

NO. 36464-6-II  
Skamania County No. 07-1-00042-7

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TROY ANTHONY TATE**

**Appellant.**

FILED  
COURT OF APPEALS  
DIVISION II  
08 JAN 18 PM 1:32  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

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**C. STATEMENT OF THE CASE**

**1. FACTUAL HISTORY**

Troy Anthony Tate and Robin Tate were married and living together in a trailer outside of his parents' home in Carson, Washington. RP 31. They had a rocky relationship. RP 30. On February 4, 2007 Robin and Troy were drinking beer and watching the Super Bowl. RP 31. After the game they continued drinking and began arguing, and Robin told Troy she wanted a divorce. RP 34. Robin and Troy gave different accounts of what happened next. Robin said Troy grabbed her by her hair and threw her on her floor. RP 34. He then jumped on her chest with his knees and began slapping her in the face. RP 34. She claimed he then tried to bite her finger off. RP 34. At some point she twisted around and got away from Troy and she said he punched her in the back of the head. RP 35. She persuaded Troy to go to bed and she went to bed with him. RP 35-36.

The next morning she went to her friend's house after Troy left for work, and her friend drove her to the hospital. RP 36. She was in a great deal of pain and found it hard to breathe. RP 36-39. She was treated for injuries ranging from pain in the right side of her chest, radiating to her back and through her right arm; swelling in her left eye region; bruising and mild swelling around her left knee and her upper left arm. RP 115-16.

She was also evaluated for significant pain in her right rib cage, although x-rays revealed there was no fracture. RP 115-17. After this incident Robin continued to have trouble sleeping due to pain and nightmares and continued to feel substantial pain from her bruising. RP 42-43. When asked how bad her pain still was, on a scale of one to ten, three weeks after the incident she rated it as an eight. RP 45. She continued to use pain medication through the month of March. RP 44.

Following her visit to the hospital Robin went to a domestic violence shelter and eventually moved to California. RP 41-48. At the time she testified at trial, she had not seen Troy since she left her home the day after the incident. RP 41.

Troy gave the following account of the argument with Robin: He and Robin began arguing about her problems with substance abuse. RP 122-24. Troy said many hurtful things to Robin. Id. Troy turned to leave for the door and Robin jumped around the table and grabbed him by the neck from behind and pulled him backwards and they fell down together onto a table. RP 124. As they fell the back of Troy's head hit Robin's face. RP 126. Troy swung around to get Robin off of him she fell down on her left side, causing most of the injuries she complained of. RP 126. That concluded the physical portion of the argument, but they continued

drinking and, Troy said, Robin continued to berate him for a period of hours. RP 126.

## **2. PROCEDURAL HISTORY**

The Skamania County Prosecuting Attorney charged Troy Anthony Tate with one count of Assault in the Third Degree, alleged to have occurred on February 4<sup>th</sup>, 2007. CP 1. The case proceeded to trial on June 11<sup>th</sup>, 2007. Report of Proceedings. Prior to trial, defense counsel moved in limine to exclude testimony from Robin Tate that she had been physically abused by Troy in the past. RP 17. The court denied the motion and ruled that the proposed testimony was admissible because there was a delay between the alleged assault and Robin reporting the incident to authorities. RP 25. Robin testified on direct examination that the reason she went to bed with Troy despite having been allegedly assaulted by him was because “this has happened before and the only way to get him to stop is just to give in...So we just went to bed.” RP 36.

Donna Clack, the emergency room coordinator for Skyline Hospital, saw Robin when she came to the emergency room. RP 62-63. She described the injuries of which Robin complained in great detail, referring to Robin’s ER record in giving her testimony. RP 65-72. The State sought to admit the record of Robin’s ER visit, the contents of which had already been substantially testified to by Ms. Clack, as a business

record. RP 74. Mr. Tate objected to the record's admission, arguing the record was cumulative and its admission would draw undue attention to its contents. RP 74. The court overruled the objection and admitted the record. RP 74. Exhibit 3. Defense counsel did not seek redaction of prejudicial information contained in Exhibit 3. Report of Proceedings. Exhibit 3 states, on page three, "[A]t approximately 2100 last night pt reports she was assaulted by her hsb (Troy Tate) who was drinking—'this happens fairly often & she would like to press charges at this time.'" Exhibit 3 states, on page nine in the typewritten narrative by Dr. Russell Smith: "She states that she has been assaulted numerous times by her husband...She also states that her husband has been jail for two assaults involving her." It also states, in this narrative at page nine: "I believe that she has a history of fractured ribs in the past."

