

No. 36884-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

APPEALS
COURT OF APPEALS
DIVISION II
08 APR 21 PM 9:11
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

STATE OF WASHINGTON

V.

JAMES NANCE, JR.

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

ORIGINAL

PM 4-18-08

TABLE OF CONTENTS

A. Assignments of Error.....1

B. Statement of Facts.....4

C. Argument.....11

1. The trial court erred by not using a Petrich instruction for the unlawful imprisonment charge.....11

2. The trial court erred by not treating the unlawful imprisonment charge as same criminal conduct with the second degree assault.....11

3. The offenses of violation of a court order and second degree assault violate Mr. Nance’s Fifth Amendment right to be free from double jeopardy.....15

4. The trial court violated Mr. Nance’s Sixth Amendment right to confront witnesses by sustaining an objection to the location of Ms. McGlaun’s workplace in January of 2006.18

5. The trial court violated Mr. Nance’s Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to present rebuttal witnesses for purposes of impeachment.....23

6. The trial court violated Mr. Nance’s Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to introduce the reason he and Ms. McGlaun were fighting.....28

7. The trial court violated Mr. Nance’s Sixth Amendment right to compel witnesses by excluding defense witness, Aurora Thomas...31

8. The trial court violated Mr. Nance’s Sixth Amendment right to compel witnesses when it denied admission of the phone records...33

9. The trial court erred by suppressing testimony that he and Ms. McGlaun intended to sleep together at the Chiefton Hotel on January 13, 2006.....35

10. Reversal is required under the cumulative error doctrine.....	36
11. The trial court erred by imposing an exceptional sentence in violation of the jury verdict.....	37
D. Conclusion.....	38

TABLE OF AUTHORITIES

Cases

<u>Alford v. United States</u> , 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931)	20
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004).....	37
<u>Blockburger v. United States</u> , 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932).....	15
<u>Mutual Life Ins. Co. v. Hillmon</u> , 145 U.S. 285, 36 L. Ed. 706, 12 S. Ct. 909 (1892).....	36
<u>Smith v. Illinois</u> , 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).....	21
<u>State v. Adame</u> , 56 Wn.App. 803, 811, 785 P.2d 1144, <u>review denied</u> , 114 Wash. 2d 1030 (1990).....	14
<u>State v. Azpitarte</u> , 140 Wn.2d 138, 995 P.2d 31 (2000).....	17
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997), <u>cert. denied</u> , 523 U.S. 1007 (1998).....	30
<u>State v. Calle</u> , 125 Wn.2d 769, 778, 888 P.2d 155 (1995)	15
<u>State v. Dunaway</u> , 109 Wn.2d 207, 743 P.2d 1237 (1987)	14
<u>State v. Fiallo-Lopez</u> , 78 Wn.App. 717, 899 P.2d 1294 (1995)	12
<u>State v. Greiff</u> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	36
<u>State v. King</u> , 113 Wn. App. 243, 268, 54 P.3d 1218 (2002).....	32
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	24
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984)	12
<u>State v. Recuenco</u> , __ Wn.2d __ (decided April 17, 2008)	38
<u>State v. Smith</u> , 101 Wn. 2d 36, 677 P.2d 100 (1984)	24
<u>State v. Smith</u> , 85 Wn.2d 840, 540 P.2d 424 (1975)	36
<u>State v. Terrovona</u> 105 Wn.2d 632, 716 P.2d 295 (1986).....	36
<u>State v. Thacker</u> , 94 Wn.2d 276, 616 P.2d 655 (1980).....	27
<u>State v. Ward</u> , 148 Wn.2d 803; 64 P.3d 640 (2003).....	16
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)	24

A. Assignments of Error

Assignments of Error

1. The trial court erred by not using a Petrich instruction for the unlawful imprisonment charge.

2. The trial court erred by not treating the unlawful imprisonment charge as same criminal conduct with the second degree assault.

3. The offenses of felony violation of a court order and second degree assault violate Mr. Nance's Fifth Amendment right to be free from double jeopardy.

4. The trial court violated Mr. Nance's Sixth Amendment right to confront witnesses by sustaining an objection to the location of Ms. McGlaun's workplace in January of 2006.

5. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to present rebuttal witnesses for purposes of impeachment.

6. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to introduce the reason he and Ms. McGlaun were fighting.

7. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by excluding defense witness, Aurora Thomas.

8. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses when it denied admission of the phone records.

9. The trial court erred by suppressing testimony that he and Ms. McGlaun intended to sleep together at the Chiefton Hotel on January 13, 2006.

10. Reversal is required under the cumulative error doctrine.

11. The trial court erred by imposing an exceptional sentence in violation of the jury verdict.

Issues Pertaining to Assignments of Error

1. Did the trial court err by not using a Petrich instruction for the unlawful imprisonment charge when the State presented two alternative theories for the unlawful restraint?

2. Did the trial court err by not treating the unlawful imprisonment charge as same criminal conduct with the second degree assault when the two offenses occurred at the same time and place, involved the same victim, and the same criminal intent?

3. Do Mr. Nance's multiple convictions for felony violation of a court order and second degree assault violate Mr. Nance's double jeopardy rights when the felony violation of court order may only be committed under circumstances not amounting to a second degree assault?

4. Did the trial court violate Mr. Nance's Sixth Amendment right to confront witnesses by sustaining an objection to the location of Ms. McGlaun's workplace in January of 2006?

5. Did the trial court violate Mr. Nance's Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to present rebuttal witnesses for purposes of impeachment?

