

No. 35899-9-II



IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

K.M.S.,

Appellant

REPLY BRIEF OF APPELLANT

On Appeal from the Superior Court of Pierce County
The Hon. James Orlando, Presiding

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ORIGINAL

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A. ISSUES IN REPLY

1. Is there any merit to the State's claim that Appellant Kuhyar Sajjadi "failed to support his assignment of error with citations to the record, argument or authority?" Brief of Respondent at 1.
2. Can a trial court's failure to make findings about the mental state element of a crime be cured by looking at a conclusion of law which is itself simply a conclusory statement in the language of the statute?
3. Where the trial court specifically did not base a finding of guilt on the allegation that Kuhyar Sajjadi broke Jason Halter's nose, is it proper for the State to argue that the trial court's findings are supported by the evidence of a broken nose?
4. Was there substantial evidence to support the findings of fact that the trial court actually entered, as opposed to the findings of fact that the State on appeal wishes were entered?
5. Was there sufficient evidence to support a conviction?
6. Has Kuhyar Sajjadi made an objection to "venue" or is his argument based upon a lack of jurisdiction?
7. Can the issue of jurisdiction be "waived?"

B. ARGUMENT

1. The State’s Argument that Kuhyar Sajjadi Did not Support His Assignments of Error with Citations to the Record, Argument or Authority is Itself Not Supported by Citations to the Record, Argument or Authority

The State argues that Findings of Fact “3” and “5”¹ should be treated as verities on appeal because Kuhyar Sajjadi “failed to support his assignment of error with citations to the record, argument, or authority.” Brief of Respondent at 1. This argument is puzzling.

Kuhyar Sajjadi assigned error to Finding of Fact III, in which the trial court found that “all relevant events occurred in Pierce County.” Opening Brief of Appellant at 1. At pages 9-11, Mr. Sajjadi detailed the “Facts Related to Jurisdiction,” again mentioning Finding of Fact III and listing a witness-by-witness recitation of the evidence as it related to the location of the alleged assault.

In the argument section of the Opening Brief, Kuhyar Sajjadi addressed Finding of Fact III at pages 25 to 28. He argued that both this particular finding and Conclusion of Law I (in which the court concluded it had “jurisdiction of the parties and subject matter”) “are not supported

¹ Presumably Findings of Fact III and V.

by the record.” Opening Brief of Appellant at 25. He argued: “Because there was no evidence that the alleged assault even occurred within the State of Washington, the conviction should be reversed and the charge dismissed.” Id. Kuhyar Sajjadi then argued this point, citing and discussing relevant statutes and case law, and discussing how “there was no testimony as to the location of Lakeridge Middle School.” Id. at 25-28.²

² Kuhyar Sajjadi went on to argue:

While a Pierce County Sheriff’s deputy went to the school and took statements, and the record contains evidence that both Kuhyar Sajjadi and Jason Halter resided in Bonney Lake, there was no substantive evidence, admitted at trial, as to the location of the school.

Opening Brief of the Appellant at 28. The record citations to support the fact that a Pierce County Sheriff’s deputy went to some school (actually with different names) and that Kuhyar and Jason resided in Bonney Lake are contained in the fact section. Opening Brief at 9-11. There is no need to repeat the citations to the record, although if this is helpful:

Testimony that the incident took place at “Lakeridge Middle School” is located at RP 15, 130. Testimony that the incident took place at “Lakeridge Junior High” is located at RP 55. Testimony that the incident took place at “Lakeridge School” is located at RP 121. Brad Paasch testified that the school was Lakeridge “junior high, but not it’s middle.” RP 34. Testimony that Ken Solbrack is an “investigator” for the Pierce County Sheriff’s Department and that he took statements at the school is located at RP 14-15.

Brad Passch’s address was listed as “19514 67th St. e.” Ex. 1. Kuhyar Sajjadi’s address was on listed as 7509 N. Tapps Highway in Bonney Lake, Washington. Ex. 2; RP 120, 129. Jason Halter’s address was listed on Ex. 4 as 17906 82nd St. E., Bonney Lake, WA, although it is not clear if the trial court excluded this portion of Ex. 4 in addition to the medical evidence.

