

NO. 35630-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAQUARRA ST. MARIE SMITH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie a. Arend

No. 05-1-04870-2

BRIEF OF RESPONDENT

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

1. Did Detective Miller's testimony constitute manifest constitutional error when it was not an explicit statement on defendant's guilt? (Assignments of Error 3-4)
2. Was the prosecutor's questioning misconduct when it did not express a personal opinion about defendant's guilt? (Assignments of Error 6-7)
3. Did the lower court properly limit defense counsel from questioning the State's witness about the irrelevant subject of prostitution? (Assignments of Error 1-2)
4. Did defendant fail to preserve a claim of evidentiary error when she did not make an objection below? (Assignment of Error 5)
5. Has defendant failed to show he is entitled to relief under the cumulative error doctrine when there were no prejudicial errors? (Assignments of Error 8)

B. STATEMENT OF THE CASE.

On the morning of July 11, 2005, defendant SAQUARRA ST. MARIE SMITH, Tiffany Osborne and two other young women went to Ms. Naquin's house to confront her about some money she had allegedly

stolen from defendant. RP 250. Ms. Naquin's mother told the four young women that Ms. Naquin was not there, but the young women barged into the house anyway and searched to make sure Ms. Naquin was not there. RP 251. The young women left and found Ms. Naquin at an old boyfriend's house. RP 136-137. The young women asked if Ms. Naquin wanted to hang out. RP 136-137. Ms. Naquin indicated that she did and left willingly. RP 136-137, 252. The five young women drove over to another house together and walked in. RP 138. As the young women were walking down the hall, defendant pinned Ms. Naquin up against the wall and said that Ms. Naquin had stolen \$2,000 from defendant. RP 138.

Defendant grabbed Ms. Naquin by the throat and pushed her into a bedroom. RP 257. Defendant then pushed Ms. Naquin onto a bed and started punching and kicking Ms. Naquin. RP 257. Ms. Naquin felt she was getting hit in the head and put her hands over her head to protect herself. RP 141. Ms. Osborne also joined in and started punching and kicking Ms. Naquin. RP 257. Ms. Osborne kicked Ms. Naquin off the bed and onto the floor. RP 259. A minute or two into the attack, defendant picked up a full-size wooden baseball bat and began hitting Ms. Naquin. RP 258-259. Ms. Naquin heard a lot of dinging and thumping noises on her head. RP 138. While she was getting hit, Ms. Naquin blacked out. RP 144.

At some point, Ms. Osborne grabbed the bat from defendant and put it away. RP 254. Ms. Osborne then threw a broken chair at Ms.

Naquin. RP 254, 260. Ms. Naquin was screaming for help and finally one of the other young women let her out the back door. RP 254. Ms. Naquin was bleeding pretty badly from her head and hands. RP 262. Once she was outside, Ms. Naquin stumbled down the street yelling for help. RP 265.

Ms. Naquin made it to an acquaintance's house and was taken to Tacoma General Hospital. RP 146. She was bleeding a lot from her head and her hands were crushed and swollen. RP 147. Dr. John Bruce was the emergency room doctor that treated Ms. Naquin. RP 195. Dr. Bruce found that Ms. Naquin had broken her left middle finger in several places and had broken her right index finger. RP 200. Dr. Bruce also found a four and a half inch laceration on the right side of Ms. Naquin's head and contusion to her right shoulder. RP 199-200. Ms. Naquin's injuries were serious enough that Dr. Bruce ordered her to undergo a CAT scan and x-rays. RP 202. Dr. Bruce had to use staples to put Ms. Naquin's scalp back together. RP 203.

After a further investigation into the incident, defendant and Ms. Osborne were arrested. RP 80, 104. Ms. Osborn entered a plea of guilty to second degree assault. RP 247. On October 5, 2005, the State charged defendant with first degree assault while armed with a deadly weapon. CP 1-3. On August 14, 2006, the case came before the Honorable Stephanie Arend for a jury trial. RP 19. The State called the following witnesses: Tacoma Police Officer Larry Bornander (RP 56-66), Tacoma Police

Detective Gene Miller (RP 67-129), victim Nacole Naquin (RP 130-185), emergency room doctor John Bruce (RP 195-244), and defendant's co-assailant Ms. Osborne (RP 245-321). Defense counsel put on no witnesses, but cross examined all of the State's witnesses, including Ms. Osborne. RP 271-301, 312, RP 317-321. Defendant attacked Ms. Osborne's credibility in closing statements and argued that the evidence only warranted a second degree assault conviction. RP 354, 361. On August 16, 2006, the jury found defendant guilty of first degree assault and found that she was armed with a deadly weapon at the time of the commission of the crime. RP 384. On November 22, 2006, Judge Arend sentenced defendant to the low end of the standard sentencing range. RPII 13. Defendant filed a timely notice of appeal. CP 86-99.