6. Did the trial court violate Mr. Nance's Sixth Amendment right to compel witnesses by denying him the opportunity to introduce the reason he and Ms. McGlaun were fighting when the reason was admissible under the res gestae doctrine?

7. Did the trial court violate Mr. Nance's Sixth Amendment right to compel witnesses by substituting its judgment of the credibility of defense witness, Aurora Thomas, and excluding her testimony?

8. Did the trial court violate Mr. Nance's Sixth Amendment right to compel witnesses when it denied admission of the phone records after the State stipulated to the authenticity of the records?

9. Did the trial court err by suppressing testimony that he and Ms. McGlaun intended to sleep together at the Chiefton Hotel on January 13, 2006 when the testimony was admissible under the Hillmon doctrine of an expression of future plan or intent?

10. Given the large number of times the trial court refused to permit relevant and admissible evidence by the defense, is reversal required under the cumulative error doctrine?

11. Did the trial court err by imposing an exceptional sentence based upon an aggravating factor not found by the jury?

B. Statement of Facts

Substantive Facts

James Nance and Shelly McGlaun have an on-again-off-again history of being boyfriend and girlfriend. They have a child in common, Jamal, who was one year old at the time of the events at issue in this case. RP, 716. In April of 2005, they started having problems. RP, 717. In October of 2005, Mr. Nance was arrested for a domestic violence offense. RP, 718. As a result of that offense, he was sentenced to several months in jail and a no contact order was ordered. RP, 718-19.

Mr. Nance was released from jail on January 6, 2006. RP, 885. According to the testimony of both, later that same day they ran into each other at the Seven Eleven in Bremerton. RP, 719, 911. Their testimony was dramatically different as to what happened over the next seven days.

According to Mr. Nance's testimony, the next day (January 7) Ms. McGlaun called Mr. Nance while he was at a friend's house for lunch. RP,

912. Ms. McGlaun and Jamal came over to the house and talked over lunch. RP, 913. They made arrangements to see each other again later that evening. RP, 912-13. That night, they met at a park with Jamal and played and talked for hours. RP, 913. Mr. Nance was particularly excited to see that his son had just learned to walk. RP, 913. Mr. Nance and Ms. McGlaun ended up sleeping together at her house that night. RP, 914. They spent every night together the next six nights, having sexual intercourse each night. RP, 910.

On January 12, Mr. Nance ran some errands for Ms. McGlaun. He used her debit card each time. RP, 916. He bought some groceries at the Red Apple Grocery and some pizza at Papa Murphy's Pizza. RP, 917.

On the morning of January 13, Mr. Nance got up at 5:30 a.m. and went to work. RP, 899. Prior to leaving, Ms. McGlaun's mother tried to enter the bedroom and possibly saw Mr. Nance. RP, 900. Ms. McGlaun's mother did not approve of the relationship with Mr. Nance. RP, 900. Mr. Nance drove to her apartment at 10:15 in the evening. RP, 906. He waited in his car for five minutes until Ms. McGlaun came out of her apartment to join him. RP, 905. With her she brought Jamal, a car seat, and a diaper bag. RP, 905. They then drove together to the Chiefton Hotel. RP, 906.

At the Chiefton, Mr. Nance played with his son for a while. RP, 906. He then ran some bath water and he and Ms. McGlaun bathed

together. RP, 906. Inside the bath, they engaged in oral sex. RP, 907. They got out of the bathtub and had sexual intercourse on the floor of the bathroom. RP, 907.

When they went into back into the bedroom, Mr. Nance and Ms. McGlaun started arguing. RP, 907. The jury was never allowed to hear what the argument was about as the trial court sustained the State's objection to this information. RP, 907. What started as a "conversation" turned into a "heated argument" over this unnamed problem. RP, 907-08. Suddenly, Ms. McGlaun charged at him. RP, 908. Initially, Mr. Nance pushed her off him, but she charged at him a second time. RP, 908. This time, Mr. Nance grabbed her by the neck and pushed her towards the wall. RP, 909. He slapped her. RP, 909. Ms. McGlaun was by this time hysterical and crying, causing Mr. Nance to leave. RP, 910. He never threatened to kill her. RP, 927. He did not have a knife. RP, 911. He did not prevent her from leaving. RP, 929.

According to Ms. McGlaun, after the chance meeting at Seven Eleven on January 6, Mr. Nance started calling her on a frequent basis. RP, 720. On either the ninth or tenth of January, Ms. McGlaun agreed to meet him at Burger King so he could spend some time with their son. RP, 722, 727. Ms. McGlaun testified that these were the only contacts she had with Mr. Nance during that week: at Seven Eleven and Burger King.

RP, 754. Although Mr. Nance called her multiple times, she refused to talk to him. RP, 754.

On the evening of January 13, 2006, at around ten o'clock, Ms. McGlaun left Jamal with her mother and walked to Seven Eleven for cigarettes and a drink. RP, 730-31. As she walked to the store, she saw Mr. Nance's vehicle approach her. RP, 732. According to her testimony, Mr. Nance jumped out of the car, grabbed her by the hair, threatened to kill her, and threw her into the backseat. RP, 733. Mr. Nance drove directly to her house and instructed her to go get their son. RP, 734. He threatened to kill her if she did not return with Jamal. RP, 734. After Ms. McGlaun returned with Jamal, he drove all of them to the Chiefton Hotel in Bremerton. RP, 736.