(continued...)

As for Finding of Fact V, here the trial court found that Kuhyar Sajjadi had inflicted substantial bodily harm on Jason Halter, listing the ways in which this occurred. Kuhyar Sajjadi assigned error to this finding at page 1 of the Opening Brief, and discussed this finding in the fact section of the brief. Opening Brief at 4. Kuhyar Sajjadi then discussed the facts in great detail at pages 5-9 of the Opening Brief.

In the argument section, Kuhyar Sajjadi attacked Finding of Fact V, stating that the finding is erroneous, following this conclusion with citations to cases dealing with substantial evidence generally. Opening Brief at 21. Kuhyar Sajjadi then offered about four pages of legal argument, discussing the facts, making citations to the record, and discussing the case law. Opening Brief at 21-25.

The argument that Kuhyar Sajjadi did not support his assignment of error with citations to the legal record or legal authority can only have been made by someone who did not read the brief.

²(...continued)

In any case, there cannot be a citation to the record for the fact that the record does not contain any evidence that Lakeridge (Middle or Junior High) School was in the State of Washington. The lack of evidence is the reason why there can be no citation to the record.

Ultimately, the issue is whether the nature of the challenge is clear and whether the challenged findings are, in fact, set out in the brief. State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981).

2. **Conclusion of Law II Cannot Cure the Failure to Make Factual Findings on a Mental State**

The State obviously recognizes that the trial judge failed to make factual findings on the issue of Kuhyar's mental state.³ The State's only argument in this regard is to point to Conclusion of Law II in which the trial court merely repeated the statutory language of the assault statute. The State argues that this Court should treat the trial court's conclusion of law as a finding of fact that Kuhyar acted recklessly. Brief of Respondent at 13. This argument should be rejected.

To be sure, a finding that is incorrectly designated as a conclusion should still be reviewed as a finding, Hoel v. Rose, 125 Wn. App. 14, 18, 105 P.3d 395 (2004), and a conclusion incorrectly designated as a finding should still be reviewed as a conclusion. State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993). "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." State v. Williams, 96 Wn.2d at 221 (interior quotations omitted).

Here, the key issue is what mental state Kuhyar had when he hit the larger boy in the classroom. While the trial court obviously concluded that

³ The findings were prepared and presented by the State.

Kuhyar acted “recklessly,” the court articulated no reasoning in Conclusion of Law II about Kuhyar’s thought processes that would support a conclusion that acted “recklessly.” Conclusion of Law II is therefore really a conclusion, and is not a finding of fact.

As the State itself recognizes, a “person acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man [sic] would exercise in the same situation. . . . Reckless conduct carries both objective and subjective components . . . Whether an act is reckless depends on both what [a] defendant knew, and how a reasonable person would have acted knowing these facts.” Brief of Respondent at 10-11.

Nothing about Conclusion of Law II reveals any factual findings on these key issues. There is no discussion in Conclusion of Law II about what Kuhyar knew and how a reasonable person would have acted knowing these facts. Just stating that the State had proven the statutory elements is insufficient to reveal “an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together

with a knowledge of the standards applicable to the determination of those facts.” Groff v. Dep’t of Labor and Industries, 65 Wn.2d 35, 40, 395 P.2d 633 (1964).⁴

By way of contrast to the paucity of factual findings in this case are the findings regarding recklessness discussed in State v. Graham, 153 Wn.2d 400, 103 P.3d 1238 (2005). In that case, a juvenile had been convicted of reckless endangerment (and vehicular homicide). The Supreme Court affirmed the convictions, holding that the following findings were sufficient:

12. Prior to the accident, the respondent had passed driver's education, in which the respondent had been instructed as to the hazards of driving at excessive speeds, in an inattentive manner, and recklessly. *She knew that not following these instructions created a dangerous situation.* She had driven on numerous occasions, and was considered a safe driver. The respondent testified that prior to March 16, 2001, she had on occasion been a passenger in her boyfriend's car while he was speeding down straight roads, and that his excessive speed on those instances made her fearful. Given the instruction she received, her previous history of safe driving, and her prior experiences, *the respondent knew the risks inherent in driving fast or in an unsafe manner.*

⁴ The Supreme Court noted in Groff: “It was pointed out in the first volume of the Washington reports, that general findings such as ‘the matters and things set forth in the complaint are true,’ are ‘entirely insufficient’ for an appellate review.” 65 Wn.2d at 40, quoting Bard v. Kleeb, 1 Wash. 370, 374, 25 Pac. 467 (1890).

13. Although *the respondent knew that driving at high speeds, not paying attention to the road, and playing games with the wheel were unsafe and could cause an accident*, the Court cannot find that she had actual knowledge of the risks inherent in the *particular* dangerous situation she created on March 16th.

14. A reasonable person in a similar situation would have recognized the risks inherent in the driving behavior in which the respondent engaged. As such, even if she did not have actual knowledge of the *specific* risks, she had constructive knowledge of those risks.

153 Wn.2d at 409-10 (emphasis in original).

These findings go into great detail about the defendant's knowledge of the risky conduct in which she engaged. In the instant case, the trial court made no similar findings, never mentioning whether Kuhyar had any experiences with fighting to know what dangers punches to the cheek could pose.

The case cited by the State – State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999) – actually supports Kuhyar. In that case, the Court of Appeals reversed R.H.S.'s conviction for second degree assault where the trial court excluded evidence from the child who was on trial whether he had “ever heard of anyone breaking the bones around their eye from getting hit?” 94 Wn. App. at 848. While “any reasonable person knows that punching someone in the face could result in a broken jaw, nose or

teeth,” 94 Wn. App. at 846,⁵ as the R.H.S. court noted, the issue is more than whether any reasonable person would know that, but rather involves the subjective component of reckless conduct. Here, the issue is what Kuhyar knew, in addition to how a reasonable person would have acted knowing these facts.

The trial court’s findings and conclusions, including Conclusion of Law II, are void of any discussion of what Kuhyar knew. Given Judge Orlando’s statement at sentencing that in his “mind, in many circumstances this kind of case possibly would have resolved in a finding of guilt to a lesser offense than the assault in the second degree” if it had been settled prior to trial, RP 171, the lack of findings on Kuhyar’s mental state is fatal.

The case should be remanded for additional findings or for dismissal.

3. There Was Insufficient Evidence of Recklessness

The State argues that the trial court’s [nonexistent] finding of recklessness was supported by evidence in the record:

which suggested that the defendant knew of the risk of injury to Jason Halter, but disregarded it. Defendant

⁵ But see infra at § B(3).

asserted that he struck the victim first in self-defense out of fear of being hit himself. 1RP 131. It was reasonable for the court to infer from this that defendant therefore knew that a punch would cause pain and possibly injury as he sought to avoid it himself. On cross-examination, defendant admitted that his actions were designed to initiate a fight. 1 [sic] 1 RP 138-39. Defendant also testified that his reason for approaching Jason was to confront him. 1RP 140. Therefore, defendant subjectively had knowledge of the risk of injury as a result of a punch.

Brief of Respondent at 11-12.

This argument is absurd. Apart from the fact that the trial court made no findings remotely even similar to what the State claims it made, the State's argument flies in the face of the trial court's actual finding of fact (to which the State has not assigned error):

There is no credible evidence that Halter initiated the physical confrontation and even the respondent did not testify that he feared, either subjectively or objectively, any physical attack or harm from Halter.

Finding of Fact VII.⁶ Additionally, the State's argument makes no sense and does not explain how the fear of being hit by Jason would have given Kuhyar the subjective knowledge or experience about the risks of punches to the head.

