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## **I. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Dillard did not reasonably believe that Mr. Albery was about to be injured or that the force used by Mr. Dillard was not reasonably prudent.
2. The trial court erred in denying Mr. Dillard's motion to prohibit all parties from referring to Mr. Horn as "the victim."
3. The trial court erred in granting the State's motion to exclude Mr. Horn's assault convictions under ER 609.
4. The trial court erred in denying Mr. Dillard's motion to admit evidence of Mr. Horn's convictions under ER 404.
5. The trial court erred in denying Mr. Dillard's motion to admit evidence of Mr. Horn's proclivity for getting into fights and using nunchakus.
6. Cumulative error deprived Mr. Dillard of a fair trial.

## **II. ISSUES PRESENTED**

1. Did the State present sufficient evidence to prove beyond a reasonable doubt that Mr. Dillard did not have a reasonable belief that Mr. Horn was about to assault Mr. Albery with a deadly weapon? (Assignment of Error No. 1)
2. Did the trial court's erroneous and improper evidentiary rulings violate Mr. Dillard's right to a fair trial? (Assignment of Error Nos. 2, 3, 4, 5, and 6)

## **III. STATEMENT OF THE CASE**

### ***A. Procedural Background***

On August 13, 2007, the State charged Mr. Kent Dillard with one count of first degree assault with a firearm or other deadly weapon in violation of RCW 9A.36.011(1)(a) and with the aggravating factor of being armed with a firearm during the commission of the crime. CP 1.

On January 16, 2008, Mr. Dillard filed a motion to disallow reference to William Horn as “the victim,” a motion to suppress 911 calls made in association with this case, and a motion to suppress Mr. Dillard’s statements. CP 4-6.

Also on January 16, 2008, Mr. Dillard filed a *Knapstad* Motion to Dismiss the case on the grounds that there was no evidence that the force used by Mr. Dillard against Mr. Horn was unlawful since Mr. Dillard was defending Mr. Albery from Mr. Horn’s use of deadly force against Mr. Albery. CP 7-11.

On March 5, 2008, the State made the following motions: (1) to exclude the criminal histories of the witnesses Mr. Justin Greenwood, Ms. Tammy Hollingsworth, Mr. Michael Strong, Mr. Porter Thompson, and Mr. Chris Wodjenski, all pursuant to ER 609; (2) to exclude the criminal history of the alleged victim, Mr. William Horn pursuant to ER 609; and (3) to exclude the testimony of Ms. Sarah Dillard, Mr. Dillard’s wife, pursuant to ERs 401, 402, 801, and 802. CP 12-18.

Also on March 5, 2008, Mr. Dillard filed motions to: (1) admit the

criminal history of Mr. Horn; (2) allow questioning regarding Mr. Horn's "reputation for Quarrelsome or Violent Disposition"; and (3) allow admission of evidence of Mr. Greenwood's criminal history. CP 40-42.

On March 18, 2008, the State amended the charge against Mr. Dillard to include the alternative means of committing the crime of assault in the first degree by intentionally assaulting Mr. Horn and inflicting great bodily harm in violation of RCW 9A.36.011(1)(c). CP 43-44.

Also on March 18, 2008, the parties stipulated that Mr. Dillard's statements were admissible under CrR 3.5. CP 45-55.

On March 18, 2008, the trial court also entered an Order on the various pretrial motions. CP 56-59. The trial court ruled that police officer witnesses could refer to Mr. Horn as "the victim" as the police officers normally use that term in their investigation, but that the State could not refer to Mr. Horn as the victim during the trial. CP 56-59. however, the State could refer to Mr. Horn as "the victim" during opening and closing argument. CP 56-59. The trial court granted the State's motion to exclude reference to Mr. Greenwood's convictions, granted the State's motion to excluded reference to Ms. Hollingsworth's criminal history, granted the State's motion to exclude reference to Mr. Wodjenski's criminal history, granted the State's motion to exclude all of Mr. Horn's criminal history except for Mr. Horn's convictions for first degree theft and first degree burglary which would be

admissible for impeachment purposes, granted the State's motion to exclude evidence of the fact that Mr. Horn's blood alcohol level at the time of the shooting was .24, denied Mr. Dillard's motion to admit evidence of Mr. Horn's prior assault convictions under ER 404(a), granted the State's motion to exclude the testimony of Ms. Dillard regarding Mr. Dillard's habit of carrying a gun, and granted the State's motion to exclude the testimony of Ms. Dillard that Mr. Dillard told her that he had "shot a guy" because the guy was "going to kill Darrell." CP 56-59.

Also on March 18, the parties stipulated to what the testimony of Dr. Michael Mulcahy would be. CP 60-63.

On March 26, 2008, the parties stipulated that defense exhibit 48, a video compilation prepared by defense counsel from the surveillance video of the scene of the shooting, was admissible. CP 105-107.

On March 31, 2008, the jury returned a verdict of guilty on the charge of first degree assault. CP 158. The jury also found that Mr. Dillard was armed with a firearm at the time of the shooting. CP 159.

On May 16, 2008, the trial court sentenced Mr. Dillard to 96 months imprisonment on the charge of first degree assault and imposed the mandatory 60 month firearm enhancement for a total sentence of 153 months. CP 184-194.

On June 3, 2008, Mr. Dillard filed his Notice of Appeal. CP 197.

**B. Factual Background**

On August 10, 2007, Mr. Kent Dillard and Mr. Darrell Albery went fishing together. RP 29, 3-25-08.<sup>1</sup> On the evening of August 10, 2007, Mr. Dillard and Mr. Albery went to Ma & Pa's Roundup Tavern. RP 137-141, 3-19-08. Mr. Dillard arrived at the tavern sometime between 8 and 9 p.m. RP 140, 3-19-08.