Ms. McGlaun testified that she did not know Mr. Nance was staying at the Chiefton Hotel and had never been there before. RP, 726. Curiously, when asked whether they went straight to the room or stopped at the registration desk first, she answered, "He went inside the front office. No, not that time. We went to – I'm sorry. We went straight to the hotel." RP, 736.

Once inside the room, Mr. Nance poured a couple alcoholic drinks and they sat and talked for a while. RP, 737. According to Ms. McGlaun, Mr. Nance was obsessed with the issue of whether she had had sex with

anyone else while he was in custody. RP, 738. Ms. McGlaun was upset to find out that Mr. Nance had watched her house the night before while she entertained a male friend. RP, 738. Mr. Nance started getting more and more aggressive. RP, 738. He then started punching her on the face and stomach. RP, 739.

Ms. McGlaun told the jury that Mr. Nance had a knife that he held to her neck. RP, 740. She testified that he threatened to slit her throat and bury her where no one would find her. RP, 740. But the jury also heard testimony from the SANE nurse, Norah Sullivan, that no weapons were used during the assault. RP, 592.

Mr. Nance then grabbed her by the neck and squeezed her neck until she lost consciousness momentarily. RP, 740. When he released her, she tried to stand up, but he grabbed her and threw her on the bed. RP, 741. He pulled down her pants, which were held up by an elastic band, and penetrated her vagina with his penis. RP, 741. According to Ms. McGlaun, the penetration was very painful and she was screaming. RP, 742. After the intercourse was done, Ms. McGlaun got up and ran for the door. RP, 742.

Once out the door, Ms. McGlaun started screaming. RP, 235. Nick Harris, who was staying in a nearby hotel room, went out into the hall and saw her. RP, 237. She told him she needed help. RP, 237. A black man

(Mr. Nance) walked past the two of them. RP, 237. Ms. McGlaun said she was raped RP, 238. Mr. Harris took her to Robyn Scott, the hotel night manager. RP, 241. Ironically, although Ms. McGlaun testified that she ran out of the hotel room immediately after the rape, both Mr. Harris and Ms. Scott said she was fully clothed when she came out of the room. RP, 249, 291.

During this period, Ms. McGlaun received a number of phone calls from Mr. Nance using a phone number she did not recognize. RP, 748. Ms. McGlaun's home phone number is 405-0707. RP, 745. Mr. Nance testified that his phone number was 204-8874. RP, 911. Ms. McGlaun denied recognizing the number 204-8874. RP, 745.

Mr. Nance was arrested on January 18, 2006. RP, 679. He was seen by Bremerton Police Officer William Endicott that night driving a vehicle. RP, 679. Officer Renfro, who was in a marked patrol car, responded to assist. RP, 686. Officer Renfro activated his emergency lights, but Mr. Nance did not stop. RP, 686. The vehicles traveled through a residential neighborhood at mostly slow speeds, although at one point Mr. Nance was going 60 miles per hour. RP, 688. Eventually, Mr. Nance's vehicle ended up in a ditch and he was arrested. RP, 691.

Procedural History

Mr. Nance was charged by Second Amended Information with six felonies: first degree rape, unlawful imprisonment, felony violation of a no contact order, second degree assault, felony harassment, and attempting to elude a police vehicle. CP, 97-104. For each of these offenses, the State alleged one or more aggravating circumstances. The jury found Mr. Nance not guilty of the first degree rape, but guilty of the remaining five felonies. CP, 196-211. On the charges of unlawful imprisonment, violation of a court order, second degree assault, and harassment, the jury found that the offense was committed against a family or household member. On all five offenses, the jury found that the offenses were committed shortly after his release from custody (rapid recidivism). Although alleged by the second amended information, the jury found that Mr. Nance was not armed with a deadly weapon at the time of any of these offenses.

The second amended information also alleged that all of these offenses (except the eluding offense) were committed as part of an ongoing pattern of psychological, physical, or sexual abuse. This aggravating circumstance is detailed in RCW 9.94A.535(3)(h). For unknown reasons, however, the jury was never instructed on this aggravating circumstance and it never considered or decided whether this aggravating circumstance exists. But the parties treated this aggravating

factor as proven at sentencing and the State relied on this aggravating factor in support of an exceptional sentence. The Judgment and Sentence clearly shows that the trial court treated this aggravating circumstance as proven. See e.g. CP, 212, line 24, reference to RCW 9.94A.535(3)(h). The court imposed exceptional sentences on all of the offenses except the harassment charge and ran the sentences concurrent. The court imposed 60 months on all the Class C felonies. The court imposed 84 months on the second degree assault, the only Class B felony. The standard range for the second degree assault was 53 to 70 months. It is unclear from the court's oral ruling whether the court was relying on the pattern of domestic violence aggravating factor, the rapid recidivism aggravating factor, or both in reaching its decision to impose an exceptional sentence. RP, 12 (Sept. 28, 2007).

C. Argument

1. The trial court erred by not using a Petrich instruction for the unlawful imprisonment charge.

2. The trial court erred by not treating the unlawful imprisonment charge as same criminal conduct with the second degree assault.

Mr. Nance's first two assignments of error are factually interconnected and are discussed together for ease of analysis. The first error is that the court did not instruct the jury on the need for unanimity pursuant to State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The second error is that the court should have treated the unlawful imprisonment charge as the same criminal conduct as the second degree assault.

When the prosecutor presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The Washington Supreme Court Committee on Jury Instructions has created a pattern jury instruction for just this purpose. WPIC 4.25. The issue of whether a court must give a Petrich instruction is one of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Fiallo-Lopez, 78 Wn.App. 717, 899 P.2d 1294 (1995).

