considered on the issue in question...” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

Yates, at 403-405 (footnotes and citations omitted). A court must examine the proof actually considered, and ask:

[W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is

comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.

Yates, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.⁵

Here, the conclusive presumption required the jury to find Mr. Hayward *recklessly* inflicted substantial bodily harm upon proof that he acted *intentionally* or *knowingly*. Instruction No. 10, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Hayward acted recklessly). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume recklessness from proof of *any* intentional act, including the intentional act of assault itself.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court

⁵ In *Deal, supra*, the Court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Hayward was reckless when he inflicted substantial bodily harm. Jurors could have focused on evidence of *any* intentional act (including the assault itself), and disregarded all other evidence bearing on Mr. Hayward’s mental state

vis-a-vis the infliction of substantial bodily injury. Because it is impossible to make the determination required by *Yates, supra*, it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Hayward of the charged crime by deciding that he was criminally negligent rather than reckless. Thus the error was not trivial, formal, or merely academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Hayward's conviction for Assault in the Second Degree must be reversed and the case remanded for a new trial.

II. DR. WALLACE'S OPINION THAT BAAR SUFFERED A "SUBSTANTIAL LOSS OR IMPAIRMENT OF THE FUNCTION OF A BODILY PART" VIOLATED MR. HAYWARD'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND UNDER WASH. CONST. ARTICLE I, SECTIONS 21 AND 22.

A criminal defendant has a constitutional right to a jury trial. Under Article I, Section 21 of the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Article I, Section 22 provides that "the accused shall have the right . . . to have a speedy public trial by an impartial jury." Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a

federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Impermissible opinion testimony on the accused person's guilt violates the constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue is forbidden if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman*, at 937.

In this case, Dr. Wallace testified that Baar suffered "temporary but substantial loss or impairment of the function of a bodily part." RP (4/8/08) 40-41. This testimony was more than "nearly explicit" or "almost explicit;" the doctor testified that a legal element had been satisfied, using the language set forth in the court's jury instruction. *See* Instruction No. 8, Supp. CP. The testimony invaded the province of the jury and violated Mr. Hayward's constitutional right to a jury trial.

The error is presumed prejudicial; accordingly, reversal is required unless the state can establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice Mr. Hayward, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A reasonable jury could decide that the injuries did not amount to

substantial bodily harm; thus, the evidence was not so overwhelming that it necessarily leads to a finding of guilt. *Burke, supra*. Accordingly, the conviction must be reversed and the case remanded to the superior court with instructions to exclude Dr. Wallace's opinion that Baar suffered substantial loss or impairment of a bodily part.

CONCLUSION

For the foregoing reasons, Mr. Hayward's conviction must be reversed. The case must be remanded to the superior court for a new trial, with instructions to exclude Dr. Wallace's improper testimony and to correctly define "recklessness" for the jury.

Respectfully submitted on January 12, 2009.

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CERTIFICATE OF MAILING

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

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

All postage prepaid, on January 12, 2009.

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 January 12, 2009.

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