

No. 35917-1-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN A. MENCER,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable, Judge James B. Sawyer, II
Cause No. 06-1-00437-0

BRIEF OF RESPONDENT

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 (B) WAS IN PLAIN VIEW ON TOP OF A STEREO, THAT HAD;

- (C) HEADPHONES PLUGGED INTO IT AND WERE LAYING ON MENCER'S BED; AND
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a unanimity instruction on Counts I where the State failed to elicit sufficient evidence of the all the alternatives of the crime of unlawful possession of a firearm in the second degree.
2. The trial court erred in allowing Mencer to be represented by counsel who provided ineffective assistance in failing to object to the court's failure to give a unanimity instruction.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not giving a unanimity instruction on count I, unlawful possession of a firearm in the second degree, when RCW 9.41.040(2)(a)(i) does not list alternative means in which that offense may be committed?
2. Did the trial court err in allowing Mencer to be represented by counsel who did not object to the lack of a unanimity instruction when that instruction was unnecessary?
3. Did the trial court err in not taking count I from the jury for lack of sufficient evidence when the .22 caliber pistol was: (a) found in Mencer's room immediately after he had been found laying in bed there; (b) in plain view on top of a stereo; that had (c) headphones plugged into it and were laying on Mencer's bed; and (d) Debbie Marshall also denied that this particular gun was hers and did not recognize it?

C. EVIDENCE RELIED UPON

The official Report of Proceedings shall be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1. Procedural History

Steven A. Mencer, the defendant, was arraigned in Mason County Superior Court on October 30, 2006, on four counts of unlawful possession of a firearm in the second degree. RP: 1: 9-13. Mencer's case went to trial on December 20, 2006, and of those four charges, the jury convicted him on count I only. RP 226: 2-6. On February 5, 2007, Mencer was sentenced to 10 months incarceration. RP 231: 5. At the time of sentencing, Mencer's offender score was 3, and his standard range was 9-12 months. RP 229: 20-22.

2. Statement of Facts

At "about daybreak" on October 17, 2006, the Mason County Sheriff's Department (MCSO), in conjunction with their "SERT" (Sheriff's Emergency Response Team), went "to execute a search warrant... at 2720 West Highland Road" inside Mason County, WA. RP 19: 13-17; 29: 9-16. The residence at this address consisted of a "trailer." RP 26: 9-11. The Mason County SERT is composed of people who "are trained" and "have the equipment and the tools and the training to enter a house quick...fast and safely [to] secure [it]." RP 19: 25; 20: 1-3. The "primary target" of the search warrant was not Mencer, but another individual named "Mr. York." RP 24: 14-16. Because the MCSO "knew"

that it “had two convicted felons in the trailer” at this address and “information that there were guns” there as well, it “chose” to use the SERT to execute this particular warrant. RP: 24: 22-25.

Detective Potts of the MCSO entered “the bedroom that [Mencer] was occupying” with Deputy Reed and saw Mencer “laying on the floor off to the left on a bed that was...[a] mattress...on the floor.” RP 30: 13-20; 24. Once these two detectives saw Mencer, they yelled, “police, search warrant, show us your hands.” RP 32: 18-19. Mencer did not “respon[d] at all” to this, “so Deputy Reed pushed him and stepped back.” RP 32: 22-24. At this point, both Detective Potts and Deputy Reed thought that Mencer might be “asleep,” but that they did not know. RP 32: 23-25.

Mencer “did open his eyes and loo[k] at” them, and the two officers kept “alternating commands...such as [s]how us your hands, roll over.” RP 33: 2-6. “At one point [Mencer] was laying down...lunged towards Deputy Reed...[a]nd then...immediately sat back down.” RP 33: 11-14. Mencer failed to “comply with the commands from [Detective Potts] and Deputy Reed...until [they] called in a third person [Deputy McGill] and...Deputy Reed deployed a Taser.” RP 33: 15-20. Mencer’s bedroom in the trailer was “10 by 12 maybe, if that.” RP 33: 22. Once

Mencer was “hit” with the Taser, he began to comply with the directions from the officers. RP 34: 6-9.