C. ARGUMENT.

1. DETECTIVE MILLER'S TESTIMONY DID NOT CONSTITUTE MANIFEST CONSTITUTIONAL ERROR BECAUSE IT WAS NOT AN EXPLICIT STATEMENT ON DEFENDANT'S GUILT.
 - a. Only questions of "manifest" constitutional magnitude may be raised for the first time on appeal.

RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of "manifest" constitutional magnitude. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The Washington Supreme Court has rejected the

argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” Id. at 687 (citing Comment (a), RAP 2.5). Exceptions to RAP 2.5(a) must be construed narrowly. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

Appellate courts will not approve a party’s failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Scott, 110 Wn.2d at 685. Failure to object deprives the trial court of this opportunity to prevent or cure the error. State v. Kirkman, ___ Wn.2d ___, ___ P.3d ___ (2007).¹ The decision not to object is often tactical. Id. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. State v. Madison, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989).

“Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” WWJ Corp., 138 Wn.2d at 603. This reading of “manifest” is consistent

¹ 2007 Wash. LEXIS 210, 24.

with McFarland’s holding that exceptions to RAP 2.5(a) are to be construed narrowly. WWJ Corp., 138 Wn.2d at 603. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted. Id. at 602; McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. McFarland, 127 Wn.2d at 333; State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

- b. In order to constitute “manifest” constitutional error, improper opinion testimony needs to be an explicit or almost explicit statement.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error.² See Kirkman (holding that opinion testimony relating only indirectly to a victim’s credibility, if not objected to at trial,

² Improper opinion testimony violates the defendant’s constitutional right to a jury trial by invading its fact-finding province. State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Washington courts view conservatively claims that testimony constitutes an opinion on guilt. Id. at 579. Testimony that does not directly comment on the defendant’s guilt or the veracity of a witness is helpful to the jury and is based on inferences from the evidence is not improper opinion testimony. Id. at 578. “The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” Id. at 579.

does not give rise to a “manifest” constitutional error).³ “Manifest error” requires an explicit or almost explicit witness statement on an ultimate issue of fact. *Id.* (citing *WWJ Corp.*, 138 Wn.2d at 603). Further, many courts have held that where there is no explicit statement that the witness believes another person’s account, there is no error. *State v. King*, 131 Wn. App. 789, 797, 130 P.3d 376 (2006); *State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006).

In this case, the testimony in question did not express Detective Miller’s personal opinion as to defendant’s guilt or innocence. The State asked Detective Miller, “[b]ased on the information in the montage procedure, what happened next?” RP 79. Detective Miller responded, “I believed -- I developed probable cause for the arrest of Ms. Smith, and notified our patrol officers of same and documented my investigation at that point forward to the prosecutor’s office in an attempt to get a warrant for her arrest.” RP 79.

First, there was no reason for defendant’s counsel to object to this statement because the nature of the testimony was not a direct comment on defendant’s guilt and the testimony described the detective’s steps in his investigation. Under defendant’s theory the State would be barred from saying a defendant was arrested as that would be an improper comment on

³ 2007 Wash. LEXIS 210, 27-28.

guilt. However, stating there was probable cause to arrest a defendant is far from saying there was evidence sufficient to convict her beyond a reasonable doubt. In this case, the jury was instructed to, “[k]eep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true.” CP 44-67 (Jury Instruction 1). Moreover, since this was not an explicit statement expressing the detective’s opinion it does not constitute manifest error. Therefore, the court should not consider this issue for the first time on appeal.

2. THE PROSECUTOR’S QUESTIONING WAS NOT MISCONDUCT BECAUSE IT DID NOT EXPRESS A PERSONAL OPINION ABOUT DEFENDANT’S GUILT.

To obtain reversal of a conviction on the basis of such prosecutorial misconduct, a defendant must show the prosecutor’s conduct was improper and the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). A prosecutor’s remarks “must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). It is improper for a prosecutor to express his personal opinion about the credibility of a witness and the guilt or

innocence of the accused in jury argument. State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984).

In this case, the prosecutor's questioning was appropriate and did not express a personal opinion about defendant's guilt. During the trial the prosecutor started asking Ms. Osborne, "At any point during the assault after the point where the assault occurred..." RP 256. Defense counsel objected to the categorization of assault arguing that it was a legal conclusion. RP 256. The prosecutor responded that Ms. Osborne had been convicted of assault. RP 256. The court overruled the objection and allowed the State to continue. RP 256. The prosecutor then asked, "At any point during the assault and the assault that you committed and that the defendant is on trial for, was [Ms. Naquin] able to say anything?" RP 256.