Considering the overall length of this trial and the number of issues, the State's cross-examination of the defendant was relatively short. RP, 929-35. One thing that the State took pains to establish, however, was that Mr. Nance unlawfully restrained Ms. McGlaun. After establishing

that Mr. Nance admits to grabbing Ms. McGlaun around the neck (RP, 930), the following colloquy occurred:

Q: Did you push her or did you squeeze? What's your testimony.

A: I pushed her against the wall.

Q: So are we talking about just that, or are we talking this, and I mean squeezing?

A: I pushed her against the wall.

Q: Did you hold her there?

A: For a few minutes, yes.

RP, 930-31. The State returned to this theme in its closing argument:

When I questioned him about [the pushing] what did he admit? That he held her there against the wall by her throat for a period of minutes. Did she want to be held by her throat for a period of minutes? He admitted: No, that she did not. . . He admitted it. He admitted to unlawfully imprisoning her. That's just one way he did it. He kept her in a hotel room by the simple fact that he had Jamal in his arms. That little boy that he apparently loves so much became a huge pawn in this case. . . The ultimate deception; the ultimate control. . . He did it against her will and he kept her there.

RP, 981-82.

The State presented alternative theories of the unlawful imprisonment offense: (1) Mr. Nance unlawfully restrained Ms. McGlaun both by pushing and holding her against the wall against her will for a few minutes; and (2) by holding her in the hotel through the use of deception. The prosecutor presented both evidence and argument of several acts that could form the basis of one count charged without electing which one she

was relying on. These are two separate acts and the jury should have been instructed on the need for unanimity.

The next question is, assuming Mr. Nance is guilty of both unlawful imprisonment and second degree assault, whether the court should have treated these two offenses as the same criminal conduct. Same criminal conduct means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(a). Intent, as used in this analysis, “is not the particular mens rea element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” State v. Adame, 56 Wn.App. 803, 811, 785 P.2d 1144, review denied, 114 Wash. 2d 1030 (1990). In State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987), the Court focused on the extent to which a defendant's criminal intent, as objectively viewed, changed from one crime to the next.

Focusing for a moment on the State’s first theory for unlawful imprisonment, it is clear that the two offenses constitute the same criminal conduct. Mr. Nance grabbed Ms. McGlaun by the neck and held her against the wall for a few minutes while choking her. This act obviously occurred at the exact same time and place and involved the same victim. Additionally, his criminal intent was the same at that moment: to prevent and control the mother of his son and prevent her from leaving.

The State's alternative theory was that the entire interaction in the motel room constituted both unlawful imprisonment and second degree assault. According to the State, Mr. Nance employed repeated acts and mechanism to control Ms. McGlaun in the room: he hit her repeatedly, he forced her to have sex, he held her, and he coerced her using their son. But viewed objectively, Mr. Nance's intent was the same: to control Ms. McGlaun. Everything happened in the same hotel room in a relatively short period of time involving the same victim. Under either of the State's theories, the two offenses constituted the same criminal conduct.

3. The offenses of violation of a court order and second degree assault violate Mr. Nance's Fifth Amendment right to be free from double jeopardy.

Washington uses the "same evidence" rule to determine whether two or more offenses are offended by the double jeopardy clause. State v. Calle, 125 Wn.2d 769, 778, 888 P.2d 155 (1995). The same evidence rule has two prongs. If either prong is offended, then the lesser of two charges must be dismissed. The first prong is identical to the federal rule first announced in Blockburger v. United States, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Calle, citing Blockburger at 304. The second prong is whether convictions for two offenses offend a “clear indication of contrary legislative intent.”

Mr. Nance was convicted of both felony violation of a court order in violation of RCW 26.50.110 and second degree assault in violation of RCW 9A.36.021. RCW 26.50.110(4) reads:

Any assault that is a violation of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and *that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021* is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

(Emphasis added.) The italicized language was discussed by the Washington Supreme Court in State v. Ward, 148 Wn.2d 803; 64 P.3d 640 (2003). In Ward, two appellants complained that the State had not proved their violations of the statute did not constitute first or second degree assaults. The Supreme Court affirmed the convictions, saying, “We hold that the provision is not an essential element of felony violation of a no-contact order. The State is required to prove that the predicate assault

‘does not amount to assault in the first or second degree’ only when the State additionally charges the defendant with first or second degree assault.” Ward at 806.

The Ward case discusses, but distinguishes, State v. Azpitarte, 140 Wn.2d 138, 995 P.2d 31 (2000). In Azpitarte, the State charged the defendant with one count of second degree assault and one count of felony violation of a no-contact order. The State's case revealed evidence of two assaults, the second degree assault that was charged and a separate uncharged fourth degree assault. Pretrial, the State maintained that it would rely solely on the fourth degree assault to prosecute the felony violation of a no-contact order. In closing arguments, however, the State invited the jury to rely on either assault to enhance the no-contact violation to a felony. The jury instructions did not specify which assault or what degree was necessary for a felony conviction and required the jury to find only an "intentional assault." The jury returned guilty verdicts on both the second degree assault charge and the felony violation of the no-contact order. The Supreme Court reversed.

Mr. Nance’s case is more comparable to Azpitarte than to Ward. Mr. Nance was convicted of both violation of a court order and second degree assault. But the jury instructions made no effort to distinguish between the two offenses. Reversal is required.

