

FILED
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DATE

No. 36336-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

S.A.W.,

Appellant.

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

The Honorable Richard C. Adamson, Court Commissioner
Cause No. 06-8-00255-1

BRIEF OF RESPONDENT

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(b) S.A.W. EXPRESSED NO CONFUSION OVER THOSE RIGHTS; AND

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- (a) NORTHUP ESTABLISHED THAT THE HONDA CFR 450 WAS HIS MOTORCYCLE;
- (b) THAT HE HAD NOT GIVEN S.A.W. PERMISSION TO RIDE OR TAKE IT;
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- (b) EMPLOYED A DEFINITE TRIAL STRATEGY AND SUCCESSFULLY DISCREDITED TERRY BROWN, ONE OF THE STATE’S MAIN WITNESSES;
- (c) ARGUED VIGOROUSLY IN S.A.W.’s DEFENSE THAT ULTIMATELY RESULTED IN;
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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in failing to hold a hearing to determine the admissibility of statements pursuant to CrR 3.5.
2. Defense counsel rendered ineffective assistance of counsel by failing to object to the lack of a CrR 3.5 hearing.
3. Defense counsel rendered ineffective assistance of counsel by failing to object to the absence of *corpus delicti* for the crime of taking a motor vehicle without permission, as charged in Count III.
4. The juvenile court erred in entering Finding of Fact G, which states, “[S.A.W.] did not express any confusion over his rights, and spoke voluntarily with Deputy Philpott.” CP 5.
5. To the extent the entry of a finding on this issue deems the statement true, the trial court erred in entering Finding of Fact H which states, “[S.A.W.] admitted that he knew the motorcycle had been stolen from Northup and knowing that, had ridden on the motorcycle.”

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by not holding a CrR 3.5 hearing to determine the admissibility of S.A.W.’s statements when the record shows that: (a) Deputy Philpott read S.A.W. his rights, including the juvenile warning; (b) S.A.W. expressed no confusion over those rights; and (c) S.A.W. then voluntarily spoke with law enforcement regarding his involvement with the stolen Honda CFR 450 motorcycle?
2. Did S.A.W. receive ineffective assistance of counsel when his court-appointed attorney did not make a corpus delicti objection as to Count III-taking a motor vehicle without permission in the second degree-when: (a) Northup testified that the Honda CFR 450 was his motorcycle; (b) that he had not given S.A.W. permission to ride or take it; (c) S.A.W. gave the motorcycle to Terry Brown; and (d) told Deputy Philpott after Miranda that he knew that motorcycle was stolen and had rode it?

3. Did S.A.W. receive ineffective assistance of counsel when his court-appointed attorney: (a) made timely objections; (b) employed a definite trial strategy and successfully discredited Terry Brown, one of the State's main witnesses; (c) argued vigorously in S.A.W.'s defense that ultimately resulted in (d) S.A.W. being found not guilty of a major felony, trafficking in stolen property in the first degree?

C. EVIDENCE RELIED UPON

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

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts the respondent's recitation of the procedural history and facts and adds the following:

On or around December 17, 2006, Deputy Philpott of the Mason County Sheriff's Department (MCSO) arrested S.A.W., then a juvenile, in connection with an investigation of a stolen motorcycle. RP 27: 19, 28:

20-25. Prior arresting S.A.W., Deputy Philpott read him his rights:

I told him that you have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk with a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. You can decide at any time to exercise these rights and not answer questions or make any statements.

Further, I advised [S.A.W.] if he was under the age of...eighteen. He told me he was, so I read him his additional

warning to juvenile, which is: If you are under the age of eighteen, anything you say can be used against you in a juvenile court prosecution for a juvenile offense, and can also be used against you in an adult court criminal prosecution if you are to be tried as an adult. RP 29: 15-25; 30: 1-5.

Immediately following this testimony, this colloquy occurred between the State and Deputy Philpott regarding S.A.W.'s understanding of those rights:

State: Did [S.A.W.] express any confusion about those rights?

Dep.: No, he did not.

State: Did he request an attorney?