At some point in the evening, Mr. Albery went to the men's restroom. RP 141, 3-19-08. The bathrooms in the Roundup Tavern are arranged in such a way that, to reach the area where the toilet is located, a patron must first pass through a door into a wash area and pass through a second door in the wash area. RP 141, 3-19-08. Mr. Albery passed through the first door in the men's bathroom but a man was blocking the second door to the area with the toilet. RP 141, 3-19-08. Mr. Albery and the man exchanged words, and the man shoved Mr. Albery. RP 141, 3-19-08. In response, Mr. Albery pushed the man, and the man fell into the second door to the toilet area, knocking it open. RP 141-142, 3-19-08.

The open second door revealed two Tavern employees, a male and a female who were both intoxicated, inside the toilet area of the men's restroom. RP 142, 3-19-08. Mr. Albery became upset and said he wanted to

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<sup>1</sup> The volumes of the report of proceedings are not numbered continuously. Reference will be made by giving the RP page number followed by the date of the hearing.

use the restroom. RP 142, 3-19-08. The first man who had been blocking the door told Mr. Albery that Mr. Albery was not going to be able to use the restroom because there was someone in the restroom. RP 142, 3-19-08. The two Tavern employees came out of the restroom and began trying to push Mr. Albery around and slap him. RP 142, 3-19-08.

Mr. Justin Greenwood, the bartender at the tavern, approached the group and tried to separate everyone. RP 137, 142, 3-19-08. The two employees who had been in the restroom were named Mikie and Laci. RP 142, 3-19-08. Both were bartenders at the Tavern. RP 142-143, 3-19-08. The man guarding the door was someone Mr. Greenwood did not know, but he was at the bar as a guest of Laci and Mikie. RP 143-144, 3-19-08. Laci and Mikie were having sex in the bathroom. RP 144, 3-19-08.

Mr. Greenwood told Laci that she had no right to be in the bathroom and the female employee became belligerent and began cussing at Mr. Albery and tried to slap him in the face. RP 142, 3-19-08. Tammy tried to restrain Laci and Mr. Greenwood stepped between Mr. Albery and Laci. RP 144, 3-19-08.

None of the altercation was Mr. Albery's fault and Mr. Dillard was not involved with the altercation at all. RP 145, 3-19-08. Following the altercation, Mr. Dillard and Mr. Albery became stand-offish and suspicious

towards the rest of the patrons. RP 48-49, 3-25-08, afternoon session.<sup>2</sup>

After the altercation at the bathroom, Mr. Dillard and Mr. Albery ordered another round of beer and stayed in the Tavern for another hour. RP 412, 3-26-08. Laci continued to say rude things about Mr. Albery and try and slap him. RP 144-145, 3-19-08. Laci loudly accused Mr. Albery of grabbing her by the neck when he tried to push her away, and Mikie tried to attack Mr. Albery. RP 144-145, 3-19-08. Mr. Greenwood had to tackle Mikie to the ground. RP 145, 3-19-08.

Mr. Greenwood told Mikie and Laci that they needed to leave the Tavern, but Laci was upset about being asked to leave and had to be escorted out of the Tavern. RP 145, 3-19-08.

Around 11:00 or 11:30 p.m., Mr. Greenwood asked Mr. Albery to leave the Tavern because things were "going sour." RP 145-146, 3-19-08. The patrons in the bar were becoming agitated by Laci, so Mr. Greenwood decided to ask people to leave to avoid any problems. RP 146, 3-19-08. Mr. Greenwood tried to get everyone to leave, and about half of the patrons in the Tavern did leave. RP 49, 3-25-08, afternoon session. Mr. Greenwood told Mr. Albery and that he would be welcome back in the Tavern, but that it was

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<sup>2</sup> The report of proceedings for March 25, 2008 is not numbered continuously with the rest of the transcript and is divided into morning and afternoon sessions, the page numbers for each starting at 1. Reference to this volume will be made by giving the RP page number, the date, and whether it is the morning or afternoon session.

time to go. RP 145, 3-19-08. At 12:55 a.m. on the morning of August 1, 2007, Mr. Albery paid the tab and he and Mr. Dillard left the bar. RP 147, 3-19-08. Neither man seemed to be intoxicated in Mr. Greenwood's opinion. RP 151, 3-19-08.

Mr. Albery and Mr. Dillard drove to the Clear Lake parking lot and talked. RP 44-45, 3-25-08, morning session; RP 413, 3-26-08. Mr. Albery told Mr. Dillard what had happened at the bathroom, and Mr. Albery decided to return to the Tavern because he was unsure if he had paid the tab and he wanted to make sure that everything was okay with Mr. Greenwood. RP 50, 3-25-08, morning session; RP 414, 3-26-08.

Mr. Dillard was nervous about going back to the Tavern because of the incident at the bathroom. RP 415, 3-26-08. Mr. Dillard was worried about Mr. Albery's safety. RP 415, 3-26-08. Before going back into the bar, Mr. Dillard gave Mr. Albery a fishing knife for defensive purposes. RP 59-61, 3-26-08, morning session; RP 418, 3-26-08. Mr. Dillard had a concealed weapons permit and took the .32 caliber handgun he habitually carried with him into the bar. RP 403-404, 419, 3-26-08. Mr. Dillard does not trust the police to protect him, so he carries the .32 for self-defense purposes. RP 405, 3-26-08.

Mr. Dillard and Mr. Albery returned to the bar around closing time. RP 148, 3-19-08. The men entered the Tavern through a door near the

karaoke area of the Tavern. RP 203, 3-19-08. Neither Mr. Albery nor Mr. Dillard appeared to be intoxicated to Mr. Greenwood. RP 151, 3-19-08.