The next issue is whether the violation of court order offense should be reversed for a new trial or reversed for dismissal. The Court in Azpitarte remanded for a new trial. But Azpitarte is distinguishable because the State announced pre-trial that it was relying on two separate assaults for the two offenses, although the jury instructions did not make this clear. In Mr. Nance's case, the prosecutor never elected between acts. In essence, the prosecutor argued that the totality of the events of January 13, 2006 proved that Mr. Nance's assault caused substantial bodily harm to Ms. McGlaun, without electing any particular assault.¹ Given the State's theory of the case, the two offenses constituted the same unit of prosecution and the proper remedy is to dismiss the violation of court order conviction on double jeopardy grounds.

4. The trial court violated Mr. Nance's Sixth Amendment right to confront witnesses by sustaining an objection to the location of Ms. McGlaun's workplace in January of 2006.

During the cross-examination of Ms. McGlaun, she was asked whether she was employed in January of 2006. RP, 781. After she

¹ The prosecutor also argued that Mr. Nance assaulted Ms. McGlaun with a knife, a deadly weapon. Given that the jury consistently declined to find a deadly weapon, it is highly unlikely that the jury's guilty verdict on the second degree assault was under the deadly weapon prong.

answered affirmatively, she was asked where she was employed, to which she answered, “I’m still employed at that place, so I’d rather not say.” RP, 781. This response prompted the court to excuse the jury so the issue could be argued. RP, 782.

In an offer of proof, counsel for Mr. Nance stated that everyone already knew that she worked for KCR.² RP, 783. While working at KCR, she met and became friends with Stephanie and Tyrone, who are also friends of Mr. Nance. RP, 783. Mr. Nance’s counsel intended the question (“Where were you employed at?”) to be the first of a series of questions about a pizza party that occurred between January 6 and January 13 at Stephanie and Tyrone’s house. RP, 783. In arguing against the motion, the prosecutor also stated that Ms. McGlaun works at KCR. RP, 785.

During the argument about the question, the issue came up whether Mr. Nance was asking where Ms. McGlaun worked at the time of trial or in January of 2006. RP, 788. A review of the question originally asked that precipitated the debate clearly shows that defense counsel was asking about her employment in January of 2006. RP, 781. It was Ms. McGlaun

² The record does not establish the meaning of this acronym, although KCR is a well known acronym for Kitsap Community Resources, a local non-profit organization. This would be consistent with her testimony that she works in the child care industry. RP, 786.

that interjected the non-responsive fact that she still works there. In case there was any ambiguity, defense counsel emphasized, "I could care less where she works now. I was concerned where she worked at the time." RP, 788.

The trial court again misstated defense counsel's question and ruled, "The question of the objection was, 'Where do you work now?' I'm sustaining it. It's not relevant to any issues in this case." RP, 789.

The Court's decision to sustain an objection to where Ms. McGlaun worked in January of 2006 violated Mr. Nance's right to confront witnesses and was error. The constitutional magnitude of prohibiting a defendant from inquiring of a material witness' living and employment situation has twice been addressed by the United States Supreme Court. In Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931), the trial court sustained an objection to background questions about the witness. Defense counsel invoked the Sixth Amendment right to confrontation, claiming the jury was entitled to know "who the witness is, where he lives and what his business is." The Supreme Court agreed, saying:

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given

the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony.

The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

Alford at 628. The Supreme Court reaffirmed the Alford analysis in Smith v. Illinois, 390 U.S. 129, 131, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968) when it said, "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." The Court made no effort in either Alford or Smith to engage in a harmless error analysis.

Justices' White and Marshall concurred with the Smith decision, but commented that there may be circumstances when limiting cross-

examination is necessary to protect the safety of the witness. In Mr. Nance's trial, because it appears, reading the colloquy as a whole, that personal safety issues may have influenced the trial court's decision to sustain the objection, it is worth commenting on this issue. First, the trial court was mistaken about the question to which it was sustaining an objection. Defense counsel made clear that she was not interested in where Ms. McGlaun was working at the time of trial, she was only interested in where she was working in January of 2006. This was an absolutely appropriate question about "who the witness is, where she lives and what her business is."

Second, the person who interjected the issue of Ms. McGlaun's present employment was not defense counsel, but Ms. McGlaun herself. Her answer to the question, "And where were you employed at?" was, "I'm still employed at that place, so I'd rather not say." Had Ms. McGlaun answered the question that was posed, rather than interjecting a non-responsive response, there would not have been an issue.

Finally, although Ms. McGlaun was apparently trying to protect her safety, the information about her employment was well known to all the parties. During the argument, during which Mr. Nance was present but the jury was not, both defense counsel and the prosecutor referenced the fact that Ms. McGlaun works at KRC. There was no safety reason to

restrict Mr. Nance's constitutional right to confront the primary witness against him.

Although the Supreme Court did not address the issue of harmless error in either Alford or Smith, the State will undoubtedly raise the issue in Mr. Nance's case. Because this is an issue of constitutional magnitude, the error cannot be harmless unless it is harmless beyond a reasonable doubt. Reviewing the record as a whole, defense counsel made a concerted effort throughout the trial to prove that Ms. McGlaun had repeated and daily contact with Mr. Nance. The contact was in person and by telephone. From defense counsel's offer of proof, Mr. Nance and Ms. McGlaun had mutual friends that worked at KRC with Ms. McGlaun. During the week of January 6, the four of them had a pizza party together. Because the court prohibited inquiry into Ms. McGlaun's employment, it effectively shut down inquiry into these mutual friends. This is the type of restriction on cross-examination that the Supreme Court was talking about when it referred to "emasculat[ing] the right of cross-examination itself." The error cannot be deemed harmless and reversal is required.

5. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to present rebuttal witnesses for purposes of impeachment.

Four of Mr. Nance's assignments of error relate to violations of his Sixth Amendment right to compel witnesses. Before reaching the specific facts, a brief overview of the relevant case law is appropriate.

The right to compel witnesses is guaranteed by the Sixth Amendment of the United States Constitution. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) the Court observed:

The right to offer the testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lie. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington at 19. A witness must be material to the defense case. State v. Smith, 101 Wn. 2d 36, 677 P.2d 100 (1984). The proposed testimony need not totally exonerate the defendant in order to be material. State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (other suspect evidence, which would not have totally exonerated defendant, was admissible because it would have brought into question the State's version of events). Because a violation of the right to compel witnesses is of constitutional magnitude, reversal is required unless the error is harmless beyond a reasonable doubt. Maupin.

There were multiple times during the cross-examination of Ms. McGlaun where she was impeached with prior statements made to defense investigators. For instance, she denied telling the defense investigator in June of 2006 that Mr. Nance waited for her in the car while she went inside her house to retrieve her son. RP, 779. That contradicted her trial testimony that Mr. Nance followed her into the hallway of her apartment and stood in the hallway. RP, 734-35.

In response to questions posed by the State on redirect, Ms. McGlaun testified that the defense investigators did not identify themselves as defense investigators. RP, 826. She said that the investigators said they were sent on behalf of Deputy Prosecutor Kelly Montgomery. RP, 826. They told her she was required to talk to them. RP, 835. The defense investigators controlled the questions and would only allow her to answer questions yes or no without elaboration. RP, 827.

Prior to resting, defense counsel asked to be allowed to call the defense investigators. RP, 935, 946. Defense counsel argued that the defense investigators were necessary rebuttal witnesses. RP, 946-47. One investigator, Don Lutes, could testify that he knows which phone numbers belong to whom, including pay phones. RP, 947-48. The second investigator, Jim Harris, could rebut Ms. McGlaun's testimony that he told her she had to talk to him and what she said. RP, 947.

The State objected on the ground that the witnesses were not on the defense witness list. RP, 948, CP, 27. The court was concerned that the witnesses were not there and ready to testify. RP, 948. The discussion was taking place at 3:45 in the afternoon on the last day of testimony. RP, 948. The court refused to allow defense counsel sufficient time to procure the witnesses. RP, 949.

The next morning, defense counsel re-raised the issue. RP, 956. Defense counsel said that the witnesses were present and ready to testify. RP, 956. Defense counsel also stated that she had had difficulty contacting the investigators the day before because of the lateness of the hour. RP, 956. At that point, although both parties had rested, the jury had not been instructed and closing arguments had not been delivered. The court refused to reconsider its earlier ruling. RP, 957. The defense investigators did not testify.

The defense investigators had relevant information to provide the jury. The trial court denied the testimony on two grounds. The first reason cited is the fact that the witnesses were not present and ready to testify. But the witnesses were readily available, just not at 3:45 on the eighth day of trial. On the morning of the ninth day, the witnesses were in the courthouse. The court had not yet instructed the jury nor had they heard closing arguments. Although it appears the court was trying to

complete the trial that day, the trial ended up going into an eleventh day anyway. The trial court denied Mr. Nance's right to compel witnesses in its haste to complete a lengthy and complex trial.

The second reason cited by the trial court is that the witnesses were not on the defense witness list. The fact that a witness is not listed on a witness list does not bar that witness from testifying when the purpose of the testimony is to rebut an issue raised by opposing counsel. State v. Thacker, 94 Wn.2d 276, 616 P.2d 655 (1980). Ms. McGlaun had denied making an impeaching statement. She claimed she had been forced to make statements in her defense interview without adequate opportunity to explain her answers. She refused to acknowledge Mr. Nance's phone number. These are facts that defense counsel could not anticipate and required rebuttal. The trial court erred by refusing the defense witnesses.

6. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by denying Mr. Nance the opportunity to introduce the reason he and Ms. McGlaun were fighting.

Early in the case, and frequently thereafter, the parties argued whether Mr. Nance could discuss the reason he and Ms. McGlaun were arguing. The issue first came up during pre-trial motions. RP, 106, 133. Mr. Nance argued that the evidence was admissible under the *res gestae*

doctrine. RP, 110. At that time, the court indicated that the evidence would probably not be allowed, but left open the issue. RP, 145. Ultimately, while he was testifying, the trial court sustained objections posed by the State to questions designed to elicit this testimony. RP, 907-08. The suppression of this information was error.

As set out in his offer of proof, Mr. Nance was upset because Ms. McGlaun was regularly allowing her mother to babysit Jamal. RP, 772. This was a concern because Ms. McGlaun's mother was living with and in a romantic relationship with a convicted sex offender. RP, 772. According to the offer of proof, Mr. Nance would testify that during the argument he told Ms. McGlaun, "I'm going to take your kid away from you if you don't get him away from a sex offender." RP, 773.

Mr. Nance argued that the reason for the argument was relevant to demonstrate Ms. McGaun's "motive to lie," as well as her "state of mind on that night." RP, 772-73. Mr. Nance would testify that he filed a complaint with CPS against Ms. McGlaun. RP, 772. He also intended to call the CPS social worker as a witness. RP, 772. The CPS social worker could also testify that Ms. McGlaun failed a drug urinalysis test in December. RP, 772. Mr. Nance further objected to the jury learning that, three months after Mr. Nance was arrested for the January 13 assault, the CPS investigation was closed with a finding that the allegations were

“unfounded.” RP, 772-73. The Court at one point indicated that Mr. Nance “can testify to whatever he says occurred that night. But there’s not going to be collateral evidence brought in regarding it.” RP, 775. But the court also ruled that there was to be “no cross-examination of [Ms. McGlaun] regarding that subject.” RP, 776.