Dep.: No, he did not.

State: Did he request to remain silent?

Dep.: No, he did not.

State: Did he make a statement?

Dep.: Yes, he did.

State: What did he state?

Dep.: At that time he told-he explained to me that he had known that Terry Brown had actually been the one who had stole the motorcycle, not him. RP 30: 6-17.

Later in his testimony, S.A.W. admitted to Deputy Philpott that he had "actually ridden" this motorcycle when he knew that it had been stolen. RP 31: 1-9.

Shane Northup, the owner of the motorcycle, paid “\$4,200.00 cash” for the “Honda CFR 450.” RP 46: 3; 47: 13-14. Northup had not given S.A.W. permission to ride or take his motorcycle. RP 62: 5-7. After receiving an “anonymous phone call,” Northup recovered his motorcycle at an address “on the South Shore across from the Sunset Beach Store, up that driveway.” RP 50: 22-25. When Northup went to that address, he saw that his motorcycle was “just sitting right out in the open in some guy’s yard.” RP 51: 7-9. After knocking on the door to this address, a guy [Terry Brown] came out and “said that he had gotten the bike from Scott Waterbury.” RP 51: 12-13; 70: 19-21.

3. Summary of Argument

The trial court did not err by not holding a CrR 3.5 hearing to determine the admissibility of S.A.W.’s statements because: (a) Deputy Philpott read S.A.W. his rights, including the juvenile warning; (b) S.A.W. expressed no confusion over those rights; and (c) S.A.W. then voluntarily spoke with law enforcement regarding his involvement with the stolen Honda CFR 450 motorcycle. That the trial court did not hold a CrR 3.5 hearing does not constitute error because a review of the record in S.A.W.’s case discloses that there is no issue regarding the voluntariness of S.A.W.’s statements to Deputy Philpott post-Miranda.

Similarly, S.A.W. received effective assistance of counsel because his court-appointed attorney declined to make meritless a corpus delicti objection as to Count III-taking a motor vehicle without permission in the second degree-since: (a) Northup testified that the Honda CFR 450 was his motorcycle; (b) that he had not given S.A.W. permission to ride or take it; (c) S.A.W. gave the motorcycle to Terry Brown; and (d) told Deputy Philpott after Miranda that he knew that motorcycle was stolen and had rode it.

Finally, S.A.W. received effective assistance of counsel because his court-appointed attorney: (a) made timely objections; (b) employed a definite trial strategy and successfully discredited Terry Brown, one of the State's main witnesses; (c) argued vigorously in S.A.W.'s defense that ultimately resulted in; (d) S.A.W. being found not guilty of a major felony, trafficking in stolen property in the first degree. The trial court did not err, and its judgement and sentence should be affirmed.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT HOLDING A CrR 3.5 HEARING TO DETERMINE THE ADMISSIBILITY OF S.A.W.'s STATEMENTS BECAUSE THE RECORD SHOWS THAT:
 - (a) DEPUTY PHILPOTT READ S.A.W. HIS RIGHTS, INCLUDING THE JUVENILE WARNING;
 - (b) S.A.W. EXPRESSED NO CONFUSION OVER THOSE RIGHTS; AND
 - (c) S.A.W. THEN VOLUNTARILY SPOKE WITH LAW ENFORCEMENT REGARDING HIS INVOLVEMENT WITH THE STOLEN HONDA CFR 450 MOTORCYCLE.

The trial court did not err by not holding a CrR 3.5 hearing to determine the admissibility of S.A.W.'s statements because: (a) Deputy Philpott read S.A.W. his rights, including the juvenile warning; (b) S.A.W. expressed no confusion over those rights; and (c) S.A.W. then voluntarily spoke with law enforcement regarding his involvement with the stolen Honda CFR 450 motorcycle.

