

Original

No. 35895-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Hurn,

Appellant.

STATE OF WASHINGTON
BY *C. M. Mistry*
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Jefferson County Superior Court

Cause No. 06-1-00179-1

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Hurn's constitutional right to due process by giving an erroneous reasonable doubt instruction.
2. The court erred by giving Instruction No. 4, which reads as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 4, Supp. CP.

3. The trial court erred by equating a "reasonable doubt" with a "real possibility" that Mr. Hurn was not guilty.
4. The trial court erred by explaining "reasonable doubt" in terms of "possible doubt" without clarifying that phrase.
5. The prosecutor committed misconduct requiring reversal.
6. The prosecutor committed misconduct that was flagrant and ill-intentioned.
7. The prosecutor committed misconduct that created a manifest error affecting Mr. Hurn's constitutional right to due process.

8. The prosecutor committed misconduct by eliciting inadmissible evidence.
9. The prosecutor committed misconduct by inviting the jury to convict Mr. Hurn on an improper basis.
10. The prosecutor committed misconduct by injecting her personal opinion on Mr. Hurn's credibility.
11. The prosecutor committed misconduct by injecting into the trial her personal opinion on Mr. Hurn's guilt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Richard Hurn was charged with Possession of a Controlled Substance and with Refusal to Give Information to or Cooperate with Officer. At the conclusion of trial, instead of giving the standard pattern instruction on reasonable doubt, the court gave an instruction which included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

1. Did the court's instruction on reasonable doubt violate Mr. Hurn's constitutional right to due process? Assignments of Error Nos. 1-3.
2. Did the court's instruction erroneously equate a "reasonable doubt" with a "real possibility" that Mr. Hurn was not guilty? Assignments of Error Nos. 1-3.

3. Did the court's instruction erroneously permit the jury to convict unless there was "substantial doubt" about Mr. Hurn's guilt? Assignments of Error Nos. 1-3.

At trial, the prosecutor elicited testimony that Mr. Hurn had a loaded handgun at the time he was contacted by police. She also established that he'd been convicted of Negligent Driving and DUI, and implied that he'd been convicted of other, more serious traffic offenses. She also elicited testimony that he had two warrants for his arrest at the time he was contacted by police. None of this evidence was relevant to any issue at trial.

During closing, she highlighted this evidence, and made statements injecting her own opinions on Mr. Hurn's credibility and his guilt.

4. Did the prosecutor commit misconduct requiring reversal of Mr. Hurn's conviction? Assignments of Error Nos. 4-10.

5. Did the prosecutor improperly introduce testimony that she knew to be inadmissible? Assignments of Error Nos. 4-10.

6. Did the prosecutor improperly invite the jury to convict Mr. Hurn on improper grounds? Assignments of Error Nos. 4-10.

7. Did the prosecuting attorney improperly inject her own opinion into the case during closing arguments? Assignments of Error Nos. 4-10.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On October 28, 2006, Richard Hurn was driving his pick-up truck in Port Townsend. An officer drove by him, ran his plates, and was informed that the registered owner of the vehicle had a suspended driver's license. RP 90- 91. Mr. Hurn was stopped, wearing a bandana over his nose and mouth as well as a cowboy hat. RP 92. He asked for an attorney repeatedly, and would not answer questions about his name. RP 97-100. He was eventually taken into custody, gave his name, and was arrested for DWLS 3 and Obstructing. RP 98-99. A search of his clothing at the jail revealed a small bindle of methamphetamine. RP 172.

Richard Hurn was charged with Possession of a Controlled Substance (Methamphetamine), Driving While License Suspended in the Third Degree, and Obstructing an Officer. Supp. CP, Information. The Obstructing charge was amended to Refusal to Give Information. CP 3. Mr. Hurn moved to suppress all evidence after he requested an attorney, and the court denied the motion. RP 29-64. He plead guilty to DWLS 3, and the remaining two charges proceeded to jury trial beginning January 29, 2007. RP 86, 74.

The state elicited from the arresting officers that Mr. Hurn, who had a concealed weapons permit, had a loaded gun upon his arrest. RP 95,

120. During cross-examination of Mr. Hurn, the state presented evidence that Mr. Hurn had been convicted of Negligent Driving and Driving Under the Influence. RP 231. The state then alluded to more serious offenses with an unanswered question. RP 231-232. The state asked Mr. Hurn if he had two warrants at the time, and he said that he did. The defense did not object to this testimony. RP 232. The prosecutor highlighted each of these allegations during the closing argument (RP 271, 264-272), and also stated as follows:

I think the State believes that [the] officers' reactions to the defendant were correct... There is no conspiracy here... There is no conspiracy here...The idea that [the officer would steal from Mr. Hurn or plant evidence] is repugnant to the State... [S]omehow, Officer Krysinski, in the course of all this activity [planted drugs on Mr. Hurn] in full view of six other officers? I don't think so. RP 268, 270-271, 280.