Before searching Mencer’s room, Detective Noyes “advised” Mencer of his rights and his “right to counsel.” RP 41: 4-6. Detective Noyes “explained to [Mencer]” that he “was going to be searching his bedroom,” and that he had “escorted him [there] so he could...point some things out to me or...take claim to anything that he found[,] or dispute whether or not it was his.” RP 41: 6-11. At no time during this conversation with Detective Noyes did Mencer “deny that it was his bedroom.” RP 41: 16-23. After escorting Mencer to the bedroom, Detective Noyes “began searching.” RP 41: 25; 42: 1.

The detective noticed that Mencer’s bedroom had two windows...[an] entertainment center” and that his bed was located in a “corner.” RP 43: 9-14; 23-25; 44: 1. Next to Mencer’s bed was “a nightstand,” and “a pair of headphones with the cord attached to the stereo” were “at the time, laying on Mr. Mencer’s bed.” RP 43: 18-21. The stereo sat atop an entertainment center and on top of that stereo, in plain view, “was a [Beretta].22-caliber pistol that was loaded.” RP 44: 8-9; 46: 21-22; 60: 4-6. This pistol had a “serial number [of] 95021,” was “loaded and had seven rounds in the magazine.” RP 46: 20-23. The room also contained a closet that “basically...took up the majority of the room”

on one side. RP 43: 15-16. Inside that closet were documents that belonged to Mencer. RP 45: 5-6.

Debbie Marshall was staying at the trailer at this time “waiting to get Steven [Mencer’s] room cleared out so [she] could move in there and start paying rent.” RP 82: 16-19. Although Marshall said she stored “stuff” in Mencer’s room, including “four guns,” she failed to recognize the pistol in State’s Exhibit No. 27, which was charged in count I. RP 102: 21-25; 103: 1-4; 68: 15-16; CP 4: 53. According to Marshall, none of the firearms that she stored in Mencer’s room were loaded. RP 103: 5-7. Marshall also stated that she put her four firearms “in the closet” of Mencer’s room, the afternoon before October 17, 2006. RP 98: 6-8.

3. Summary of Argument

The trial court did not err by not giving a unanimity instruction on count I, unlawful possession of a firearm in the second degree, because RCW 9A.04.020(a)(i) does not list alternative means in which that offense may be committed. No error occurred when the trial court allowed Mencer to be represented by court appointed counsel who did not object to the lack of a specific unanimity instruction on count I because that instruction was unnecessary. Lastly, the trial court did not err in not taking count I from the jury for lack of sufficient evidence because

Mencer constructively possessed the .22 caliber handgun when: (a) it was found in his room immediately after he had been laying in bed there; (b) was in plain view on top of a stereo that had; (c) headphones plugged into it and were laying on Mencer's bed; and (d) Mencer lunged at one of the deputies who had to employ a Taser to subdue him; and (e) Debbie Marshall denied that this particular gun was hers and did not recognize it. The judgement and sentence of the trial court is correct and should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT GIVING A UNANIMITY INSTRUCTION ON COUNT I, UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, BECAUSE RCW 9.41.040(2)(a)(i) DOES NOT LIST ALTERNATIVE MEANS IN WHICH THAT OFFENSE MAY BE COMMITTED.

The trial court did not err by not giving a unanimity instruction on count I, unlawful possession of a firearm in the second degree, because RCW 9.41.040(2)(a)(i) does not list alternative means in which that offense may be committed.

Alternative means statutes identify a single crime and provide more than one means of committing that crime. *State v. Williams*, 136 Wash.App. 486, 497, 150 P.3d 111 (2007); see *In re Detention of Halgren*,

156 Wash.2d 795, 809, 132 P.3d 714 (2006). For example, under RCW 9A.44.040(1)(a) and (b), rape in the first degree may be committed by the alternative means of either (1) using or threatening to use a deadly weapon, or (2) kidnapping the victim. *Williams* at 497; *see State v. Whitney*, 108 Wash.2d 506, 510-511, 739 P.2d 1150 (1987). Where a single offense may be committed by alternative means under such a statute, unanimity is required as to guilt for the single crime charged, but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wash.2d 403, 410, 756 P.2d 105 (1988); *see State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984); *State v. Lobe*, ---P.3d---, 2007 WL 2774257 (Div. II 2007).

The facts and procedure of *Whitney* can be contrasted to Mencer's case because they show that a unanimity instruction is needed if (a) statutory alternatives are charged and/or (b) each alternative is not supported by substantial evidence.