CrR 3.5 is a mandatory rule. State v. Kidd, 36 Wash.App. 503, 509, 674 P.2d 674 (1983). Before introducing evidence of a statement of the defendant, the court must hold a hearing to determine if the statement was freely given. Kidd, 36 Wash.App. at 509; see State v. Renfro, 28 Wash.App. 248, 253, 622 P.2d 1295 (1981). Failure to hold a CrR 3.5, however, does not render a statement inadmissible when a review of the

record discloses that there is no issue concerning its voluntariness. Kidd, 36 Wash.App. at 509; see State v. Harris, 14 Wash.App. 414, 422, 542 P.2d 122 (1975).

Kidd is partially analogous to S.A.W.'s case because it addresses the admissibility of a defendant's statements absent a CrR 3.5 hearing. In Kidd, two officers, Wanner and Stith, saw smoke coming from a holding cell in the King County Jail. Kidd, 36 Wash.App. at 504. They observed defendant Kidd standing in the cell, watching a sheet that was on fire. Another inmate, Lee, was asleep on a mattress in the same cell. While Stith awoke Lee and removed him from the cell, defendant Kidd crawled under a low shelf. Subsequently, defendant Kidd was removed from the cell.

Only Lee and defendant Kidd had access to the area where the fire occurred. A Seattle Fire Department investigator determined that the fire had been ignited by a 'hand-held flame.' Books of matches were found on the floor of the cell. Defendant Kidd denied any knowledge of the fire.

At trial, the State called a surprise witness, Seattle Fire Department Investigator Owens, who had arrested defendant Kidd for previous offenses. Kidd, 36 Wash.App. at 508. In detailing the circumstances of the previous arrest, Owens recounted a statement made by defendant Kidd concerning his disdain for hospitals, jails and prostitutes. Defense counsel

called for a side bar conference and objected to the line of questioning on the grounds of irrelevancy and prejudice. Kidd, 36 Wash.App. at 508-509. She then moved for a mistrial. Kidd, 36 Wash.App. at 509. The trial court denied the mistrial because defense counsel had not objected when the testimony was given.

On appeal, defendant Kidd argued that the failure to hold a pretrial hearing pursuant to CrR 3.5 necessitated a declaration of mistrial. Division One of the Court ruled that nothing in the record discloses that Kidd made the statements under duress, coercion or inducement of any kind. The Court also found that the record did not reflect any interrogation whatsoever. Kidd was apparently not advised of his constitutional rights before making his statements to Investigator Owens. However, voluntary, unsolicited statements of an accused made before interrogation are not rendered inadmissible by the absence of previous advisement of constitutional rights.

In S.A.W.'s case, although he did receive Miranda and made post-Miranda statements, Kidd applies because the colloquy between S.A.W. and Deputy Philpott shows that S.A.W. understood his rights, was not confused and spoke voluntarily with law enforcement. That the trial court did not hold a CrR 3.5 hearing does not constitute error, because this exchange between the deputy and the responded demonstrates that there

was no issue regarding the voluntariness of S.A.W.'s statements. The record does not show that any coercive tactics were employed by law enforcement to get S.A.W. to make his statements, but rather that standard, investigatory techniques were employed. The trial court did not err in not holding a CrR 3.5 hearing, and its judgement and disposition should be affirmed.

2. S.A.W. RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COURT-APPOINTED ATTORNEY DECLINED TO MAKE A MERITLESS CORPUS DELICTI OBJECTION AS TO COUNT III-TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE-BECAUSE:
 - (a) NORTHUP ESTABLISHED THAT THE HONDA CFR 450 WAS HIS MOTORCYCLE;
 - (b) THAT HE HAD NOT GIVEN S.A.W. PERMISSION TO RIDE OR TAKE IT;
 - (c) S.A.W. GAVE THE MOTORCYCLE TO TERRY BROWN; AND
 - (d) TOLD DEPUTY PHILPOTT AFTER MIRANDA THAT HE KNEW THAT MOTORCYCLE WAS STOLEN AND HAD RODE IT.

S.A.W. received effective assistance of counsel because his court-appointed attorney did not make meritless a corpus delicti objection as to Count III-taking a motor vehicle without permission in the second degree-when: (a) Northup testified that the Honda CFR 450 was his motorcycle; (b) that he had not given S.A.W. permission to ride or take it; (c) S.A.W.

gave the motorcycle to Terry Brown; and (d) told Deputy Philpott after Miranda that he knew that motorcycle was stolen and had rode it.