When the issue came up during Mr. Nance’s testimony, the court ordered a side bar. RP, 907. At the side bar, the court reiterated its previous ruling that there was to be no testimony regarding the sex offender status of Ms. McGlaun’s mother’s boyfriend. RP, 918. Despite repeated requests by defense counsel, the trial court repeatedly stated that there would be no testimony on the subject of the argument. RP, 918-20. Ultimately, the court sustained objections to the testimony. RP, 907.

In Washington, the facts immediately surrounding an event are almost always probative under the *res gestae* rule. The Washington Supreme Court explained this rule as follows:

Under Evidence Rule 404(b) evidence of other misconduct is not admissible to show a defendant is a "criminal type." However, crimes or misconduct other than the acts for which a defendant is charged may be admitted for other reasons. In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a *res gestae* or "same transaction" exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the

charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury." Additionally, the rule itself allows evidence of other misconduct to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. To admit evidence of other crimes or misconduct under ER 404(b), the trial court must identify on the record the purpose for which it is admitted.

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998) (citations omitted).

Mr. Nance had the right under the res gestae doctrine to provide the jury with an "unbroken sequence of events" surrounding what happened on January 13. The trial court denied him that opportunity.

Although the trial court refused to permit the defense from telling the full story, the State was given great latitude. The trial court overruled Mr. Nance's objection to the jury learning the nature of the domestic violence charge against Ms. McGlaun that caused his October of 2005 arrest. RP, 718, CP, 88. The court even cited the res gestae rule as grounds for allowing the fact that between January 13 and January 17 Mr. Nance was on "Bremerton's Most Wanted." RP, 678. It is hard to fathom how being on Bremerton's Most Wanted list is part of the res gestae of the offense but the reason for the argument and fight is not. Reversal is required.

7. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses by excluding defense witness, Aurora Thomas.

At trial, Mr. Nance called Aurora Thomas to testify. Although Ms. Thomas was present and testified outside the presence of the jury, the trial court excluded her testimony. RP, 896.

Ms. Thomas is a friend of Mr. Nance. She testified that Mr. Nance came to her house for lunch, but could not remember the exact date. RP, 891-92. Mr. Nance received a phone call from a woman and, after the phone call, asked if she and her baby could join them for lunch. RP, 892-93.

Shortly thereafter, a woman and her baby arrived. RP, 893. The baby was an infant. RP, 895. Ms. Thomas could not remember the name of the woman, but described her as heavy set with shoulder length hair. RP, 894. This would have been an accurate description of Ms. McGlaun in January of 2006. See RP, 733 (discussion of the length of her hair). The group sat down and ate lunch for about 45 minutes. RP, 894. The trial court excluded the testimony because Ms. Thomas could not remember the date the lunch happened or the identity. RP, 896.

Although Ms. Thomas was not permitted to testify, Mr. Nance testified about the events. According to Mr. Nance's testimony, on January 7 Ms. McGlaun called him while he was at a friend's house for

lunch. RP, 912. Ms. McGlaun and Jamal came over to the house and talked over lunch. RP, 913.

The trial court erred by excluding the testimony of Ms. Thomas. The trial court basically substituted its judgment for that of the jury on her credibility. While the fact that she could not identify Ms. McGlaun by name and could not be certain of the date affects her credibility, it does not render her testimony irrelevant. State v. King, 113 Wn. App. 243, 268, 54 P.3d 1218 (2002) (inconsistencies in testimony go to weight, not admissibility). Ms. Thomas was able to describe Ms. McGlaun physically and said that she was carrying an infant. In addition, Mr. Nance's limited time out-of-custody creates only a seven day period during which this luncheon could have occurred.

Although Mr. Nance was permitted to testify about the lunch, the absence of a corroborating witness was highly prejudicial to his defense. This case was essentially a he said-she said case. Credibility of the two primary witnesses was critical to both sides. The State called multiple police officers, medical personnel, and civilians to corroborate Ms. McGlaun's testimony. Ms. McGlaun claimed that she met with Mr. Nance twice between January 6 and 13. The first time was the chance meeting at Seven Eleven. The second time was a brief meeting at Burger King. She claimed she never called him on the phone. The one witness

who could corroborate Mr. Nance's testimony that she called him and met with him voluntarily was excluded. The trial court essentially found her testimony not credible. But that was not the trial court's job. The jury should have been allowed to hear Ms. Thomas testify.

8. The trial court violated Mr. Nance's Sixth Amendment right to compel witnesses when it denied admission of the phone records.

Mr. Nance sought to admit phone records showing that he and Ms. McGlaun were having daily contact. Apparently there was some confusion about how the phone company listed the date. Instead of the normal American convention of listing the month, day, and year, the records listed the year, month, and day. RP, 813. There was also an issue created by the fact that Ms. McGlaun denied recognizing the phone number 204-8874. RP, 813.