In *Whitney*, the defendant was charged with rape in the first degree, in violation of RCW 9A.44.040(1)(a) and (b). *Whitney* at 507. RCW 9A.44.040(1) provides in part:

- (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another

person by forcible compulsion when the perpetrator or an accessory;

- (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
- (b) Kidnaps the victim....*Whitney* at 507.

The Court of Appeals affirmed, holding that sufficient evidence supported the verdict. *State v. Whitney*, 44 Wn.App. 17, 20-21, 720 P.2d 853 (1987). In particular, the Court held that the jury need not be unanimous as to the method by which the first degree rape was committed because sufficient evidence supported each alternative way of committing the crime charged. *Whitney*, 108 Wn.2d at 507. The Court also reasoned that the alternative methods which are part of a first degree rape are not separate and distinct offenses but are rather alternate means by which one may commit the single offense of rape.

The key distinction in Mencer's case that is that he was not charged and convicted of an offense that had statutory alternative means.

In count I, Mencer was charged as follows:

In the County of Mason, State of Washington, on or about the 17th day of October, 2006, the above-named defendant, STEVEN A. MENCER, did commit UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE, a Class C felony, in that said defendant did, having previously been convicted in this state or elsewhere of a felony that does not qualify as a serious offense as defined in RCW 9.41.010(12)(a), to wit: Unlawful Possession of a Controlled Substance, Mason County Superior Court No. 05-1-0006-1; did knowingly own or have in his possession or under his control a firearm, to wit: a Beretta .22

caliber pistol Serial No. 95021; contrary to RCW 9.41.040(2)(a)(i) and against the peace and dignity of the State of Washington.
CP: 4.

Unlike the defendant in *Whitney* who was charged with an offense that listed statutory alternative means in specific subsections, Mencer was not as his information shows. The specific statute that Mencer was charged under asked the jury to consider whether he “did knowingly own or have in his possession or under his control” a particular firearm; a question that the jury in *Whitney* had to answer by choosing between statutory alternative means that were differentiated into subsections (a) and (b). As RCW 9.41.040(2)(a) reads:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm.
RCW 9.41.040(2)(a)

This issue of when a specific unanimity instruction should be given occurred again recently in *Lobe*, where the Court ruled that the jury should have received a unanimity instruction on witness tampering. Under RCW 9A.72.120-Tampering with a witness, its subsections are divided into “(a), (b) and (c),” and specifically define the alternative means in which that crime can be committed. RCW 9.41.040(2)(a)(i), by contrast, does not have these particular subdivisions; someone either unlawfully owns,

controls or possesses a firearm in the second degree or does not. This is reflected in the “to convict” instruction in Mencer’s case, which reads in part: “the defendant knowingly owned, knowingly had in his possession or knowingly had in his control a firearm.” CP 36: Instr. No 12.

Like the juries in *Lobe* and *Whitney*, the one in Mencer’s case had to be unanimous as to his guilt and was given a general unanimity instruction to that effect. CP 36: Instr. 2. The addition of a specific unanimity instruction on count I in Mencer’s case, however, would have been unnecessary and could have caused him prejudice. The trial court acted properly and no error occurred.

2. THE TRIAL COURT DID NOT ERR IN ALLOWING MENCER TO BE REPRESENTED BY COUNSEL WHO DID NOT OBJECT TO THE LACK OF A SPECIFIC UNANIMITY INSTRUCTION BECAUSE THAT INSTRUCTION WAS UNNECESSARY.

The trial court did not err in allowing Mencer to be represented by counsel who did not object to the lack of a specific unanimity instruction because that instruction was unnecessary.

We start with the strong presumption that counsel’s representation was effective. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); *see State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); *State v. Schwab*, ---P.3d---, 2007 WL 2847556 (Wash.App. Div. 2). This

requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *Rodriguez* at 184; *see State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see McFarland* at 334-335; *State v. Keend*, ---P.3d---, 2007 WL 2713926 (Wash.App. Div. 2).

Deficient performance is performance 'below an objective standard of reasonableness based on consideration of all the circumstances'. *Rodriguez* at 184; *citing Studd* at 551(citations omitted). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland* at 334-335. Effective assistance of counsel does not mean 'successful assistance of counsel.' *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

Jury instructions are 'sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole

properly inform the trier of fact of the applicable law.” *Keend* at 2007 WL 2713926 (citation currently available).