Given the evidence addressed in questioning Ms. Osborne and the issues in dispute in the case, it is clear that the prosecutor did not commit misconduct. The evidence addressed in questioning Ms. Osborne revealed that Ms. Osborne had pled guilty to second degree assault for her actions during the incident in question. RP 247. Therefore, it was appropriate for the prosecutor to use the term assault when asking Ms. Osborne what she remembered during the incident. Moreover, defendant provides no authority that the prosecution or witnesses cannot use general vocabulary terms that are also the names of crimes.

Further, the main issue in this case was not whether an assault had been committed, but whether first degree assault had been committed. Defendant's theory of the case admitted she had committed assault. In closing, defense counsel stated, "... the rest of the evidence will probably support assault 2.... Look again at all the evidence and come back with an Assault 2 conviction..." RP 361. Therefore, even if it were misconduct for the prosecutor to use the term assault, defendant has failed to show the prejudicial effect of the conduct. This court should find that the comment had no prejudicial effect on the trial because it was not disputed that an assault had occurred.

3. THE COURT PROPERLY LIMITED THE SCOPE OF CROSS-EXAMINATION BY PROHIBITING DEFENSE COUNSEL FROM QUESTIONING THE STATE'S WITNESS ABOUT THE IRRELEVANT SUBJECT OF PROSTITUTION.

A trial court's admission or exclusion of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 135 L. Ed. 2d 1084 (1996). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). The appellant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). Generally, the trial court has broad discretion to admit or

exclude evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). The scope of cross examination lies within the sound discretion of the trial court. ER 611(b); State v. Hoffman, 116 Wn.2d 51, 96, 804 P.2d 577 (1991). A court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution grant a criminal defendant the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) and Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). A defendant may cross-examine the State's witnesses to show bias, motive, or lack of credibility, but he may not bring in irrelevant evidence. Davis, 415 U.S. at 316-18; ER 402, 607. Moreover, a defendant does not have "an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Jones, 67 Wn.2d 506, 512, 408

P.2d 247 (1965); State v. Knapp, 14 Wn. App. 101, 540 P.2d 898 (1975).

The court properly limited the scope of cross-examination by prohibiting defense counsel from questioning Ms. Osborne about the irrelevant subject of prostitution. Relevant evidence is evidence that has any tendency to make the existence of a fact of consequence to the determination of the action more or less probable. ER 401. The issue of whether or not Ms. Osborne was involved in some alleged later prostitution did not prove or disprove any facts concerning defendant's charge of first degree assault.

In her brief, defendant alleges (1) that she was prevented from cross-examining Ms. Osborne about leaving the state in violation of her conditions of release (Appellant's Brief at 11); and (2) that Ms. Osborne was likely avoiding further criminal prosecution (e.g. for prostitution) because she testified favorable for the State (Appellant's Brief at 12). Defendant is barred from arguing for the first time on appeal that she was prevented from cross-examining Ms. Osborne about leaving the state in violation of her conditions of release. Appellant's Brief at 11. Defendant fails to point out in the record where defense counsel attempted to ask Ms. Osborne a specific question about leaving the state in violation of her conditions of release. At trial, defense counsel did ask, "Now, you're also being investigated for other problems?" RP 301. The ten pages of discussion following that question (RP 301-311) indicate that defense counsel was referring to an investigation about prostitution and not about

an investigation into her leaving the state in violation of her conditions of release. Because she never asked a question about Ms. Osborne leaving the state in violation of her conditions of release, the facts necessary to adjudicate this claimed error are not in the record. Accordingly, the issue is not preserved for review.

Further, the allegation that Ms. Osborne was likely avoiding criminal prosecution for prostitution does not find adequate support in the record. The State corrected a similar suggestion from defense counsel at trial by stating that Ms. Osborne was “not being investigated for anything associated with the plea agreement... She was the victim of child prostitution out of state for transporting a minor out of state for purposes of prostitution.” RP 302. The State went on to say, “at no point in this plea agreement can you read into it that Ms. Osborne is being investigated because of wrong doing on her part in the sense of she’s the subject of the investigation such that charges are going to be brought potentially against her.” RP 308. These statements informed the court that the plea agreement did not address filing prostitution charges against Ms. Osborne. Because Ms. Osborne’s culpability for prostitution was not part of the conditions of the plea agreement, it was not a relevant topic to inquire about on cross-examination.

At trial, defense counsel also attempted to argue that Ms. Osborne’s alleged prostitution was nonetheless admissible under ER 608 and 609. RP 309. As the State pointed out at trial, ER 609 deals with

convictions and is not applicable. RP 309. ER 608(b) provides that specific instances of a witness's conduct, introduced for purposes of attacking the witness's credibility, may not be proved by extrinsic evidence, but may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness." ER 608(b). In exercising its discretion, the trial court may consider whether the instance of the witness's misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial. State v. O'Connor, 155 Wn.2d 335, 349, 119 P.3d 806 (2005).

