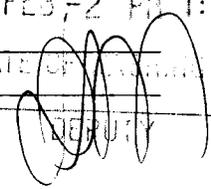


NO. 40069-3-II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY



**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANDRE BONDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 08-1-05850-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the statement "I'm an original from here," stripped of all connotations, was inadmissible under ER 404(b)?
2. If gang-related evidence was admitted, was it done so properly?
3. If gang-related evidence was improperly admitted, whether the defendant preserved error where he failed to object to such evidence?
4. If gang-related evidence was improperly admitted, whether the defendant has shown that it necessarily affected the outcome of the trial?
5. Whether the State adduced sufficient evidence for the jury to find the elements of intent and requisite injury beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On December 10, 2008, the Pierce County Prosecuting Attorney (State) charged Andre Bonds (the defendant) with one count of assault in the first degree. CP 1-2. On August 5, 2009, the case was assigned to Hon.

Frank Cuthbertson for trial. 1 RP 3¹. In anticipation of testimony, the defendant filed motions in limine to exclude a gang expert (CP 22-25) and other gang-related evidence (CP 26-28). Before jury selection, the State filed an Amended Information which charged assault in the first degree under RCW 9A.36.011(1) by alternative means; using a firearm, deadly weapon, or any other force or means likely to produce great bodily harm under subsection (a), and inflicting great bodily harm under subsection (c). CP 29.

After hearing all the evidence, the jury found the defendant guilty. CP 48. The defendant moved for a new trial. CP 75-92. On December 4, 2009, the court sentenced the defendant to 276 months in prison. CP113. The defendant filed a timely notice of appeal on the same day. CP 121.

2. Facts

The night of December 8, 2008, the defendant went to Charley's, a bar on So.19th St. in Tacoma, to join the birthday celebration of a friend. 11 RP 1165. While there, he saw and briefly greeted Roosevelt Ports, an acquaintance. 11 RP 1166. Ports and the defendant shook hands. 11 RP 1167. Ports was there with his friend Tommy Pitts, whom he introduced to

¹ The verbatim report of proceedings in this case consists of 15 volumes. Most of the volumes have consecutively numbered pages from the same court reporter. There are two volumes from substitute court reporters. Their volumes begin with page 1. For ease of reference, this brief will refer to the volume number and page as submitted by the main reporter, e.g. 1 RP 3. Volumes from the substitute reporters will be referred to by date and page, e.g. 8/10/2009 RP 1

the defendant. *Id.* 8 RP 763. The defendant nodded hello to Pitts. 11 RP 1167.

After he left Charley's, the defendant went to another Tacoma bar, the Friendly Duck. 11 RP 68. There, he chanced upon Ports and Pitts as he was leaving. *Id.* The defendant again greeted them and told them that he was going to another Tacoma bar, McCabe's. *Id.* After closing time at McCabe's, the defendant went to a local gas station/convenience store at So. Center and Tyler Sts. that was a gathering place for many of the defendant's friends and acquaintances. 11 RP 1169. There, he saw his friend Larry Brown. *Id.* The defendant told Brown that he was going to get something to eat at the Denny's at So. 84th and Hosmer. 11 RP 1170.

When the defendant arrived at Denny's, he chanced upon Ports and Pitts again, outside. 8 RP 744, 11 RP 1171. Pitts, who had been drinking, made some disparaging remarks to the defendant. 8 RP 624, 744, 11 RP 1172. Pitts wanted to know where the defendant was from. 8 RP 631. The defendant told him that the defendant was "an original from here." *Id.* Pitts had indicated that he was from California. 8 RP 655. The defendant told Pitts that he should not "come here talking like that." 8 RP 631.

The verbal exchange escalated to an exchange of blows. 8 RP 745, 11 RP 1175. The defendant and Pitts separated, and the defendant began to leave. 8 RP 746. At that point, Larry Brown arrived. 8 RP 624, 747.

The defendant and Pitts started fighting again. 8 RP 748, 11 RP 1182. The defendant punched Pitts in the face, knocking him out and to

the ground. 8 RP 749. When Pitts fell to the ground, the defendant began stomping on Pitts' head. 8 RP 750, 11 RP 1186. After rendering Pitts helpless, the defendant left the scene with Larry Brown. 11 RP 1187.

The argument and fight occurred just outside the windows at the Denny's restaurant. 5 RP 138, 6 RP 373. Patrons of the restaurant were shocked and concerned about what they saw. 4 RP 32-33, 86, 6 RP 392. The waitress called 911 to summon police and medical aid. 9 RP 928. Police and medical aid arrived to find Pitts lying in a pool of blood, non-responsive. 3 RP 12, 14.