⁶ The State's argument is also quite disingenuous. If Kuhyar subjectively feared suffering pain and injury if Halter hit him first, then he clearly would have the right to self-defense, and the State should have no business prosecuting him.

In all of this, the appropriate standard of “reasonableness” is not how an *adult* would act, having had the knowledge that Kuhyar had. The standard of reasonableness is what a *fourteen-year-old child* would do. Juveniles are held to the standard of a reasonable juvenile of the same age and circumstances. See State v. Marshall, 39 Wn. App. 180, 183-84, 692 P.2d 855 (1984) (fifteen-year-old defendant convicted of manslaughter held to the standard of a reasonable fifteen-year-old). As the Supreme Court explained in a civil tort context:

Washington has long recognized the special standard of care applicable to children: a child's conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training and experience. Robinson v. Lindsay, 92 Wn.2d 410, 412, 598 P.2d 392 (1979); Roth v. Union Depot Co., 13 Wash. 525, 43 P. 641, 44 P. 253 (1896). The rationale for the special child's standard of care is that a child is lacking in the judgment, discretion, and experience of an adult; thus, the child's standard of care allows for the normal incapacities and indiscretions of youth. *See* 3 Vand. L. Rev. 145 (1949); 37 Tex. L. Rev. 255 (1958); Keet, *Contributory Negligence of Children*, 12 Clev.-Mar. L. Rev. 395 (1963). Most significantly, the child's standard was created because public policy dictates that it would be unfair to predicate legal fault upon a standard most children are incapable of meeting. Thus, the fact of minority is not what lowers the standard; rather, the child's immaturity of judgment and lack of capacity to appreciate dangers justifies a special child's standard.

Bauman v. Crawford, 104 Wn.2d 241, 244, 704 P.2d 1181 (1985).

The United States Supreme Court agrees that the culpability of children is measured by a different standard than the culpability of adults:

[A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." [citations omitted] It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 *Developmental Review* 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

Roper v. Simmons, 543 U.S. 551, 569 (2005). See also Thompson v. Oklahoma, 487 U.S. 815, 834-35 (1988) (discussing immaturity of juveniles).

Kuhyar Sajjadi was only fourteen years old at the time of the alleged assault. There is no reason why Kuhyar or any other fourteen-year-old boy would know that substantial bodily harm could result from a simple punch.⁷ Popular culture is filled with images of people hitting each

⁷ Division One did not seem to apply a reasonable teenager standard in R.H.S. It does not appear, however, that the defense raised that issue on appeal. Moreover, the record is unclear how old the juvenile was in that case. R.H.S. could well have been up to 18, if not 21, years of age, and reasonableness would therefore be measured by an adult

(continued...)

other in the face without any injuries other than a fat lip or a black eye resulting.⁸ Here, there was no evidence that Kuhyar had any special knowledge of the sensitivity of the facial area – there was no evidence that he had been in or knew of prior fights where severe injury resulted, nor was there any evidence that he had been taught in any class about the fragility of cheeks and faces.⁹

Accordingly, there was insufficient evidence that Kuhyar knew of and disregarded a substantial risk that substantial bodily harm would result from a punch to the face, and this disregard of substantial risk is a gross deviation from conduct that a reasonable fourteen-year-old would exercise in the same situation. The conviction should be reversed based upon insufficient evidence under the Due Process Clause of U.S. Const. amend. 14.

⁷(...continued)
standard.

⁸ A reasonable fourteen year old boy who watched Western or Kung-Fu movies, slapstick comedy (even of the old school such as Charlie Chaplin or the Three Stooges), professional wrestling, ice hockey, or boxing would never think that punches to the cheeks could cause substantial bodily harm.

⁹ Jason testified that Kuhyar did not hit him directly on the nose, but rather to the cheeks – “he was just trying to get me in the face.” RP 112.