Mr. Dillard entered the Tavern first to speak with Mr. Greenwood to verify that everything was all right between Mr. Greenwood and Mr. Albery. RP 417-418, 3-26-08. Mr. Dillard approached Mr. Greenwood at the bar and asked if everybody was all right and told Mr. Greenwood that Mr. Albery was upset because Mr. Albery's and Mr. Greenwood's children go to daycare together. RP 149, 3-19-08. Mr. Albery entered the bar shortly after Mr. Dillard. RP 420-421, 3-26-08. Mr. Greenwood told Mr. Dillard that everything was all right but asked the men to leave because Mr. Greenwood was closing the bar. RP 149, 3-19-08. Mr. Albery approached Mr. Greenwood to apologize and was carrying a can of beer of a brand not sold in the Tavern. RP 149, 3-19-08. Mr. Greenwood told Mr. Albery to throw the can of beer in the garbage and Mr. Albery did. RP 149-150, 3-19-08.

Laci was sitting in the middle of the Tavern with a bunch of people loudly proclaiming that Mr. Albery had attacked her. RP 130, 3-25-08, morning session; RP 422, 3-26-08.

When Mr. Dillard approached Mr. Greenwood, Mr. Greenwood felt that Mr. Dillard's and Mr. Albery's behavior seemed awkward. RP 152-153, 3-19-08. Mr. Dillard's demeanor was "different" and it made Mr. Greenwood "uncomfortable." RP 153. Mr. Greenwood felt that both men

were acting paranoid, on-guard, and afraid. RP 154, 161, 188, 3-19-08.

Mr. Greenwood told Mr. Albery that he and Mr. Dillard were welcome to come back to the Tavern and Mr. Dillard and Mr. Albery left the Tavern through a second entrance. RP 150, 3-19-08. As Mr. Albery and Mr. Dillard were leaving the Tavern, Mr. William Horn began told the men that they had been asked to leave and that it was closing time. RP 150, 3-19-08. Mr. Horn followed Mr. Albery and Mr. Dillard out the door of the Tavern when they left. RP 150, 3-19-08. The last Mr. Greenwood saw of the men was when they left the Tavern. RP 150, 3-19-08.

Michael Strong works at the Roundup Tavern as a karaoke operator. RP 182, 3-19-08. As the men were leaving the Tavern and Mr. Horn was telling them that they had to leave, Mr. Strong observed Mr. Albery begin to argue with Mr. Horn. RP 189-190, 3-19-08. Mr. Strong got between the men and told Mr. Horn to stop and stay out of it. RP 190-191, 3-19-08. Mr. Albery and Mr. Dillard then left the Tavern through the karaoke entrance. RP 191, 3-19-08. Prior to Mr. Dillard leaving the Tavern, Mr. Strong did not observe anything in Mr. Dillard's hands. RP 191, 3-19-08.

Once Mr. Horn got outside the Tavern, he became very aggressive towards Mr. Albery and began threatening him. RP 66-68, 3-25-08, morning session; RP 432, 3-26-08. Mr. Albery did not do anything aggressive with the knife, just displayed it and told Mr. Horn to back off. RP 72, 3-25-08,

morning session; RP 54-55, 3-25-08, afternoon session. Mr. Horn responded by telling Mr. Albery to “drop the knife or I am going to nunchakus your ass.” RP 217, 3-19-08. Mr. Albery then turned around and walked away. RP 74-75, 3-25-08, 3-25-08, morning session; RP 433, 3-26-08.

Mr. Porter Thompson was a patron of Ma and Pa’s Roundup Tavern on the night of the shooting. RP 7-8, 3-25-08, morning session. Mr. Porter was outside the Tavern smoking a cigarette when Mr. Albery, Mr. Dillard, and Mr. Horn exited the Tavern. RP 12, 3-25-08, morning session. Mr. Porter heard Mr. Horn exchanging angry words with someone. RP 13, 3-25-08, morning session. Mr. Porter saw Mr. Horn and Mr. Albery, but he could not see Mr. Dillard. RP 13-14, 3-25-08, morning session.

After Mr. Albery and Mr. Dillard had exited the Tavern, Mr. Strong observed Mr. Dillard go around the corner of the bar and saw what appeared to be a fishing fillet knife in Mr. Albery’s hand. RP 192-193, 3-19-08. Mr. Strong exited the Tavern at the same time as Mr. Horn went to his van saying he would kick Mr. Albery’s ass. RP 14, 3-25-08, morning session. Mr. Strong asked Mr. Albery if he had come into the Tavern with a knife and at the same moment looked to his right and saw Mr. Dillard standing with his hand down, holding a small black gun in his hand. RP 193, 3-19-08. Mr. Strong did not see where Mr. Dillard had obtained the gun from. RP 193, 3-19-08. Mr. Strong’s reaction upon seeing the gun was to run back into the

Tavern and tell the bartender that Mr. Dillard had a gun and to call 911. RP 197, 3-19-08. Mr. Strong yelled to Mr. Greenwood that someone had a gun and told Mr. Greenwood to call 911 two to five minutes after the men left the Tavern. RP 154, 3-19-08.

As Mr. Albery was walking away, Mr. Horn ran to his van, saying "I'll kick your ass." RP 15, 3-25-08, morning session. Mr. Albery walked away from Mr. Horn, but Mr. Horn chased after Mr. Albery wielding a pair of nunchakus. RP 434-435, 3-25-08. Mr. Albery continued walking away from Mr. horn, but Mr. Horn followed Mr. Albery around a corner. RP 15-16, 20, 3-25-08, morning session. Mr. Dillard ran after Mr. Horn, and saw Mr. Horn raise the nunchakus over his head with both hands once Mr. Horn got within striking distance of Mr. Albery. RP 75-76, 3-25-08, morning session; RP 438, 3-26-08. The nunchakus were each roughly 14 inches long and one-and-a-quarter inches in diameter. RP 563, 3-27-08.