The defense did not object to any of the state's closing argument. RP 265-272, 278-281.

At trial, the court gave an instruction on reasonable doubt, without objection, that included the following:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is

not guilty, you must give him the benefit of the doubt and find him not guilty.
Supp. CP, Instruction No. 4.

The jury convicted Mr. Hurn as charged, and he was sentenced on February 2, 2007. RP 284-285, CP 4-14. This timely appeal followed. CP 15.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. HURN'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY GIVING AN ERRONEOUS INSTRUCTION ON REASONABLE DOUBT.

In a criminal case, the jury must be instructed that the state has the burden to prove each essential element of the crime beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard “provides concrete substance for the presumption of innocence,” which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363; *see also Sullivan v. Louisiana, supra*.

An instruction defining reasonable doubt is erroneous if there is a reasonable likelihood that the jury applied it in an unconstitutional manner. *Victor v. Nebraska*, 511 U.S. 1 at 6, 114 S. Ct. 1239, 127 L. Ed.

2d 583 (1994). An error defining reasonable doubt can never be harmless error. *Sullivan v. Louisiana, supra*. The constitution does not require a trial court to define reasonable doubt; however, any definition must not diminish the state's burden of proof. *Victor v. Nebraska, at 5; Cage v. Louisiana, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).*

In *Victor v. Nebraska*, the Supreme Court made clear that the phrase "possible doubt" could be included in an instruction defining reasonable doubt so long as the context required the word "possible" to mean "imaginary" or "fanciful." Cases interpreting similar instructions have followed the Supreme Court's requirement that the context clarify any ambiguities. See, e.g., *United States v. Rodriguez*¹, 162 F.3d 135 at 146 (1st Cir., 1998); *Tillman v. Cook*², 215 F.3d 1116 at 1125-1126 (10th

¹ "[T]he instructions overall left the jury with an accurate impression of the presumption of innocence and of the substantial burden faced by the prosecution," because the phrase "real possibility" was given substance in part by the sentence "Everything in our common experience is open to some possible or imaginary doubt".

² The instruction explicitly distinguished a "real, substantial doubt" from one that is "merely possible or imaginary".

Cir., 2000); *Commonwealth v. Murphy*³, 559 Pa. 71 at 84, 739 A.2d 141 (1999).

In this case, the trial court gave an instruction on reasonable doubt that included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.
Instruction No. 4, Supp. CP.

This language is identical to that used in the so-called *Castle* instruction. *See State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, *review denied* 133 Wn.2d 1014 (1997). The court did not provide instructions defining the phrases "real possibility" and "possible doubt." Court's Instructions, Supp. CP. The first of these two phrases calls to mind the instruction rejected by the Supreme Court in *Cage v. Louisiana*, *supra*,

³ The phrase "substantial doubt" was acceptable because it was "invoked only as a comparison to possible or imaginary doubt."

with its emphasis on “grave” or “substantial” doubt. The second phrase closely parallels the concept being defined-- “reasonable doubt” itself-- yet the instruction provides no guidance for distinguishing between a “reasonable doubt” and a “possible doubt.” Furthermore, instead of presenting the state’s burden in an affirmative manner, the definition focuses on what the prosecutor need *not* do (“the law does not require proof that overcomes every possible doubt.”) The effect of this is to detract from the serious and heavy burden that the state does bear.

The instruction does not contain words like “imaginary” or “fanciful,” which saved similar language in *Victor v. Nebraska, supra*. Instead, the instruction relies on the phrases “firmly convinced,” “absolute certainty,” and “benefit of the doubt” to provide context to the “real possibility” and “possible doubt” language. These three phrases provide the context within which the questionable language should be analyzed. *Victor v. Nebraska, supra*.

To satisfy the reasonable doubt standard, the evidence must meet “the highest burden possible.” *In re Young*, 122 Wn.2d 1 at 39, 857 P.2d 989 (1993). To adequately convey the reasonable doubt standard, any definition must make apparent to the jury that conviction requires proof

that is more than clear, cogent, and convincing.⁴ See *Cage v. Louisiana*, *supra*; *In re Winship*, *supra*; *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The language here fails to meet that standard.