4. **There Was Insufficient Evidence of Substantial Bodily Harm**

The State argues that there was sufficient evidence of substantial bodily harm based upon Jason's broken nose, bleeding, and pain, as well as disfigurement. Brief of Respondent at 14-18. The State wonders why "Defendant [sic] failed to address why Jason's broken nose did not constitute substantial bodily harm." Brief of Respondent at 17.

Kuhyar Sajjadi's brief recognizes that causing a fracture of a nose bone would qualify as "substantial bodily harm," under RCW 9A.04.110(4)(b). Opening Brief of Appellant at 20. However, the trial court did not base conviction on that prong of the statute, and, as noted in the opening brief, the findings make no mention of the broken nose, stating:

The respondent thereby inflicted substantial bodily harm in that he caused bleeding from Halter's nose, caused, [sic] swelling of Halter's face and nose, caused impairment of Halter's breathing, and caused Halter considerable pain that lasted a substantial period of time. Halter missed some school because of his injuries.

FF V, CP 7-10.

The trial court did not base its decision on the broken nose because it excluded the medical evidence, a ruling to which the State has not cross-

appealed or assigned error. RP 156-57. Thus, the broken nose allegation has nothing to do with a review of the trial court's decision. The trial court made its findings and based its verdict on "substantial bodily harm" that resulted from bleeding from the nose, swelling in the face and nose, impairment in breathing and "considerable pain."

As for impairment in breathing, this finding is not supported by the evidence. See Opening Brief at 21-22. The State has no response.

As for "considerable pain," this factor is appropriate for the definition of "bodily harm" under RCW 9A.04.110(4)(a), an element of third degree assault under RCW 9A.36.031(1)(d). Pain, however, is not part of the definition of "substantial bodily harm" under RCW 9A.04.110(4)(b). So too with "bleeding." The fact of bleeding is not sufficient for a finding of "substantial bodily harm."

The only factor mentioned by the trial court that could possibly constitute "substantial bodily harm" would be "substantial disfigurement." Here, though, Jason's nose was "pretty swollen," RP 71, and his cheeks were "kind of swollen, not as much as my nose, though." RP 112. His lip was bleeding but he did "not really" get a black eye. RP 112. The question is whether a swelling of the nose qualifies as "substantial

disfigurement.”

The State relies heavily on the Division One case, State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993). In Ashcraft, a woman was accused of second degree assault of a three-year-old child with a shoe. There was testimony that the child had bruises on her that were consistent with being hit by a shoe with a rigid sole. 71 Wn. App. at 449. On appeal, the defense challenged sufficiency of the evidence, and Division One held:

Substantial bodily harm is defined as "bodily injury which involves a temporary but substantial disfigurement" RCW 9A.04.110(4)(b). The doctors at Children's Hospital testified that they saw bruise marks on J. which would be consistent with her being hit with a shoe. *The presence of the bruise marks indicates temporary but substantial disfigurement.*

71 Wn. App. at 455 (emphasis added).

The italicized portion of the quote set out above is hardly extensive legal analysis that should be relied upon as precedent in all other cases. There is such little analysis in this one italicized sentence so as to make the case of little utility to use in deciding any case other than one with the same facts as in Ashcraft. Thus, Division One’s holding in Ashcraft is easily limited to the facts of that particular case – that bruise marks on a three-year-old child, made with a shoe with a rigid sole, constituted

sufficient evidence to constitute “substantial disfigurement” of that young and particularly vulnerable victim.

Division One never announced a broad rule that the presence of bruising in every other case is in and of itself sufficient evidence of “substantial disfigurement.” The issue is still one for the finder of fact, as this Court recognized in State v. Dolan, 118 Wn. App. 323, 330-32, 73 P.3d 1011 (2003). There still must be, though, sufficient evidence of “substantial disfigurement” to satisfy the 14th Amendment’s Due Process Clause and the requirements of Jackson v. Virginia, 443 U.S. 307 (1979).

When deciding whether there is “substantial disfigurement,” even that of a “temporary” nature, a reviewing court must give effect to the intent of the Legislature and give effect to every word of the statute. Seattle v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) (“[W]e are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.”).