Pitts was taken to Madigan Army Hospital. 10 RP 1080. Pitts suffered traumatic brain injury to the frontal lobe of his brain as result of the assault. 10 RP 1082, 1091. He also had facial and skull fractures as result of the assault. 10 RP 1077. The injury resulted in permanent disability to Pitts' brain function. 10 RP 1101.

C. ARGUMENT.

1. WHERE THE TRIAL COURT CAREFULLY EXCLUDED ALL EVIDENCE OF GANG AFFILIATION FROM THE TRIAL, IT COMMITTED NO ERROR.
 - a. The statement: "I'm an original from here.", as presented to the jury, was not 404(b) evidence.

Evidence Rule 404(b) states:

Other Crimes, Wrongs, or Acts. 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Gang membership and gang-related behavior falls under this rule. *See, e.g., State v. Campbell*, 78 Wn. App. 813, 901 P. 2d 1050 (1995). With proper foundation and weighing by the court, it can be admissible, usually to show motive. *See State v. Yarbrough*, 151 Wn. App. 66, 210 P. 3d 1029 (2009); *Campbell, supra*. In other cases, it is not. *See, e.g., State v. Scott*, 151 Wn. App. 520, 213 P. 3d 71 (2009).

As the defendant discusses in his brief, one of the important issues in this case was whether the gang affiliation of the defendant or Pitts was admissible. App. Br., at 10. The trial court heard extensive argument on this issue. The defendant moved to exclude it. 1 RP 14-15. The State argued that it was admissible to prove motive as *res gestae*. 1 RP 13.

After hearing argument, the court decided that the evidence was more prejudicial than probative. 8/10/2009 RP 42. The court excluded the evidence. 8/10/2009 RP 41. The court found that the State had proved that the defendant made the gang-related statements. 8/10/2009 RP 41. However, the court thought that the State's case was strong enough to prove guilt without the potentially prejudicial gang evidence. 8/10/2009 RP 42. Presciently, the court warned the defendant not to "open the door" by eliciting or testifying to such evidence. 8/10/2009 RP 44.

In the present case, the defendant, his friend Larry Brown, and witnesses Ports and Pitts are all gang members. The defendant is one of the founding members of the 23rd St. set of the Hilltop Crips. 1RP 41. Larry Brown is also a Hilltop Crip. 1 RP 40. Ports is a member of the 25th St. Neighborhood Crips. 1 RP 40. Pitts is a gang member from Compton, California. 1 RP 45.

The descriptive phrase “I’m an original” in gang culture does have an additional significance beyond normal parlance. In gang culture, it means that the person is an original, or founding, member of a street gang. 1 RP 44. As such, the person would expect respect and deference from other gangsters. 1 RP 43.

However, in order to keep the gang issue out, the trial court stripped the expression of all negative connotations. The court specifically prohibited the State from having Det. Ringer or any other State witness from explaining gang culture or the significance of being a gang “original.” 8/10/2009 RP 41.

Defense counsel suggested rephrasing the statement to “I’m from Tacoma, you don’t bring your California trash talk and talk like that.” 8/10/2009 RP 36. The court’s ruling amounted to the same thing. Contrary to the defendant’s contention that “original from here” had only a gang connotation; under the court’s ruling, being “an original from here” could be asserted by any one of the thousands of people born in Tacoma.

When the gang connotation was removed, the statement ceased to be 404(b) evidence. It was merely a pedestrian explanation of why the fight took place. It was, therefore, relevant.

In the present case, the alleged gang reference: "I'm an original from here." came before the jury twice. The first time was during Det. Ringer's testimony. 7 RP 631. Det. Ringer had interviewed the defendant, who gave a statement. In recounting the fight, defendant said that he told Pitts: "I'm an original from here. Don't come talking like that." 1 RP 59. In the gang culture, this meant that Pitts, who was from out of state, was on the defendant's turf, and that disrespecting the defendant would lead to trouble. 1 RP 59-60. The defendant indicated to Det. Ringer that Pitts' status as a gang member from California did not impress the defendant. 1 RP 65.

As pointed out above, the court granted the motion in limine to keep out gang references, implications, or interpretations. 8/10/2009 RP 41. However, the court held that Det. Ringer could quote the defendant from the interview. *Id.*, at 43. The limitations changed the connotation of the statement.