The court ruled that ER 609 was not applicable because there was nothing about the alleged prostitution that made it an "issue of truthfulness or untruthfulness." RP 311. This was not an abuse of discretion considering that many courts have found that the law should not recognize any necessary connection between a witness's veracity and her sexual immorality. State v. Thompson, 59 Wn.2d 837, 844, 370 P.2d 964 (1962); See also Dewey v. Funk, 211 Kan. 54, 57-58, 505 P.2d 722 (1973); Riddle v. State, 92 Okl.Cr. 397, 411 223 P.2d 379 (1950). In sum, the court properly limited the scope of cross-examination by prohibiting defense counsel from questioning Ms. Osborne about the irrelevant subject of prostitution.

Moreover, defendant fully exercised her right to cross examine the State's witness. The record contains over 30 pages of defense counsel

cross-examining Ms. Osborne (RP 271-301, 312) and four pages of recross-examination (RP 317-321). At one point during the cross-examination the State objected that defense counsel was not asking new questions and was just repeating what had been answered. RP 287. Defense counsel responded that he was, “assisting the jury in understanding the specific facts and the specific sequence of events...” RP 287. The court overruled the objection and allowed defense counsel’s detailed cross-examination to continue. RP 287.

Defense counsel was also able to question Ms. Osborne about her alleged bias and motive resulting from her plea deal. Defense counsel asked Ms. Osborne how much time she would have faced if she had not assisted the State. RP 301. Ms. Osborne responded that the maximum was 13 years. RP 301. After establishing that by cooperating with the State Ms. Osborne would instead only have to serve four years, defense counsel asked, “Big difference between four years and 13 years, isn’t it?” RP 301. Ms. Osborne answered, “Yes.” RP 301. In closing, defense counsel returned to Ms. Osborne’s plea agreement to attack her credibility. In closing, defense counsel stated that taking the State’s plea was going to save Ms. Osborne “a big chunk of time” and that would be motivation for her to “fabricate,” “spin,” “exaggerate,” and “commit hyperbole.” RP 354. In sum, defendant was able to cross examine Ms. Osborne and refer back to that cross-examination to thoroughly attack Ms. Osborne’s credibility in closing.

4. DEFENDANT WAIVED HER RIGHT TO APPEAL AN EVIDENTIARY ERROR WHEN SHE DID NOT OBJECT.

“Under ER 103, an objection must be made to preserve an evidentiary error for appeal.” State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995). Moreover, erroneous admission of ER 404(b) is not error of constitutional magnitude, and may not be raised for the first time on appeal under RAP 2.5(a). State v. Everybodytalksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002).

In this case, defendant challenges statements made by Detective Miller about looking at defendant’s criminal history as constituting improper ER 404(b) evidence. (Appellant’s Brief at 20). At trial Detective Miller was asked, “What did you do after you determined that Saquarra Smith was a suspect?” RP 76. Detective Miller answered, “Obtained a photo montage that included her, looked at her criminal history, wanted to see if there was in fact some association that was consistent with what I had been provided because I had been provided a physical description of the residence and information about a boyfriend and that type of thing.” RP 76. Detective Miller did not explain what the defendant’s criminal history consisted of or whether it was indeed consistent with her current crime. RP 76. There was no objection to this testimony. RP 76. Consequently, defendant is barred from arguing this issue because she did not object and preserve it for appeal.

5. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE BECAUSE THERE WERE NO PREJUDICIAL ERRORS.

The cumulative error doctrine applies only where there have been several trial errors that alone may not be sufficient to justify reversal but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 928, 10 P.3d 390 (2000). Cumulative error does not turn on whether a certain number of errors occurred. Compare State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial. The defendant is not entitled to a new trial when the errors had little or no effect on the outcome of the trial. Greiff, 141 Wn.2d at 928. Errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990)(defendant was not deprived of a fair trial where no prejudicial error occurred).

Defendant has not established that several prejudicial errors occurred at her trial. In this case, neither the State nor the State's

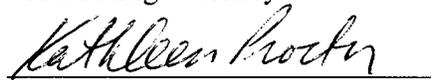
witnesses offered improper opinion testimony. Moreover, the trial court properly limited the scope of cross-examination. At most defendant raises one questionable statement about a general reference to her criminal history. As discussed above, defendant waived this issue by not objecting. Even if this court finds that was an error, a complete review of the record shows it was an isolated incident that could not have constituted egregious circumstances that denied defendant a fair trial.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this court affirm defendant's conviction.

DATED: MAY 16, 2007

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Pierce County
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Levi Larson
Rule 9

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.

5/16/07
Date

Johnson
Signature