As Mr. Horn approached Mr. Albery, Mr. Horn yelled he would kill Mr. Albery. RP 121, 3-25-08. Believing Mr. Horn was about to strike Mr. Albery with the nunchakus, Mr. Dillard fired one shot from his .32, striking Mr. Horn. RP 438-439, 452, 3-26-08; RP 615, 3-27-08. Mr. Dillard shot Mr. Horn because he believed Mr. Horn was about to kill Mr. Albery. RP 465, 494-495, 3-27-08. After being shot, Mr. Horn continued after Mr. Albery. RP 453, 3-26-08.

When the karaoke operator yelled that someone had a gun, Tammy Hollingsworth, a bartender and the daughter of the owners of the Tavern, grabbed her keys and began locking the Tavern up. RP 165, 173, 3-19-08. Ms. Hollingsworth saw Mr. Albery run past the back of the Tavern and saw Mr. Horn walk up to the back of the bar. RP 173, 3-19-08. Mr. Horn was saying, "he shot me, he shot me." RP 173, 3-19-08.

Exhibit 43 is a surveillance picture of Mr. Horn after he was shot and shows Mr. Horn holding something in his right hand. RP 358-359, 3-26-08. Exhibits 44-46 are sequential surveillance photos from the Tavern showing Mr. Horn climbing the back steps of the Tavern. RP 359, 3-26-08. Exhibits 44 and 45 both show something in Mr. Horn's hand, but in exhibit 46 Mr. Horn's hand is empty. RP 359, 3-26-08.

Mr. Greenwood called 911 and while he was calling heard a pop on the side of the building. RP 154-155, 3-19-08. The pop sounded like a small caliber gunshot to Mr. Greenwood. RP 155, 3-19-08. After the sound of the gunshot, Mr. Horn walked up to the back door of the bar and said, "That guy shot me." RP 155, 3-19-08.

Mr. Greenwood gathered first aid supplies to help Mr. Horn and the police arrived about 30 minutes later. RP 155-156, 3-19-08.

Police arrived at the scene, identified witnesses, and took statements. RP 72, 3-25-08, afternoon session. Police were informed to look for the

nunchakus Mr. Horn had retrieved from his vehicle, but searched the area and Mr Horn's vehicle and did not find any nunchakus in the vicinity of the Tavern. RP 71, 84-86, 3-25-08, afternoon session; RP 281-287, 333-336, 3-26-08.

After the shooting, Mr. Albery and Mr. Dillard returned to Mr. Dillard's truck and drove to Mr. Albery's house where they switched vehicle to Mr. Albery's truck and drove back to Clear Lake. RP 85-86, 93, 3-25-08, morning session; RP 457-458, 3-27-08. Eventually, the men decided to turn themselves in and returned home so that Mr. Dillard's wife could drive the men to a police station. RP 94-97, 3-25-08, morning session; RP 460, 3-27-08. The men returned to Mr. Albery's home and Mr. Dillard walked to his home across the street from Mr. Albery's house. RP 28, 3-25-08, morning session; RP 460-461, 3-27-08. When Mr. Dillard got home, he told his wife he had shot a man to defend Mr. Albery. RP 461, 3-27-08.

Police identified Mr. Albery as a suspect based on the credit card receipt for Mr. Albery's bar tab. RP 78, 3-25-08, afternoon session. Police went to Mr. Albery's residence and found him inside with his wife. RP 78-81, 3-25-08, afternoon session. Police had Mr. Albery and his wife step outside their home and placed him in custody. RP 80, 3-25-08, afternoon session.

As police took Mr. Albery into custody, Mr. Dillard approached the

police and confessed that he had shot Mr. Horn and that the gun used to shoot Mr. Horn was on Mr. Dillard's porch. RP 82, 3-25-08, afternoon session; RP 295-296, 3-26-08. Mr. Dillard was taken into custody and the .32 was retrieved from Mr. Dillard's porch. RP 299, 3-26-08.

Mr. Dillard told police that he wanted to turn himself in and that Mr. Horn deserved to be shot. RP 296, 3-26-08. Mr. Dillard told police that Mr. Horn had gone after Mr. Albery with nunchakus so Mr. Dillard shot Mr. Horn. RP 363, 3-26-08.

Mr. Horn told police that the object he had disposed of on the back step of the Tavern was a marijuana pipe and marijuana. RP 354, 3-26-08. Police searched the area but found no nunchakus or anything else matching the long cylindrical object Mr. Horn was carrying in the surveillance photographs. RP 85-86, 3-25-08, afternoon session; RP 287, 3-26-08; RP 382, 3-26-08. Surveillance video at the Tavern shows someone in the area of the back of the Tavern who is out of frame for 1.5 minutes. RP 380-381, 3-26-08. Det. Heishman, the lead detective on the case, agreed it was reasonable to assume that someone had moved whatever object Mr. Horn had disposed of prior to the police searching the area. RP 329, 383, 3-26-08. The police never recovered the object that was in Mr. Horn's hands. RP 379, 3-26-08.

At trial, Mr. Horn denied ever having possession of nunchakus on the

night of the shooting and denied attacking Mr. Albery. RP 230, 3-19-08.

However, Mr. Horn also testified that he was intoxicated on the night he was shot and his memory was vague and blurry, RP 245-246, 256, 3-19-08.