Washington's version of the corpus delicti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone. State v. Valdez, 137 Wash.App. 280, 290, 152 P.3d 1048 (2007); see State v. Bernal, 109 Wash.App. 150, 152, 33 P.3d 1106 (2001). A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. Valdez, 137 Wash.App. at 290-291; see State v. Vangerpen, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995).

The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. State v. Whalen, 131 Wash.App. 58, 62, 126 P.3d 55 (2005); see State v. Riley, 121 Wash.2d 22, 32, 846 P.2d 1365 (1993). If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with independent evidence to establish a defendant's guilt. Whalen, 131 Wash.App. at 62. To be sufficient, independent corroborative evidence need not establish the corpus delicti, or 'body of crime,' beyond a reasonable doubt, or even by a preponderance of the evidence. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delicti.

Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. In determining whether the State has produced sufficient prima facie evidence, we must assume the truth of the State's evidence and all reasonable inferences drawn therefrom. But the independent evidence must support a logical and reasonable inference of criminal activity only. Whalen, 131 Wash.App. at 63. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti.

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, 167 P.3d 1225, 1230, 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, 121 Wash.App. 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, 127 Wash.2d at 334-335; State v. Keend, 166 P.3d 1268, 1271-1272, 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, 121 Wash.App. at 184. 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 127 Wash.2d 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).

State v. Bernal can be distinguished from S.A.W.’s case as an example of where corpus delicti was not established. In Bernal, Zachariah Reid, age 14, was living in a trailer rented by his father’s girlfriend. Bernal, 109 Wash.App. at 152. Reid’s father lived elsewhere. At 3:00 AM on December 5, 1999, Reid was seen in good health. At 1:30 PM on the same date, his body was found inside the trailer. He had died from a heroin overdose. On December 7, 1999, the police interviewed defendant Bernal, who lived in the same trailer park. She admitted to selling heroin to Reid on the evening of December 4, 1999.

The record in defendant Bernal's case contained no other material evidence, and the State charged Bernal with homicide by controlled substance. Bernal filed a pre-trial motion to dismiss in which she alleged that the State could not prove the necessary corpus delicti and that the State lacked sufficient evidence to take a case to a jury. Ruling that the State could not prove the necessary corpus delicti, the trial court granted the motion.

On appeal, the Court reasoned that for corpus delicti to be proven, the State had to produce evidence independent of defendant Bernal's statements sufficient to support findings that heroin was delivered to Reid and that his use of it resulted in his death. Bernal, 109 Wash.App. at 153. Although defendant Bernal did not dispute the fact that the State produced evidence sufficient to support a finding that Reid's use of heroin resulted in his death, the Court reasoned that the State failed to produce any evidence other than Bernal's statement as to how Reid acquired the heroin. Bernal, 109 Wash.App. at 154. As the Court stated:

We can speculate that [Reid] acquired it by delivery, by stealing it, by finding it, or by some other means-but the record gives no rational basis for inferring one possibility over the others... There is simply no evidence, independent of Bernal's statements, from which to infer how Reid obtained the heroin.

Accordingly, the Court ruled that Washington's corpus delicti rule had not been satisfied and that trial court correctly dismissed the case.

Assuming the truth of the State's evidence and all reasonable inferences drawn therefrom, the State satisfied the corpus delicti rule in S.A.W.'s case and made a prima facie case on Count III-taking a motor vehicle in the second degree. Unlike Bernal where all the State had was the defendant's admission, Northup, the victim here, established that the Honda CFR 450 motorcycle was his, and that he had not given S.A.W. permission to take or ride it.

Photographs of Northup's motorcycle documenting its condition both before and after it was stolen were also admitted into evidence, as was Northup's receipt for the bike when it was new. RP 58: 24-25; 59: 1-25; 60: 1-3. Terry Brown also accepted Northup's motorcycle from S.A.W. as part of a trade. Taking this independent evidence in conjunction with the statements that S.A.W. made to Deputy Philpott post-Miranda, the State established a prima-facie case that S.A.W. committed this class C felony.