The defendant himself raised the issue when he took the stand. The defendant asserted that the detectives had misquoted him, by failing to mention all his statements. 11 RP 1194. On cross-examination, he denied that he said "I'm an original." 11 RP 1213. He asserted that he actually said "I'm the original brother from Tacoma." And that he did not need to

get involved in “this foolishness” because he had kids to raise. *Id.* After the jury was excused, there was a discussion regarding how to neutralize the defendant’s own testimony. The court found that the defendant had not “opened the door” with this testimony. 11 RP 1215. Defense counsel requested the court to strike the question and answer entirely. 11 RP 1216.

The court decided to order the jury to disregard the last question and answer and allow the State to ask another question. 11 RP 1218. The court admonished the defense to take care not to open the door to the topic again. 11 RP 1218. Even though the defendant was on the stand in the middle of cross-examination, defense counsel was permitted to caution the defendant not to mention it again. 11 RP 1220. After the conference, the court later instructed the jury appropriately. 11 RP 1220.

The court worked assiduously to keep any mention of gangs out of the trial. Even though “dog tags” which were inscribed with “Tiny Stretch Loc,” a reference to Brown’s street moniker, and “Snitch Killer,” which should be self-explanatory, were found hanging in Larry Brown’s car, this evidence excluded because of potential prejudice. 6 RP 308, 319. The issue arose again during Det. Vold’s testimony. The court excluded it because of prejudice. 7 RP 566. In his testimony before the jury, Det. Ringer related the defendant’s statement, without any gang references or interpretations. The defendant did not object when Det. Ringer relayed the “I’m an original from here” quote.

The defendant had also told Det. Ringer, in referring to Pitts; “Dude says he’s from Cali. That shit don’t matter to me.” 8 RP 655-656. The defendant had further explained why “it didn’t matter.” The defendant explained that he had been in federal prison in California for 7 years with “real gangsters.” 8 RP 639. Therefore, the defendant found Pitts’ claim of status as a gangster from “Cali” unimpressive. *Id.* The court ruled that the jury would not hear this explanation. *Id.*, at 642.

The court and parties discussed that part of the defendant’s statement. Again, the concern was regarding the prejudice compared to the probative value. 8 RP 639. The State agreed not to raise context of the defendant’s statement. *Id.*, at 641. The court permitted the relatively innocuous statement “Dude says he’s from Cali. That shit don’t matter.” 8 RP 642. The jury heard that part of the statement. 8 RP 655-656. It was presented as Pitts bragging about being tough. *Id.* The defendant’s response was characterized as reflecting his pride that he was from Tacoma. 8 RP 657.

Soon thereafter, another gang issue came up. In the interview, the defendant had asked Det. Ringer if Ports was a police informant. 8 RP 647. Ports had been involved in another gang-related assault with a gang member named Thurman Sherill. 8 RP 652. Without making any gang references or putting the question into context, Det. Ringer was permitted to testify that there had been a generic “older investigation” regarding Ports and Sherill. 8 RP 652. 8 RP 719.

Before Ports testified, defense counsel moved to prevent Ports from mentioning that he and the defendant were both Crips. 8 RP 723. Defense counsel wanted to prevent Ports from describing the gang relationship that he and the defendant shared, and that Ports would fear retaliation and being labeled a snitch. 8 RP 724. The court so ordered. 8 RP 723. Defense counsel also moved to sanitize the exchange of the gang challenge or disrespect shown between Pitts and the defendant. 8 RP 729-730. The court observed that it had done as much as possible to do so already. *Id.* Then, out of the presence of the jury, the court admonished Ports what not to say, because of the gang issue. 8 RP 731.

The trial court was extremely careful regarding the gang issues and references in this case. The court specifically mentioned this several times. 8 RP 722, 729, 11 RP 1160. Its rulings sanitized the context and motive for the assault from the reality of a beating for the failure to kiss the ring of one of the forefathers of the Tacoma Crips, to a disagreement over local civic pride. The court committed no error.

- b. Even if the phrase was 404(b) evidence, it was properly admitted.

Evidence of gang membership is admissible to show motive for an assault. *See Yarbrough*, 151 Wn. App. at 81. A trial court's ruling regarding gang evidence under ER 404(b) is reviewed for a manifest abuse

of discretion such that no reasonable judge would have ruled as the trial court did. 151 Wn. App. at 81.

In the present case, Det. Ringer specifically asked the defendant about motive: why did the defendant “put the boots to” Pitts? 7 RP 631. The defendant explained that Pitts had been insulting. 8 RP 658. He said that Pitts needed to know where the defendant was from. *Id.* He said that he felt insulted and disrespected. 7 RP 632.