#### IV. ARGUMENT

**1. The State presented insufficient evidence to establish beyond a reasonable doubt that Mr. Dillard was not acting in defense of Mr. Albery.**

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Wn. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *City of Seattle v. Norby*, 88 Wn.App. 545, 554, 945 P.2d 269 (1997), *overruled on other grounds State v. Robbins*, 138 Wn.2d 486, 980 P.2d 725 (1999). Where the issue of self-defense is raised, the absence of self-defense becomes another element of the offense, which the State must prove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

Where a criminal defendant challenges the sufficiency of the evidence, reviewing courts view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence

and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Circumstantial and direct evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is ‘unequivocally prohibited.’ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Dillard was charged with first degree assault in violation of RCW 9A.36.011(1)(a) and, alternatively, RCW 9A.36.011(1)(c). Mr. Dillard confessed to the shooting (RP 82, 3-25-08, afternoon session; RP 295-296, 3-26-08) and his theory of defense at trial was that he shot Mr. Horn because he believed Mr. Horn was about to seriously injure or kill Mr. Albery with nunchakus. RP 363, 3-26-08; RP 465, 494-495, 3-27-08.

Under Washington law, an actor may use force to defend another if he subjectively believes the other is in danger and a reasonable person considering only the circumstances known to the actor would share his belief. *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977); *State v. Watkins*, 61 Wn.App. 552, 561, 811 P.2d 953 (1991); RCW 9A.16.020(3). The actor may

not, however, use more force than a reasonable person would use, considering only the circumstances known to the actor. *Penn*, 89 Wn.2d at 66, 568 P.2d 797; *Watkins*, 61 Wn.App. at 561, 811 P.2d 953 (“A party can lawfully use force to aid another who he reasonably believes is about to be injured. In so doing the party may only use such force and means as a reasonably prudent person would use under the same or similar conditions.”).

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.” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). Deadly force may be used in self-defense, but only when the defendant reasonably believes he or she is threatened with death or great personal injury. *Walden*, 131 Wn.2d at 474, 932 P.2d 1237.

Generally, any time a defendant produces some evidence of self-defense, he or she is entitled to a self-defense instruction. *Walden*, 131 Wn.2d at 473, 932 P.2d 1237. The burden then shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Walden*, 131 Wn.2d at 473-474, 932 P.2d 1237. Evidence of self-defense is evaluated under both subjective and objective standards. *Walden*, 131 Wn.2d at 474, 932 P.2d 1237. The subjective aspect requires the jury to stand in the defendant's shoes and to consider the circumstances known to the defendant, while the objective aspect requires the jury to decide what a reasonably

prudent person similarly situated would have done. *Walden*, 131 Wn.2d at 474, 932 P.2d 1237.

“A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. Given this subjective component, the jury need not find actual imminent harm.” *State v. Woods*, 138 Wn.App. 191, 199, 156 P.3d 309 (2007), citing *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996).

Thus, once Mr. Dillard produced some evidence that he was acting in defense of Mr. Albery, in order to have Mr. Dillard convicted, the State in this case had the burden of proving, beyond a reasonable doubt, either that Mr. Dillard's belief that Mr. Albery was in imminent danger of harm was not subjectively reasonable, or that the force Mr. Dillard used was not objectively reasonable.

- A. Mr. Dillard presented sufficient evidence he shot Mr. Horn in defense of Mr. Albery to shift the burden to the State to disprove that Mr. Dillard acted in defense of Mr. Albery.

In general, where a defendant requests that the jury be instructed on self-defense at trial, there need be only some evidence admitted in the case that tends to prove an act was done in self-defense to entitle the defendant to such instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Adams*, 31 Wn.App. 393, 395, 641 P.2d 1207 (1982). In determining whether a defendant was entitled to present a defense of self-

defense, an appellate court must view the underlying facts in the light most favorable to the defendant. *State v. Westlund*, 13 Wn.App. 460, 465, 536 P.2d 20, *review denied* 85 Wn.2d 1014 (1975).

At trial, Mr. Albery testified that at the time Mr. Dillard shot Mr. Horn, Mr. Horn was running at Mr. Albery, holding a pair of nunchakus over his head, yelling "I'm going to kill him." RP 121, 3-25-08. Mr. Dillard testified that he believed that Mr. Horn was going to kill Mr. Albery. RP 465, 494-495, 3-27-08.

Viewed in the light most favorable to Mr. Dillard, this evidence was sufficient to entitle Mr. Dillard to a defense-of-others instruction.

- B. The State presented insufficient evidence to establish beyond a reasonable doubt that Mr. Dillard's belief that Mr. Albery was in imminent danger of harm was not subjectively reasonable.

Mr. Dillard based his belief that Mr. Horn was about to harm Mr. Albery on Mr. Dillard's knowledge of the following facts: (1) that Mr. Horn had been behaving aggressively towards Mr. Albery (RP 432, 3-26-08); (2) that Mr. Albery had to display a knife to get Mr. Horn to back off (RP 432-433, 3-26-08); (3) that Mr. Horn had then gone to his vehicle and obtained what appeared to Mr. Dillard to be 14 inch long nunchakus made of 1.5 inch

thick wood (RP 434-435; 3-26-08); (4) that Mr. Horn had then chased after Mr. Albery yelling that he would kick Mr. Albery's ass or "I'm going to kill him" (RP 14, 3-25-08, morning session; RP 121, 3-25-08); and (5) that in the instant before Mr. Dillard shot Mr. Horn, Mr. Horn was running at Mr. Albery with both his hands grasping one of the nunchakus and holding the nunchakus over his head, apparently about to strike Mr. Albery. RP 438, 3-26-08.

Nunchakus are a dangerous weapon capable of inflicting serious bodily harm. RP 87, 3-25-08, afternoon session.

Given Mr. Dillard's knowledge of these facts, it is patently obvious that Mr. Dillard had knowledge of sufficient facts to support a subjectively reasonable belief that Mr. Albery was in danger of suffering great personal injury.