The facts of *Schwab* are analogous to Mencer’s case because they involve a claim of ineffective assistance of counsel regarding additional arguments that the defendant felt could have been made before the trial court. In *Schwab*, the defendant attempted to withdraw a not guilty by reason of insanity plea over a year after he had made it. *Schwab* at 2007 WL 2847556. Defendant Schwab argued that both the trial court and his attorney failed to inform him that he faced a maximum penalty of life in Western State Hospital for a conviction on assault in the first degree with a deadly weapon. Although RCW 10.73.090 bars defendants from challenging a judgement and sentence in a criminal case more than one year after it has become final, the trial court nonetheless appointed new counsel and allowed Schwab to proceed with his motion.

The trial court ruled that Schwab’s not guilty by reason of insanity plea was voluntary. On appeal, Schwab argued that he received ineffective assistance of counsel during the CrR 7.8 proceedings because his attorney did not raise additional arguments regarding the voluntariness of his insanity plea. Specifically: (1) Schwab pleaded to a firearm enhancement, but the State had charged him with a deadly weapon enhancement; (2) the trial court did not explain to Schwab all the rights he waived in entering

the plea; and (3) Schwab's counsel who helped him enter the plea was ineffective. Schwab, however, does not contend that he raised these issues with his attorney, and nor did he demonstrate that it was likely that he could have prevailed if he had raised these arguments.

The Court of Appeals ruled that although the plea agreement erroneously mentioned a firearm enhancement, the trial court properly found Schwab not guilty of a deadly weapon enhancement, which did not apply to the term of confinement for his insanity-based acquittal. There is also no evidence in the record that shows the trial court failed to inform Schwab of the rights he waived by asking the trial court to acquit him on the ground that he was insane and required treatment. Per the Court of Appeals, counsel is not ineffective for failing to raise meritless arguments that Schwab did not request.

Similarly, court appointed counsel for Mencer provided effective assistance to his client by not raising a meritless argument; namely, by arguing that an unnecessary, specific unanimity instruction should have been given. Defense counsel's decision to not ask for that specific instruction was correct, especially since the jury had already been given a general unanimity instruction. CP 36: Instr. No 2. Like Schwab, Mencer was not prejudiced by his attorney's performance, particularly as Mencer

was acquitted outright on three out of four charges. Counsel for Mencer provided him with effective assistance and error did not occur.

3. THE TRIAL COURT DID NOT ERR IN NOT TAKING COUNT I FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE MENCER CONSTRUCTIVELY POSSESSED THE .22 CALIBER HANDGUN WHEN:

- (A) IT WAS FOUND IN HIS ROOM IMMEDIATELY AFTER HE HAD BEEN LAYING IN BED THERE;
- (B) WAS IN PLAIN VIEW ON TOP OF A STEREO, THAT HAD;
- (C) HEADPHONES PLUGGED INTO IT AND WERE LAYING ON MENCER'S BED; AND
- (D) MENCER LUNGED AT ONE OF THE DEPUTIES WHO HAD TO EMPLOY A TASER TO SUBDUE HIM; AND
- (E) DEBBIE MARSHALL DENIED THAT THIS PARTICULAR GUN WAS HERS AND DID NOT RECOGNIZE IT.

The trial court did not err in not taking count I from the jury for lack of sufficient evidence because Mencer constructively possessed the .22 caliber handgun when: (a) it was found in his room immediately after he had been laying in bed there; (b) was in plain view on top of a stereo that had; (c) headphones plugged into it and were laying on Mencer's bed; (d) Mencer lunged at one of the deputies who had to employ a Taser to subdue him; and (e) Debbie Marshall denied that this particular gun was hers and did not recognize it.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential

elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993); *see State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Ware*, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); *cited by State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas* at 201.

Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992); *see State v. Rooth*, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

Possession of property may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession. *State v. Callahan*, 77 Wn.2d 27, 29, 459

P.2d 400 (1969); *see State v. Partin*, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over them. *Callahan* at 29; *see State v. Walcott*, 72 Wn.2d 959, 967, 435 P.2d 994 (1967). Whether a person has dominion and control is determined by considering the totality of the situation. *Partin* at 906.

The facts of *Walton* are analogous to Mencer's case because the evidence for Walton's constructive possession of heroin was found to be sufficient in part when: (a) the police arrived at his home, he hurried to the kitchen where the drugs were found; (b) two letters and a telephone bill were addressed to him at this address; and (c) he was aware of the presence of drugs in the home.