Defense counsel did not propose a limiting instruction about the substantial amount of propensity evidence that was admitted for the jury's consideration. Clerk's Papers, Report of Proceedings. During the jury's deliberation the jury sent a note to the Court. CP 48. The note said:

Can we consider the Defendant's 2 prior arrests for domestic abuse as to his credibility as stated in the medical record. (page 9, item 3).

[illegible signature]

“She states that she has been assaulted numerous times by her husband.”

“She also states that her husband has been in jail for two assaults involving her.”

CP 48. This question was not discussed on the record. Report of Proceedings, CP 86. The record contains no information that would suggest the parties were consulted prior to the judge answering the jury’s question. See CP 86. The judge answered the question by writing on the bottom of the same sheet of paper: “No, you may not consider any alleged prior acts of the defendant.” CP 48.

The jury returned a verdict of guilty, as well as a special verdict finding that the crime was one of domestic violence. CP 49-50. He was given a standard range sentence. CP 56. This timely appeal followed. CP 64.

**D. ARGUMENT**

**I. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 3 BECAUSE IT WAS CUMULATIVE, IT CONTAINED HEARSAY, AND IT CONTAINED PREJUDICIAL MATERIAL WHICH SUGGESTED THAT MR. TATE HAD A PROPENSITY TO COMMIT AN ASSAULT.**

When Exhibit 3 was proposed defense counsel objected on the basis that it was cumulative and admitting it would draw undue attention to its contents. Because both Donna Clack and Dr. Smith testified about

the injuries sustained by Robin Tate, there was no need to admit this document into evidence. It was clearly cumulative under ER 403, which commands that evidence may be excluded if it would constitute the needless presentation of cumulative evidence, and should not have been admitted by the trial court. Unfair evidence is evidence with “scant or *cumulative* probative force, dragged in by the heels for the sake of its prejudicial effect.” *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994), quoting *United States v. McRae*, 593 F.2d 700 (1979) (emphasis added).

Further, the fact that this document qualified as a business record should not have been dispositive to the court; there were other considerations that should have persuaded the court not to admit this document. First, it was replete with double hearsay. That the document itself was a business record does not excuse the hearsay statements within it that were made by Ms. Tate and which did not meet any recognized exception to the hearsay rule.

Specifically, Ms. Tate’s statements to Dr. Smith that she had been assaulted numerous times in the past by Mr. Tate and that Mr. Tate had been in jail for two assaults involving her were hearsay statements that did not fall within any exception to the rule. The State might respond that these statements fell within the exception to the hearsay rule which allows

for the admission of statements which are made for the purposes of medical diagnosis or treatment (ER 803 (a) (4)). However, these statements clearly do not fall within this exception. Whether Mr. Tate had previously been in jail or assaulted Ms. Tate numerous times in the past was not in any way necessary to her current medical diagnosis. The trial court erred in admitting this document without at least redacting the inadmissible hearsay statements made by Ms. Tate.

The statements identified in the paragraph above, in addition to being inadmissible hearsay, were inadmissible under ER 404 (b). ER 404 (b) prohibits the admission of evidence of other crimes, wrongs, or acts for the purpose of showing action in conformity therewith. The admission of evidence that a defendant committed an act similar to the charged act carries the substantial risk that the jurors will wrongfully convict. They may convict because they feel that the defendant is the type of person who would commit the charged crime. Some jurors may decide that the defendant should be punished for the prior bad acts, even if he is not guilty of the charged act. These are the reasons for ER 404 (b)'s prohibitions. *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Even where the evidence of prior bad acts is admissible to show something other than propensity, the prior bad acts must be proven by a preponderance of the evidence, be logically relevant to a material issue at trial, and be of greater

probative value than its potential for unfair prejudice. *Saltarelli* at 362.

“Because substantial prejudicial effect is inherent in ER 404 (b) evidence, uncharged offenses are admissible only if they have substantial probative value.” *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, the trial court initially allowed limited testimony by Ms. Tate that she had been assaulted in the past for the limited purpose of explaining why she went to bed with Mr. Tate rather than immediately flee the scene after the alleged assault. The information contained in Exhibit 3 went well beyond what was necessary to satisfy the State’s goal in this regard. In particular, the evidence about Mr. Tate having been twice incarcerated for the same conduct he was currently on trial for was extremely prejudicial.