The State did present evidence that Mr. Dillard did not know what material the nunchakus wielded by Mr. Horn were made of (RP 564-565, 3-27-08), but knowledge of the exact composition of the nunchakus was not necessary for Mr. Dillard to have a subjectively reasonable belief that Mr. Albery was in danger of great personal injury. A reasonable person in Mr. Dillard's position would reasonably assume that Mr. Horn would not run to his vehicle, obtain a pair of nunchakus, chase after Mr. Albery threatening to kill him, and attempt to strike Mr. Albery with the nunchakus if the

nunchakus were made of foam, rubber, or some other material incapable of inflicting harm to Mr. Albery.

In any event, actual imminent harm to Mr. Albery is not necessary for the jury to find that Mr. Dillard acted in defense of Mr. Albery: “A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. Given this subjective component, the jury need not find actual imminent harm.” *State v. Woods*, 138 Wn.App. 191, 199, 156 P.3d 309 (2007), *citing State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). All that is necessary is for Mr. Dillard to have had a *subjectively reasonable* belief that Mr. Albery was in imminent harm.

The State presented insufficient evidence to establish beyond a reasonable doubt that the facts known to Mr. Dillard at the time he shot Mr. Horn did not support a subjectively reasonable belief that Mr. Horn was about to inflict great bodily injury to Mr. Albery with the nunchakus.

- C. The State presented insufficient evidence to establish beyond a reasonable doubt that the force used by Mr. Dillard was not objectively reasonable.

As stated above, 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.” *Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237. Deadly force may be used in self-defense, but only when the

defendant reasonably believes he or she is threatened with death or great personal injury. *Walden*, 131 Wn.2d at 474, 932 P.2d 1237.

At the time Mr. Dillard shot Mr. Horn, Mr. Dillard believed that Mr. Horn was armed with nunchakus, a weapon capable of inflicting great personal injury, even death. Further, Mr. Dillard was roughly 25 feet away from Mr. Albery and Mr. Horn at the time Mr. Horn got close enough to Mr. Albery to hit him with the nunchakus. RP 567, 3-27-08. Given that Mr. Horn was about to strike Mr. Albery with a weapon capable of causing great bodily harm or even killing Mr. Albery, and given that Mr. Dillard was 25 feet away, and given that Mr. Dillard was armed with a handgun, a reasonably prudent person in Mr. Dillard's position would believe that shooting Mr. Horn once with the handgun was necessary. There was no way Mr. Dillard could have traveled the 25 feet in time to stop Mr. Horn from striking Mr. Albery, therefore the best reasonable alternative was to use the handgun to stop Mr. Horn from striking Mr. Albery.

Further, Mr. Dillard reasonably believed that Mr. Albery was being threatened with deadly force or force that would cause great personal injury. On those facts alone it was lawful for Mr. Dillard to use deadly force to defend Mr. Albery.

The State presented insufficient evidence to establish beyond a reasonable doubt that a reasonably prudent person in Mr. Dillard's position

would not find the use of the handgun reasonably prudent.

Even viewed in the light most favorable to the State, the evidence presented at trial was insufficient to establish that Mr. Dillard did not have a subjectively reasonable belief that Mr. Albery was about to suffer great bodily harm at the hands of Mr. Horn and that the amount of force used by Mr. Dillard to stop Mr. Horn was objectively reasonable. Therefore, the State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Dillard's actions were not lawful since he was acting in defense of Mr. Albery and used an objectively reasonable amount of force to defend Mr. Albery.

**2. Cumulative error deprived Mr. Dillard of a fair trial.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

*State v. Rooth*, 129 Wn.App. 761, ¶ 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.

*State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

A. The trial court erred in denying Mr. Dillard's

motion to prohibit all parties from referring to Mr. Horn as “the victim.”

Pre-trial, counsel for Mr. Dillard moved to disallow any reference to Mr. Horn as “the victim.” CP 4-6; RP 45-49. Mr. Dillard’s counsel argued that reference to Mr. Horn as “the victim”

presupposes the entire case. It takes the jury’s job completely away from them. It presumes Mr Horn was, in fact, victimized when, in fact, he wasn’t.

Mr. Horn was shot as he attempted to kill somebody else. That’s not being victimized. That’s being wounded in the act of victimizing someone else.

...

I certainly think that describing Mr. Horn as a victim is not only prejudicial, it’s inflammatory, and the only reason to do it is to convince the jury right up front that he is, in fact, a victim, when, in fact, Mr. Albery is the victim.

RP 45, 3-5-08.

The trial court held that the law enforcement witnesses could refer to Mr. Horn as “the victim”, the prosecutor could not refer to Mr. Horn as “the victim” during trial, but the prosecutor could refer to Mr. Horn as “the victim” during opening and closing arguments. CP 56-59. The trial court’s ruling was in error.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of a criminal defendant. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.

*Kirkman*, 159 Wn.2d at 927, 155 P.3d 125.

Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

A police officer's improper opinion testimony may be especially prejudicial because it carries a "special aura of reliability." *Demery*, 144 Wn.2d at 765, 30 P.3d 1278.

Trial counsel for Mr. Dillard was correct: the ultimate issue before the jury was whether or not Mr. Dillard's act of shooting Mr. Horn was an assault or an act of defense of Mr. Albery. If the jury found that Mr. Dillard was lawfully defending Mr. Albery, then Mr. Dillard's acts were lawful and Mr. Horn was not a "victim" of any crime. If the jury found that Mr. Dillard was not lawfully defending Mr. Albery when he shot Mr. Horn, then the jury would find Mr. Dillard guilty of assault.