In *Walton*, the defendant hurried to the kitchen when his son opened the door to their residence at the request of the police who were there to execute a search warrant. *Walton* at 412. The officers observed what appeared to be black tar heroin on the kitchen table together with a shooting kit, including a spoon and a razor-type tool used for cutting purposes. Defendant Walton was arrested, and in response to questions from a booking officer, he said that he lived at that address. During a later search officers found, among other items, a telephone bill and letters

addressed to Walton at this address. The Court affirmed Walton's conviction for possession of a controlled substance because this evidence was sufficient for the trier of fact to find that he constructively possessed the heroin. *Walton* at 416-417.

Although these cases address constructive possession in terms of narcotics, the basic facts are similar to those in Mencer's case involving a handgun as it was established that Mencer: (a) resided at 2720 West Highland Road in a room of a trailer that was approximately 10x10 or 10x12 feet; (b) had documents that belonged to him in the closet in his room; (c) lunged at one of the deputies who came into his room; when there was (d) a .22 caliber pistol sitting in plain view on a stereo in which (e) headphones were plugged into and on the bed that (f) Mencer had been laying on when the deputies entered. As the Court in *Walton* succinctly reasoned in that case, "[c]onstructive possession has been based on less evidence..." *Walton* at 416.

Citing to *State v. Bradford*, the *Walton* Court noted that constructive possession was found in that case based on "receipts, utility and telephone bills all addressed to the defendant [,] together with his presence at the address alone with two small children. *State v. Bradford*, 60 Wash.App.857, 864, 808 P.2d 174 (1991). In another case, *State v. Dobyms*, the *Walton* Court again noted that constructive possession was

found there based on “a witness’ observation of the defendant’s car parked near the residence, a bill addressed to the defendant found [there], and his business card with a telephone number matching that of the residence as well. *State v. Dobyys*, 55 Wash.App. 609, 616, 779 P.2d 746 (1989).

In Mencer’s case, by contrast, there is significant evidence that he constructively possessed the .22 caliber handgun: His room was quite small, the gun was in plain view on the stereo in which headphones were plugged into and laying on the bed where he had been sleeping prior to the deputies entering it. That Mencer lunged at one of the deputies could suggest that he was simply surprised by their entry, or perhaps that he was trying to flee or even dispose of the handgun that as a convicted felony he knew was a crime to possess.

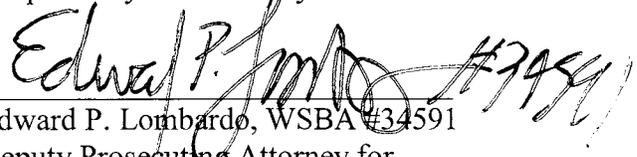
In addition, that Debbie Marshall did not recognize the .22 caliber handgun is significant, for that leaves only Mencer, who had yet to move out of his room, as the only person who in all likelihood could have brought the loaded handgun into it. The jury in Mencer’s case was properly instructed on both actual and constructive possession, and that his mere proximity to the gun without more would be insufficient evidence to establish constructive possession. CP 36: Instr. Nos. 9, 10. The testimony and evidence present was sufficient for the trial court to allow count I to go to the jury, and no error occurred.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 10TH day of October, 2007.

Respectfully submitted by:

Handwritten signature of Edward P. Lombardo in black ink, including the WSBA number #34591.

Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for
Gary P. Burlison, Prosecuting Attorney
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 35917-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
STEVEN A. MENCER,)	
)	
Appellant,)	
_____)	

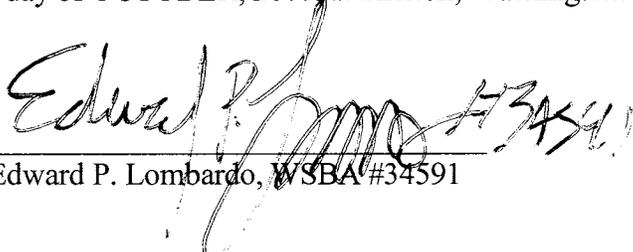
I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, OCTOBER 10, 2007, I deposited in the U.S.
Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF
RESPONDENT, to:

Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 10TH day of OCTOBER, 2007, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591