Here, the court carefully considered the proposed testimony and the weighed the probative value with the potential prejudicial effect. The court ruled in the defendant’s favor to keep gang evidence out, but agreed that the parts of the verbal exchange between the defendant and Pitts were relevant and admissible to show motive and context of the fight.

In the present case, the defendant was charged with inflicting very serious injuries on a man that he had just met. The evidence of motive; or why it happened, showed that the fight did not happen, nor escalate, in a vacuum. The fight and assault happened in the context of a heated verbal exchange between the defendant and Pitts. The court’s ruling provided a sanitized explanation for the jury. This benefited the defendant, as well. In the complete absence of an explanation, the case for the defendant is worse: he inflicts extremely serious injuries on a near stranger without provocation.

2. ASSUMING, ARGUENDO THAT GANG EVIDENCE WAS IMPROPERLY ADMITTED, THE DEFENDANT FAILED TO PRESERVE THE ISSUE FOR APPEAL WHERE HE FAILED TO OBJECT BELOW.

The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); See *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). An evidentiary error, such as erroneous admission of ER 404(b) evidence, is not of constitutional magnitude. See *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

Generally, to preserve an issue for appeal, a party must object to inadmissible evidence when it is offered during trial, even when the trial court has already excluded it through a pretrial order. *State v. Weber*, 159 Wn.2d 252, 271, 149 P.3d 646 (2006) (citing *State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993)). *State v. Ra*, 144 Wn. App. 688, 700, 175 P. 3d 609 (2008). This gives the trial court the opportunity to determine whether the evidence is covered by the pretrial motion and, if so, whether the court can cure any potential prejudice through an instruction. *Id.*, citing *Weber*, 159 Wn.2d at 272.

There are few exceptions to this requirement. Examples are when the other party's questions were "in deliberate disregard of the trial court's ruling, or an objection by itself would be so damaging as to be immune from any admonition or curative instruction by the trial court."

Ra, 144 Wn. App. at 700, citing *Weber, supra*. In *Ra*, the Court found no waiver in a case where the prosecutor disregarded the trial court's ruling that gang evidence not be introduced by deliberately questioning a detective about his gang unit and why the case was assigned to him, and questioning the defendant about many aspects of his "group's gang-like behavior." 144 Wn. App. at 701.

Here, defense counsel made motions in limine regarding gang evidence and to exclude expert testimony regarding gangs. CP 22-28. As discussed above, counsel and the court discussed several potential gang-related issues out of the presence of the jury. In every circumstance involving potential gang-related testimony, the court excluded the evidence. There was no objection that the State or the witnesses purposely tried to admit evidence in violation of the court's order or rulings. Defense counsel was vigilant in preventing testimony that he thought would be damaging.

There was also testimony of the same nature that the defendant did not object to. Det. Ringer testified that Larry Brown and the defendant had similar nicknames or street names. 8 RP 645. The defendant explained the "dude was from Cali." 8 RP 655. He also explained that he prevailed in the fight because "I've just been doing it longer, I guess." 8 RP 657. In explaining why Pitts would pick a fight with him, the defendant said that Pitts "somehow felt I wasn't respecting him." 8 RP 658.

The above statements are no different in weight or meaning than the other evidence that the court admitted, to which the defendant now assigns error. Trial counsel exercised discretion and judgment in making motions in limine and objections. Where he did not object to testimony, the issue was not preserved for appeal.

3. ASSUMING, ARGUENDO, THAT GANG EVIDENCE WAS IMPROPERLY ADMITTED, THE DEFENDANT CANNOT SHOW PREJUDICE.

If gang evidence was improperly admitted, the appellate court must determine whether the erroneous admission of the gang association evidence or the gang expert testimony was unfairly prejudicial to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is grounds for reversal only if the error is prejudicial). “An error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (Jul. 19, 2002) (internal quotation marks omitted) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)); *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P. 3d 1136 (2009).

In the present case, there was no doubt that there was a confrontation and fight between the defendant and Pitts outside the Denny’s Restaurant on So. Hosmer St. The defendant argued self-defense.

As such, he necessarily admitted that he assaulted Pitts. *See State v. Pottorf*, 138 Wn. App. 343, 348, 156 P. 3d 955 (2007); *State v. Gogolin*, 45 Wn. App. 640, 643, 727 P. 2d 683 (1986). The defendant could not argue self-defense if he denied the underlying act of defending himself. *See State v. Barragon*, 102 Wn. App. 754, 762, 9 P. 3d 942 (2000).