As discussed above, Mr. Dillard and Mr. Albery testified that Mr. Horn was running at Mr. Albery and about to strike him with nunchakus when Mr. Dillard shot Mr. Horn. Mr. Horn testified that he was never armed with nunchakus that night and that he was 35-40 feet away from Mr. Albery when Mr. Dillard shot him. RP 227, 230, 3-19-08. The evidence presented

to the jury was therefore open to two possible interpretations: (1) Mr. Horn was unarmed and nowhere near Mr. Albery when he was shot, making Mr. Horn the victim of an assault by Mr. Dillard; or (2) Mr. Horn was charging Mr. Albery and about to strike Mr. Albery with a pair of nunchakus when he was shot by Mr. Dillard, making Mr. Horn a person who was lawfully prevented from assaulting another and therefore not a victim of any crime.

Under the facts of this case and in light of the charges against Mr. Dillard, any testimony that Mr. Horn was a “victim” would constitute a comment on the credibility of Mr. Dillard and Mr. Albery, and would amount to opinion testimony as to Mr. Dillard’s guilt. This testimony was highly prejudicial and invaded the fact-finding province of the jury, depriving Mr. Dillard of his Constitutional right to have a jury determine the facts of the case. Further, the prejudice was heightened because the witnesses who referred to Mr. Horn as “the victim” were law enforcement witness.

Additionally, ER 701 prohibits opinion testimony by lay witnesses unless the opinion is (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witnesses’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701. The testimony by police officers and other lay witnesses that Mr. Horn was a

“victim” presupposes the conclusion that Mr. Dillard did not shoot Mr. Horn in defense of Mr. Albery. However, none of these witnesses saw the shooting. Any testimony identifying Mr. Horn as the victim of a crime would therefore be lay opinion testimony not based on the perception of the witness which was not admissible under ER 701.

Finally, allowing the prosecutor and witnesses to refer to Mr. Horn as a “victim” was tantamount to a comment that Mr. Dillard and Mr. Albery weren’t credible. As discussed above, the conclusion that Mr. Horn was a “victim” presupposes that Mr. Dillard unlawfully assaulted Mr. Horn, the very issue before the jury. To conclude that Mr. Dillard unlawfully assaulted Mr. Horn requires a finding that both Mr. Dillard’s and Mr. Albery’s accounts of the events surrounding the shooting were inaccurate, and therefore a finding that Mr. Dillard and Mr. Albery were not credible.

A prosecutor may not assert his opinion about the credibility of the witness and the guilt or innocence of the accused. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (holding reversible error occurred when during closing argument, the prosecutor called the accused a liar and maligned defense counsel). Further, “[N]o witness may give an opinion on another witness’ credibility.” *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). Thus, the trial court’s ruling allowing such testimony in this case was error.

The trial court erred in allowing the State and law enforcement witnesses to refer to Mr. Horn as a “victim.” The trial court should have followed the suggestion of Mr. Dillard’s trial counsel to simply refer to Mr. Horn as Mr. Horn. Allowing Mr. Horn to be referred to as a “victim” was error and was prejudicial to Mr. Dillard.

- B. The trial court abused its discretion in granting the State’s motion to exclude reference to Mr. Horn’s two convictions for assault 3.

Pre-trial, the State moved to exclude evidence of Mr. Horn’s two 2006 convictions for third degree assault. CP 12-18; RP 24-33, 3-5-08. The trial court granted the State’s motion, finding that the convictions were not admissible under ER 609. CP 56-59; RP 33, 3-5-08. Counsel for Mr. Dillard moved to admit these same crimes under ER 404(a) and ER 609(a).

A trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). Abuse exists when the trial court’s exercise of discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *Powell*, 126 Wn.2d at 258, 893 P.2d 615.

- i. Mr. Horn’s 2006 assault convictions were admissible under ER 609(a).*

ER 609 provides, in pertinent part:

For the purpose of attacking the credibility of a witness in a

criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime...was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered...

In 2006, Mr. Horn was convicted of two counts of third degree assault. CP 12-18. Assault in the third degree is a class C felony, and is therefore punishable by up to five years in prison. RCW 9A.36.031, RCW 9A.20.021. Thus, provided the trial court found that the convictions were more probative than prejudicial, Mr. Horn's third degree assault convictions were admissible under ER 609.

Counsel for Mr. Dillard sought to introduce evidence of Mr. Horn's assault convictions in conjunction with evidence that Mr. Horn was known to carry and brandish nunchakus and was known for starting and getting into fights. RP 25, 3-5-08. Counsel for Mr. Dillard argued that this evidence was relevant to Mr. Horn's credibility since evidence existed which indicated that Mr. Horn was carrying nunchakus on the night of the shooting but Mr. Horn denied that he ever possessed nunchakus that night. RP 25-26, 31-33, 3-5-08. The trial court excluded evidence relating to Mr. Horn's assault convictions because, "[t]hey are not involved with dishonesty under ER 609." RP 33.

In making its ruling, the trial court completely ignored the provision

of ER 609(a) which allows admission of prior convictions of crimes not involving dishonesty to impeach a witness. This was error since this was clearly the applicable prong of ER 609(a). Mr. Dillard's motion to admit the evidence was clearly based on the prong of ER 609(a) dealing with convictions for crimes which do not involve dishonesty. CP 40-42. It was never asserted that Mr. Horn's assault convictions were admissible as crimes of dishonesty, therefore the trial court abused its discretion in excluding the convictions on that basis since its ruling was based on untenable grounds.

*ii. Mr. Horn's 2006 assault convictions were admissible under ER 404(a).*

The trial court denied Mr. Dillard's motion to admit evidence of Mr. Horn's prior convictions under ER 404(a) because, "The defense did not establish any factual basis for its argument that the facts underlying those convictions would be admissible character evidence contemplated by ER 404(a). The convictions themselves are not admissible under the rule as a "pertinent trait" of character. CP 56-59.