In this case, we are in the unique position of not only knowing the jury noticed this information in the medical records, but knowing they discussed it during deliberation because they asked about it in a jury note. CP 48. We are not even required to speculate about the prejudicial impact of this evidence because we know it for a certainty. Although the court responded to this jury question by telling the jury they could not consider these alleged prior acts, the context in which the question was asked was

whether the jury could consider these prior acts in evaluating the defendant's *credibility*. The court merely instructed the jury it could not consider these alleged prior acts for the purpose they proposed; it did not instruct them that they could not consider this evidence for *any purpose*, such as (and most importantly) his propensity to commit this crime. The court's response was inadequate to prevent the jury's use of this evidence for an improper purpose and, as such, the admission of the 404 (b) evidence in Exhibit 3 cannot be considered harmless error. Mr. Tate should be granted a new trial.

**II. MR. TATE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO STATE ALL OF THE BASES ON WHICH EXHIBIT 3 WAS OBJECTIONABLE, FAILED TO SEEK REDACTION OF PREJUDICIAL MATERIAL FROM EXHIBIT 3, AND FAILED TO SEEK A LIMITING INSTRUCTION REGARDING THE PROPENSITY EVIDENCE SUBMITTED TO THE JURY.**

Mr. Tate was denied effective assistance of counsel when his attorney failed to make a complete objection to Exhibit 3, failed to seek redaction of prejudicial material from Exhibit 3 when the court admitted the document over his objection, and failed to propose a limiting instruction to lessen the extreme prejudice of admitting this material.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v.*

*Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney has a duty to make a correct and complete objection to evidence so that the trial court can make an informed decision about whether to admit the evidence. An objection that does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *State v. Guloy*, 104 Wash. 2d 412, 422, 705 P.2d 1182, (1985) (citing *State v. Boast*, 87 Wash. 2d 447, 553 P.2d 1322 (1976)). Here, defense counsel stated that he objected to Exhibit 3 only on the basis that it was cumulative. Having concluded (erroneously, as Appellant argues) that the document was not cumulative, the trial court was left to conclude that Mr. Tate did not otherwise object to this evidence. Because defense counsel failed to make a proper objection, an exhibit containing extremely prejudicial material was given to the jury

and, as we know, they discovered the allegations that Mr. Tate had assaulted Ms. Tate in the past and had been in jail twice for assaulting her.

Further, defense counsel did not ask to have this document redacted, which could easily have been done, nor did he ask for a limiting instruction (assuming the trial court would have denied his request for redaction, which is unlikely). The only plausible explanation for these failures is that he didn't read Exhibit 3, as it would be difficult to conclude that any attorney, knowing its contents, would not at a minimum have sought to have it redacted. The jury, however, read it thoroughly and found the most prejudicial information in the whole exhibit (that Mr. Tate had been in jail twice for assaulting Ms. Tate). Defense counsel's failure to object to the admission of this evidence for the correct reasons, to seek redaction of this evidence, and to seek a limiting instruction fell below an objective standard of reasonableness.

Mr. Tate was prejudiced by his attorney's deficient performance. First, he was prejudiced because the jury most definitely saw this information and discussed it during deliberation. Second, he was prejudiced because the court's response to the juror question did not adequately limit the jury's use of this evidence. The argument pertaining to the prejudice suffered by Mr. Tate is presented in Section I, above, and incorporated here. Mr. Tate should be granted a new trial.

**III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHERE IT ANSWERED THE JURY QUESTION IN SUCH A WAY THAT IT PERMITTED THE JURY TO CONSIDER THE PRIOR ARRESTS OF THE DEFENDANT FOR ANY PURPOSE EXCEPT TO EVALUATE HIS CREDIBILITY, AND THE RECORD DOES NOT SHOW THAT THE DEFENDANT WAS CONSULTED AND GIVEN AN OPPORTUNITY TO BE HEARD PRIOR TO THE COURT ANSWERING THIS QUESTION.**

Communication between the trial court and the jury in the absence of the defendant is error. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Further, under CrR 6.15(f)(1), when the court receives questions from a deliberating jury, it must “notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response.” Although a trial court's ex parte judicial communication with a jury is error, reversal is required only if that error is prejudicial. *Caliguri* at 508. But where a defendant demonstrates the possibility of prejudice from the trial court's ex-parte communication, it is the State's burden to prove harmless error beyond a reasonable doubt. *Caliguri* at 509.