The issue for the jury was whether the defendant acted lawfully. The jury rejected his claim of self-defense. The defendant does not show how, absent the alleged errors, the outcome of the trial would have been materially affected; i.e., he probably would have been acquitted.

4. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND ALL ELEMENTS PROVEN BEYOND A REASONABLE DOUBT.

The standard of review for sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the

defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, the defendant was charged with assault in the first degree under RCW 9A.36.011(1)(a) and (c). This requires the State to prove that the defendant acted with intent to cause great bodily harm. *Id.* In his Statement of Additional Grounds (SAG), the defendant challenges the quantum of proof of intent, motive, and the level of injury.

a. Proof of great bodily harm.

RCW 9A.04.110 defines “great bodily harm” as:

(c) “Great bodily harm” means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

Dr. Jason Freidman is the chief neurologist at Madigan Army Hospital. 10 RP 1067. He treated Pitts. *Id.*, at 1080. Dr. Friedman testified that Pitts had suffered facial and skull fractures in the assault. *Id.*, at 1077. The fracture of the eye socket was potentially life-threatening. *Id.*, at 1080. The injury to the eye socket required surgery. *Id.*, at 1082. Without surgery, the injury would likely have resulted in permanent blindness in

that eye. *Id.* The action of stomping on Pitts' head with the force involved was potentially lethal. *Id.*, at 1103.

The assault also resulted in a traumatic brain injury (TBI). 10 RP 1082. The assault resulted in injury to the frontal lobe of Pitts' brain. *Id.*, at 1090. The TBI resulted in a permanent disability to brain function. *Id.*, at 1101-1102. The brain injury was permanent. *Id.*, at 1104.

From this evidence, the jury could conclude that the defendant inflicted injuries that resulted in significant permanent loss or impairment of the function of any bodily part or organ. In this case, the permanent injury was to Pitts' brain.

b. Proof of intent.

Dr. Friedman also testified regarding the level of force that was used to inflict the injuries on Pitts. The injuries were the result of "severe" force. 10 RP 1077, 1093. The deformity of Pitts' face showed that "very significant" force had been applied. *Id.*, at 1091. The injuries showed that there were numerous blows. *Id.*, at 1093.

Numerous witnesses testified that the defendant and Pitts argued and fought. 4 RP 29, 86, 5 RP 142, 6 RP 283, 373, 7 RP 455, 8 RP 745, 807, 9 RP 937. The witnesses saw the defendant stomp on Pitts' head after Pitts was down on the pavement. 4 RP 88, 5 RP 142, 143, 6 RP 387, 8 RP 781, 811, 9 RP 937. They also saw that the defendant stomped on Pitts'

head anywhere from 3-10 times. 4 RP 33, 35, 92, 5 RP 145-146, 6 RP 283, 390, 7 RP 460, 8 RP 785, 809, 9 RP 937, 956.

From this evidence, the jury could conclude that the defendant had animosity toward Pitts. The two argued and fought outside the restaurant. The defendant admitted that he was angered by this exchange with Pitts. 7 RP 631. The jury could conclude from the means and manner that the defendant intended maximum injury. Pitts was unconscious and helpless on the pavement. The defendant stomped Pitts' head repeatedly while Pitts was down. The defendant used such force as to crush Pitts' eye socket.

Although the defendant argued at trial (11 RP 1184) and in now in his appeal (SAG at 5) that the manner of the blows were not intended to result in the requisite injury, the jury could and did conclude otherwise.

All of the above evidence is circumstantial evidence of intent. The State was not required to prove motive. *See Yarbrough*, 151 Wn. App. at 83; *State v. Boot*, 89 Wn. App. 780, 789, 950 P. 2d 964 (1998). The jury's verdict is supported by sufficient evidence.

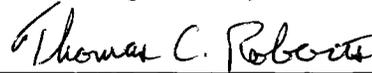
D. CONCLUSION.

The defendant received a fair trial where the trial court exercised great care in either eliminating or sanitizing all references to gang association of the participants and words used in their statements. Even if some of this evidence came before the jury, it was admissible under ER 404(b). The State proved all the elements of the charge beyond a

reasonable doubt. The State respectfully requests that the judgment be affirmed.

DATED: February 2, 2011

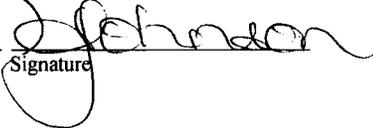
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WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

2/2/11 
Date Signature