First, although use of the words “firmly convinced” does not necessarily reduce the prosecution’s burden (*see, e.g., Hunt, supra*, at 539), one may be “firmly convinced” by evidence that is merely “clear, cogent, and convincing.” *See, e.g., Cooke v. Cain*⁵, 35 Wash. 353 at 363-364, 77 Pac. 682 (1904); *Lifescan, Inc. v. Home Diagnostics, Inc.*⁶, 103 F. Supp. 2d 345 at 378 n. 6 (D. Del. 2000). Because of this, the phrase “firmly convinced” cannot be used to clarify what is meant by “real possibility” and “possible doubt.”

Second, to say that proof need not provide “absolute certainty” about a defendant’s guilt does nothing to distinguish between proof by a preponderance, proof that is clear, cogent, and convincing, and proof

⁴ But see *State v. Hunt*, 128 Wn. App. 535, 116 P.3d 450 (2005), in which Division III found that the instruction at issue here “accurately informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, but need not necessarily prove its case by an absolute certainty.” *Hunt*, at 540.

⁵ A factfinder may be “firmly convinced” by evidence that “is ‘clear, cogent, and convincing,’ even though it be the testimony of a party only.”

⁶ Quoting with approval an instruction reading in part “You must be firmly convinced that the fact is indeed true in order to meet the clear and convincing burden.”

beyond a reasonable doubt. One need not have “absolute certainty” to meet any of these standards.

Third, the phrase “benefit of the doubt” conveys a similar idea to the very low preponderance standard. Requiring jurors to give a defendant the “benefit of the doubt” suggests that close cases-- cases in which neither side has a clear preponderance-- must result in acquittals. The clear implication is that where the preponderance favors the state, a jury is permitted to convict, even in the absence of proof beyond a reasonable doubt.

Because the context does not properly clarify the phrases “possible doubt” and “real possibility,” the instruction is unconstitutional. Despite this, many cases have erroneously upheld similar instructions.⁷ But as used in the prosecutor’s instruction in this case, the phrases “possible doubt” and “real possibility” are equivalent to the language rejected by the U.S. Supreme Court in *Cage*. Under the court’s erroneous instruction, the jury here was obliged to find the defendant guilty unless their doubt was sufficiently substantial to be considered “real.” As a result, it is

⁷ In Washington, all three divisions of the Court of Appeals have upheld the instruction. *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014 (1997); *State v. Hunt*, supra; *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006).

reasonably likely that the jury used an unconstitutional standard to evaluate the evidence.

The validity of the *Castle* instruction is currently pending before the Washington State Supreme Court. *State v. Bennett*, No. 78377-2. If the Supreme Court determines that the instruction is invalid, then reversal will be required in this case.

II. THE PROSECUTOR COMMITTED MISCONDUCT REQUIRING REVERSAL.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused's right to a fair trial. *Boehning, supra, at 518*. Prejudice is established whenever there is a substantial likelihood that instances of misconduct affected the jury's verdict. *Boehning, supra, at 518*. Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794 at 804-805, 998 P.2d 907 (2000).

Under certain circumstances, prosecutorial misconduct may be reviewed even absent an objection from defense counsel. Misconduct to which no objection was made requires reversal (1) if it is so flagrant and

ill-intentioned that a curative instruction would not have remedied the prejudice, or (2) if it creates a manifest error affecting a constitutional right, and the state is unable to prove that the error is harmless beyond a reasonable doubt. *Boehning, supra*, at 518; RAP 2.5 (a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988).

A. The prosecutor committed misconduct by introducing and arguing inadmissible propensity evidence.

It is misconduct for a prosecutor to attempt to elicit testimony that she knows (or should know) is inadmissible. *See State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (prosecutor committed misconduct by eliciting prejudicial information not permitted under ER 609); *see also State v. Jungers*, 125 Wn. App. 895 at 903, 106 P.3d 827 (2005).

Similarly, it is improper to “[invite] the jury to determine guilt based on improper grounds.” *Boehning, supra*.

Evidence of prior crimes or “bad acts” is inadmissible to show criminal propensity. ER 404(b); *State v. Sanford*, 128 Wn. App. 280, 115 P.3d 368 (2005). *State v. Acosta*, 123 Wn. App. 424, 98 P.3d 503 (2004). Furthermore, evidence is inadmissible if it is irrelevant, or if its probative value is substantially outweighed by the danger of unfair prejudice. *See* ER 401, ER 402, *and* ER 403.