Here, the record does not reveal that CrR 6.15 (f) (1) was complied with because it does not demonstrate that the parties were notified of the question and given an opportunity to comment upon the court's response. The record only reveals that the question was asked and the judge answered it. The record also reveals this was not done in open court. Mr.

Tate suffered prejudice here because the response from the court was highly improper. As argued above, the trial court's response to the jury's question did not prohibit the jury from using Mr. Tate's prior alleged acts against him; it only prevented them from using it to evaluate Mr. Tate's credibility. They were free to use it, in the absence of a proper limiting instruction, to conclude that the current allegation was true because Mr. Tate had committed this conduct in the past so he most likely did it this time as well (i.e. he had a propensity to assault Ms. Tate).

Mr. Tate has demonstrated prejudice such that the burden is on the State to prove that this error is harmless. The State will be unable to prove this error is harmless because the trial court's instruction allowed the jury to consider his un-proven prior bad acts as propensity evidence. Mr. Tate's conviction should be reversed and he should be granted a new trial.

**E. CONCLUSION**

Mr. Tate's conviction should be reversed and he should be granted a new trial.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of January, 2008.

  
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ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Tate

## APPENDIX

### 1. Rule 6.15. Instructions and argument

(a) *Proposed instructions* Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) [Reserved.]

(c) *Objection to instructions* Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

(d) *Instructing the jury and argument of counsel* The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecution's rebuttal.

(e) *Deliberation* After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

(f) *Questions from jury during deliberations*

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff.

The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(g) *Several offenses* The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or any offense necessarily included therein may be submitted to the jury.

## 2. Wash. ER 403 (2007)

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## 3. Wash. ER 404 (2007)

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

#### 4. Wash. ER 803 (2007)

##### Rule 803. Hearsay exceptions; availability of declarant immaterial

(a) *Specific exceptions* The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded recollection* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity* [Reserved. See RCW 5.45.]

(7) *Absence of entry in records kept in accordance with RCW 5.45* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of

information or other circumstances indicate lack of trustworthiness.

(8) *Public records and reports* [Reserved. See RCW 5.44.040.]

(9) *Records of vital statistics* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of public record or entry* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of religious organizations* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, baptismal, and similar certificates* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family records* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of documents affecting an interest in property* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) *Statements in documents affecting an interest in property* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents* Statements in a document in existence 20 years or more whose authenticity is established.

(17) *Market reports, commercial publications* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises* To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation concerning personal or family history* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) *Reputation concerning boundaries or general history* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to character* Reputation of a person's character among his associates or in the community.

(22) *Judgment of previous conviction* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to personal, family, or general history, or boundaries* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(b) *Other exceptions* [Reserved.]

FILED  
COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON,	)	Court of Appeals No. 36464-6-II
	)	Skamania County No. 06-1-00042-7
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
TROY ANTHONY TATE,	)	
	)	
Appellant.	)	

ANNE M. CRUSER, being sworn on oath, states that on the 16<sup>th</sup> day of January, 2008  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Peter S. Banks  
Skamania County Prosecuting Attorney  
P.O. Box 790  
Stevenson, WA 98648

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Troy Anthony Tate

**Anne M. Cruser**  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

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DOC#307701  
Vancouver CJC/Vancouver West  
9105B N.E. Highway 99  
Vancouver, WA 98665

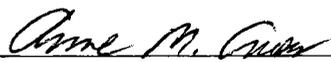
AND

Sharon Vance  
Skamania County Clerk's Office  
P.O. Box 790  
Stevenson, WA 98648-0790

and that said envelope contained the following

- (1) BRIEF OF APPELLANT
- (2) VERBATIM REPORT OF PROCEEDINGS (TO MR. BANKS)
- (3) RAP 10.10 (TO MR. TATE)
- (4) SUPPLEMENTAL DESIGNATION (ORIGINAL TO MS. VANCE)
- (5) AFFIDAVIT OF MAILING

Dated this 16<sup>th</sup> day of January, 2008

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: January 16, 2008, Kalama, WA

Signature: Anne M. Cruser