This Court must give meaning to the use of the word “substantial” and not read it out of the statute. While the particular bruises on the three-year-old toddler in Ashcraft may have been “substantial,” it cannot be said that every puffy nose on a teenager, caused during a fight with his or her

peers, constitutes “substantial” disfigurement. To reach this conclusion would be to read out of the statute the word “substantial” and convert many fourth and third degree assaults into second degree assaults.

Fourteen-year-old Kuhyar Sajjadi got into a fight with a bigger peer at school. While Kuhyar should have been subjected to some sort of discipline for this behavior, Kuhyar should not be stigmatized with a felony conviction for second degree assault. Based upon the trial judge’s factual findings, there was insufficient evidence that Kuhyar caused Jason “substantial disfigurement.” The conviction should be reversed under the Due Process Clause of U.S. Const. amend. 14, and the charge dismissed.

5. There Was Insufficient Evidence of Jurisdiction

The State argues that there was sufficient evidence of “venue” and that Kuhyar Sajjadi “waived” the issue by failing to object to “venue” at trial. Brief of Respondent at 18-22. The State attempts to rebut an argument that Kuhyar Sajjadi did not make. The word “venue” does not appear in the Opening Brief of the Appellant. Kuhyar Sajjadi argued instead that the trial court erred when it concluded in Conclusion of Law I: “That the Court has jurisdiction of the parties and subject matter.” CP 7-10.

RAP 2.5(a)(1) clearly allows for challenges to the trial court's jurisdiction to be raised for the first time on appeal. See Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County, 92 Wn.2d 844, 852, 601 P.2d 943 (1979) ("This court may raise at any time the question of jurisdiction."). Indeed, there is no indication that the issue of "jurisdiction" was ever raised in the trial court in any of the main cases relied upon by Kuhyar Sajjadi in the Opening Brief. See State v. Ford, 33 Wn. App. 788, 658 P.2d 36 (1983); State v. Kees, 48 Wn. App. 76, 737 P.2d 1038 (1987).

The State's brief ignores Ford and Kees, never bothering to cite these cases, let alone attempt to distinguish them. The reason for the State's failure to discuss these two cases is obvious. Their holdings should lead to reversal in this case.

The fact that the witnesses lived in Bonney Lake in this case is no different from the fact that in Ford a witness who worked at the Raging River Ranch lived in Edmonds and that a present resident of Issaquah was a former resident at the home. The fact that a police officer from Pierce County took the report does not support the conclusion that the incident took place in the State of Washington. See State v. Hickman, 135 Wn.2d

97, 954 P.2d 900 (1998).

The school at issue here is not such a well-known building that it can be assumed, as the State assumes, that it is located in Bonney Lake, Pierce County, Washington. It is not even clear from the record what the name of the school is – “Lakeridge Middle School,” “Lakeridge School” or “Lakeridge Junior High.”

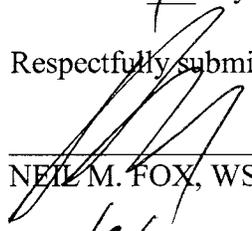
The Lakeridge (Middle or Junior High) School is no different from the Raging River Ranch. The State failed to prove jurisdiction under RCW 9A.04.030. Under Ford and Kees, and under the Due Process Clause of U.S. Const. amend. 14, the conviction should be reversed.

C. CONCLUSION

For the foregoing reasons, and the reasons set out in the opening brief, Kuhyar Sajjadi asks that this Court reverse his conviction and remand either for dismissal with prejudice or additional findings.

Dated this 4 day of October 2007

Respectfully submitted,



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KUHYAR MATTHEW SAJJADI,

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COA NO. 35899-9-II

CERTIFICATION OF SERVICE

I, Lauren Jones, certify and declare that on June 28, 2007, I mailed copies of the attached
Opening Brief of Appellant, with proper first-class postage attached, to:

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I certify and declare under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.

10/4/07 Seattle, WA
DATE AND PLACE

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