S.A.W. did not receive ineffective assistance of counsel when his court-appointed attorney declined to make a meritless corpus delicti objection, because she knew that the record did not support her claim. Instead of making a meritless objection, court-appointed counsel focused

her attention on the real issues in the case, her successful work on discrediting Terry Brown's credibility and effectively represented S.A.W. The trial court did not err in allowing S.A.W. to be represented by court-appointed counsel because she provided effective assistance to her client. Corpus delicti was satisfied, S.A.W. received effective assistance and no error occurred.

3. S.A.W. RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COURT-APPOINTED ATTORNEY:
 - (a) MADE TIMELY OBJECTIONS;
 - (b) EMPLOYED A DEFINITE TRIAL STRATEGY AND SUCCESSFULLY DISCREDITED TERRY BROWN, ONE OF THE STATE'S MAIN WITNESSES;
 - (c) ARGUED VIGOROUSLY IN S.A.W.'s DEFENSE THAT ULTIMATELY RESULTED IN;
 - (d) S.A.W. BEING FOUND NOT GUILTY OF A MAJOR FELONY, TRAFFICKING STOLEN PROPERTY IN THE FIRST DEGREE.

S.A.W. received effective assistance of counsel because his court-appointed attorney: (a) made timely objections; (b) employed a definite trial strategy and successfully discredited Terry Brown, one of the State's main witnesses; (c) argued vigorously in S.A.W.'s defense that ultimately resulted in (d) S.A.W. being found not guilty of a major felony, trafficking in stolen property in the first degree.

The facts of State v. Schwab are analogous to S.A.W.'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. State v. Schwab, 167 P.3d 1225, 1226 (2007). 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. Schwab, 167 P.3d at 1227. 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 defendant Schwab to proceed with his motion.

The trial court ruled that defendant 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. Schwab, 167 P.3d at 1227, 1230.

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, 167 P.3d at 1230. 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 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, counsel is not ineffective for failing to raise meritless arguments that Schwab did not request.

Contrasting Schwab with S.A.W.'s case, it can be seen that court-appointed counsel for S.A.W. employed effective trial strategy and discredited Terry Brown, one of the main witnesses for the State by bringing in his extensive criminal history. Commenting on Terry Brown's testimony in making its ruling, the trial court stated:

I'll just say this about Mr. Brown. There's one word, in my opinion, that describes Mr. Brown, and that is he's a fence. He's just-a fence means somebody who buys stolen property, and that was just very clear to me in this case. RP 118: 3-6.

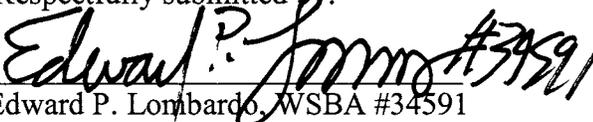
Court-appointed counsel for S.A.W. successfully argued that Terry Brown was not credible; an argument that the trial court accepted. Defense counsel's representation was effective if not entirely successful, as S.A.W. was acquitted on one of the three felonies he was charged with. Neither prong of the Strickland test was satisfied and no error occurred.

F. CONCLUSION

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

Dated this 26TH day of December, 2007

Respectfully submitted by:


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

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

STATE OF WASHINGTON,)	
)	No. 36336-4-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
S.A.W,)	
)	
Appellant,)	
_____)	

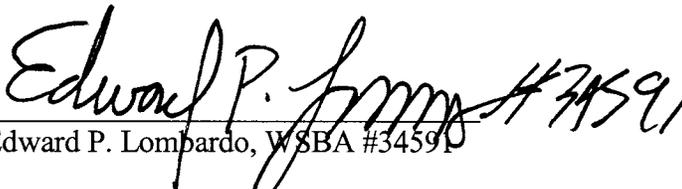
I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, DECEMBER 26 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:

Susan F. Wilk
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

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 26TH day of DECEMBER, 2007, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591