ER 404(a)(2) provides, "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused."

Here, counsel for Mr. Dillard sought to introduce evidence that Mr.

Horn was known to carry nunchakus and get into fights. This evidence was pertinent since it would support Mr. Dillard's claim of self defense and give the jury a fuller picture of Mr. Horn. This evidence would also give the jury a more complete understanding of the facts when it judged Mr. Horn's credibility and his denials that he was carrying nunchakus and attacked Mr. Albery on the night of the shooting. Evidence that Mr. Horn was known to get into fights and had been convicted of two counts of assault was evidence of a character trait of a predilection towards violence in Mr. Horn.

When a defendant seeks to excuse the killing on the ground of self-defense, it is competent for him to show the general reputation and character of the deceased for a quarrelsome disposition. The character of the deceased may be shown whether the defendant knew of it or not, because such testimony has a tendency to support the defendant's contention that the deceased was the aggressor.

*State v. Adamo*, 120 Wn. 268, 270, 207 P. 7 (1922).

Other than the fact that Mr. Dillard is claiming defense of others as a defense to an assault charge, the situation in Mr. Dillard's case is almost identical to the one discussed by the court in *Adamo*. Mr. Dillard sought to introduce evidence of Mr. Horn's 2006 convictions for assault as evidence that Mr. Horn attacked Mr. Albery on the night of the shooting.

- C. The trial court abused its discretion in granting the State's motion to prevent Mr. Dillard from questioning witnesses about Mr. Horn's prior incidences of fighting at the Tavern and Mr. Horn's previous use of nunchakus.

In addition to evidence of Mr. Horn's assault convictions, Mr. Dillard sought to introduce evidence that Mr. Horn was known for carrying nunchakus, known for brandishing nunchakus, and known for starting and getting into fights under ER 404(a)(2). CP 40-42; RP 60-66, 3-5-08. Specifically, Mr. Dillard sought to offer the following testimony: testimony of individuals from the Tavern who were interviewed by police and indicated that Mr. Horn was known to regularly carry nunchakus; testimony from Clyde Harris, a friend of Mr. Horn's father, who had seen Mr. Horn brandishing and training with nunchakus on numerous occasions; testimony from Mr. Harris that on one occasion Mr. Horn went to the Tavern for the purpose of getting into an argument with some college kids and attacked their car with nunchakus and Mr. Harris had to rescue Mr. Horn from the college kids and warn him to stop getting into fights. RP 64-65, 3-5-08. Mr. Dillard sought to introduce this evidence to establish that Mr. Horn is known for carrying and occasionally using a deadly weapon, specifically the nunchakus. RP 65, 3-5-08.

As discussed above, this evidence is precisely the type of evidence admissible under ER 404(a)(2) and *Adamo*. Despite this, the trial court ruled that this evidence was inadmissible. The trial court excluded this evidence without offering an explanation as to why. RP 65-66, 3-5-08.

Evidence relating to Mr. Horn's character trait of carrying nunchakus and getting into fights was highly probative of Mr. Horn's credibility when he denied that he was carrying nunchakus of the night of the shooting and denied attacking Mr. Albery. As discussed above, Mr. Horn's credibility is a central issue in this case since he is the only person who witnessed the shooting who denies that he was armed and attacking Mr. Albery.

Further, evidence that Mr. Horn got into fights and carried nunchakus strengthened Mr. Dillard's defense that Mr. Horn was the aggressor against Mr. Albery and was attacking him with nunchakus. Under *Adamo*, Mr. Dillard was not required to demonstrate that he was aware of Mr. Horn's character and reputation for getting into fights with nunchakus because the evidence would have supported Mr. Dillard's contention that Mr. Horn was the aggressor and attacked Mr. Albery with nunchakus.

D. Mr. Dillard was prejudiced by the cumulative effect of these errors.

The cumulative effect of the trial court's rulings allowing Mr. Horn to be referred to as a victim and barring evidence of Mr. Horn's prior convictions for assault and his reputation for carrying nunchakus and starting fights was that the jury was presented with an unfairly incomplete picture of Mr. Horn's character and propensity to assault people with nunchakus. Evidence that Mr. Horn habitually carried nunchakus and got into fights with

them is highly relevant since whether or not Mr. Horn attacked Mr. Albery with nunchakus was the central issue at trial.

Preventing Mr. Dillard from introducing this highly probative and relevant evidence prejudiced him in that the jury based its verdict on an incomplete knowledge of Mr. Horn's character, as well as limiting the amount of admissible evidence Mr. Dillard could submit to the jury to judge Mr. Horn's credibility. Further, allowing police and the prosecutor to refer to Mr. Horn as a victim conditioned the jury to be predisposed to conclude that a crime had occurred and that Mr. Dillard was therefore guilty.

In this case, a new trial is necessary because Mr. Dillard was unable to present highly probative and material evidence about Mr. Horn which would great affect the jury's perception of Mr. Horn and how the jury weighed Mr. Horn's credibility when he denied carrying nunchakus and attacking Mr. Albery.

## **V. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Dillard's conviction and remand for dismissal with prejudice. Alternatively, this court should vacate Mr. Dillard's conviction and remand for a new trial.

DATED this 6<sup>th</sup> day of March, 2009.

Respectfully submitted,



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Attorney for Appellant

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on March 6, 2009, I delivered by United States mail: to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and appellant, Kent R. Dillard, DOC # 318585, Monroe Correctional Complex, WSRU, A 420L, Post Office Box 777, Monroe, Washington 98272, true and correct copies of this Amended Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on March 6, 2009.

  
Norma Kinter