Here, the prosecutor improperly elicited and argued evidence that Mr. Hurn was guilty because he had a propensity toward criminal acts. First, during her examination of Officer Krysinski, she elicited testimony that Mr. Hurn's gun was loaded at the time he was contacted by police. RP 95. This information was unknown to the police at the time of their initial contact, and was inadmissible at trial. ER 402, ER 403, ER 404(b). Second, during her cross-examination of Mr. Hurn, the prosecutor elicited that he'd been convicted of negligent driving and DUI, and implied that he'd been convicted of "some other driving offenses... of additional serious, more serious than Driving While License Suspended Second." RP 231. She went on to elicit that he had two warrants for his arrest-- evidence that the court had provisionally suppressed prior to trial. RP 67-70, 232. None of this information was admissible at trial. ER 402, ER 403, ER 404(b).

During closing, the prosecutor highlighted this evidence, implicitly inviting the jury to convict Mr. Hurn based on a propensity toward criminal activity:

[T]hey were also some other issues [sic] that the defendant mentioned in his testimony, that he had warrants out for his arrest... [I]t's illegal to have a loaded weapon... Defendant freely admits that that's how he travels, and I think the State believes that [the] officers' reactions to the defendant were correct... Defendant admitted that he's been stopped before. Took him a while to admit

why he's been stopped before. But, eventually he admitted that he's been stopped before.
RP 265, 268, 271.

These comments were improper and prejudicial, and suggested to the jury that Mr. Hurn was guilty for reasons unrelated to the evidence. His convictions must be reversed and the case remanded for a new trial.
Sanford, supra; Boehning, supra.

B. The prosecutor committed misconduct by injecting her personal opinion into the case, vouching for the testimony of the officers, and exposing the jury to facts not in evidence.

A prosecutor may not express a personal opinion as to the credibility of a witness or the guilt of the accused. *State v. Horton*, 116 Wn. App. 909 at 921, 68 P.3d 1145 (2003); *U.S. v. Frederick*, 78 F.3d 1370 at 1378 (9th Cir. 1996), *citing United States v. Roberts*, 618 F.2d 530 at 533 (9th Cir.1980), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Misconduct occurs when it is clear that counsel is expressing a personal opinion. *State v. Price*, 126 Wn. App. 617 at 653, 109 P.3d 27 (2005); *State v. Trout*, 125 Wn. App. 403, 105 P.3d 69 (2005).

During closing arguments in this case, the prosecutor made several statements expressing her personal opinion about the case:

I think the State believes that [the] officers' reactions to the defendant were correct... There is no conspiracy here... There is no

conspiracy here...The idea that [the officer would steal from Mr. Hurn or plant evidence] is repugnant to the State... [S]omehow, Officer Krynski, in the course of all this activity [planted drugs on Mr. Hurn] in full view of six other officers? I don't think so. RP 268, 270-271, 280.

By attributing feelings to “the state” and by using the pronoun “I,” the prosecutor clearly expressed her personal opinion about Mr. Hurn’s credibility and his guilt. The conviction must be reversed and the case remanded for a new trial. *Price, supra*.

C. In the alternative, Mr. Hurn was denied the effective assistance of counsel when his attorney failed to object and request a curative instruction to negate the prosecutor’s repeated instances of misconduct.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

The failure to object to prosecutorial misconduct can constitute ineffective assistance of counsel under the Sixth Amendment. U.S. Const. Amend. VI; *State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (2003).

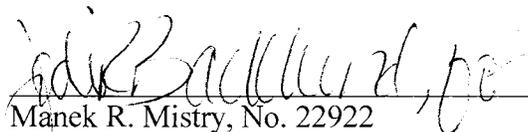
Here, there was no strategic reason for defense counsel's failure to object to the numerous instances of prosecutorial misconduct and failure to request a curative instruction to counter the effect of the misconduct. In the absence of a curative instruction, the jury was likely swayed by the prosecutor's use of inadmissible evidence and her improper argument during closing. Defense counsel's failure to object and request a curative instruction prejudiced Mr. Hurn. His convictions for Possession of a Controlled Substance and for Refusal to Give Information must be reversed and the case remanded for a new trial. *Horton, supra*.

CONCLUSION

For the foregoing reasons, Mr. Hurn's convictions on Counts III and I must be reversed and the case remanded to the Superior Court for a new trial.

Respectfully submitted on June 6, 2007.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

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

Richard Hurn
General Delivery
Joyce, WA 98343

and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368-0920

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

All postage prepaid, on June 6, 2007.

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

Signed at Olympia, Washington on June 6, 2007.



Jodi R. Backlund, No. 22917
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