According to testimony, the records showed that on January 7 Ms. McGlaun called from her phone number, 405-0707, to 204-8874 multiple times. RP, 812-13. For instance, there were thirteen calls on January 7 and four calls on January 8. RP, 815, 817. But the testimony was confusing, brought about in part because Ms. McGlaun had never seen the records before testifying and did not know how to read the records. At one point in the testimony, defense counsel was asking her about the

length of a phone call made by Ms. McGlaun to 204-8874. RP, 818. After Ms. McGlaun was unable to determine the length of the call, the State stipulated that the call was four minutes and 50 seconds. RP, 819. Defense counsel continued to try to examine the records using a confusing mixture of testimony from Ms. McGlaun and stipulations from the State. RP, 820-21.

Defense counsel then moved to admit the phone records. RP, 823. Ex. 129, 130. Although the State objected, the court admitted the records. RP, 823. Later, the Court sua sponte reconsidered its decision to admit the records. RP, 845. The State argued that the records were confusing and there was no evidence that Mr. Nance's number was 204-8874. RP, 846. Defense counsel responded that she had originally subpoenaed a representative from the phone company to testify about the business records but had canceled the subpoena due to a stipulation by the State to the authenticity of the records. RP, 847. The prosecutor confirmed the existence of the pre-trial stipulation. RP, 847. After more discussion, the trial court withdrew the admission of the records because they were confusing and "extrinsic to the testimony that's been given." RP, 852-53. Among the problems cited by the court was the fact that Ms. McGlaun testified that she did not believe 204-8874 was Mr. Nance's number. RP, 854, line 24.

The court later advised the jury about its decision to withdraw the exhibits. RP, 884. At least one juror immediately expressed concern that the jury would not be permitted to inspect the documents. RP, 884.

During Mr. Nance's testimony, defense counsel asked Mr. Nance to identify calls made by Ms. McGlaun to him. RP, 925-27.

Although the business records in this case may have been difficult to read, prior to trial the State and defense stipulated to their admissibility. The trial court erred by excluding the records. The records were relevant to show that Ms. McGlaun was regularly calling Mr. Nance, contrary to her testimony otherwise.

9. The trial court erred by suppressing testimony that he and Ms. McGlaun intended to sleep together at the Chiefton Hotel on January 13, 2006.

During Mr. Nance's testimony, he was asked about whether he and Ms. McGlaun intended to stay together at the Chiefton Hotel on January 13, 2006. RP, 901. The State objected and cited "self-serving hearsay" as the basis of its objection. RP, 901. The court partially sustained the objection and partially overruled it. RP, 901. The court instructed defense counsel to reask the question. RP, 901. When counsel reasked the question, the State objected again and the court sustained the objection.

Later in the testimony, Mr. Nance tried to testify that Ms. McGlaun called him and asked him to pick her up at ten o'clock. RP, 903. This statement was objected to by the State and stricken by the court. RP, 904.

Out-of-court statements that tend to prove a plan, design, or intention are admissible under ER 803(a)(3) to show the declarant's state of mind and plan. State v. Terrovona 105 Wn.2d 632, 716 P.2d 295 (1986); State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975). This rule, sometimes referred to as the Hillmon doctrine, has been consistently applied for over a century. Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 36 L. Ed. 706, 12 S. Ct. 909 (1892).

When defense counsel asked Mr. Nance whether he intended to meet with Ms. McGlaun at the Chiefton Hotel that night, the evidence was admissible as to both Mr. Nance's and Ms. McGlaun's intent to be together that night. The trial court erred by ruling otherwise.

10. Reversal is required under the cumulative error doctrine.

Under the cumulative error doctrine, reversal may be warranted where multiple errors, when considered as a whole, combine to deny a defendant his right to a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In this case, Mr. Nance has identified six Sixth Amendment errors (assignment of errors IV-IX) that resulted in repeated denial of his right to confront and compel witnesses. While each of these errors, viewed in isolation, may seem minor, when viewed as a whole they demonstrate that Mr. Nance was repeatedly stymied in his attempt to contest the charges. The cumulative effect was to deny him a fair trial.

11. The trial court erred by imposing an exceptional sentence in violation of the jury verdict.

The trial court imposed an exceptional sentence in this case. But the basis of the exceptional sentence was never found by the jury. Mr. Nance had the right to have the jury determine the aggravating circumstances. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004).

The State alleged multiple grounds for an exceptional sentence. The jury found that the offenses were committed shortly after his release from custody. But at sentencing, the prosecutor alleged that the jury also found that these offenses were part of a pattern of domestic violence as set out in RCW 9.94A.535(3)(h). But the jury was never instructed on this aggravator and they never found it. The judgment and sentence proves that the trial court relied, at least in part, on this aggravator to impose an

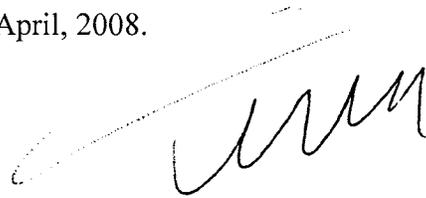
exceptional sentence. While it is possible that the court would have imposed the same sentence based upon the rapid recidivism aggravator alone, the court made no attempt to clarify its ruling.

Under the recent precedent of State v. Recuenco, ___ Wn.2d ___ (decided April 17, 2008), when a trial court imposes an exceptional sentence based upon an aggravating factor not considered by the jury, the error can never be harmless.

D. Conclusion

Reversal of all counts for a new trial is required. The felony violation of a court order should be dismissed for violation of double jeopardy. Resentencing is also required in order to treat the unlawful imprisonment and second degree assault as same criminal conduct and correct the erroneously imposed exceptional sentence.

DATED this 18th day of April, 2008.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

FILED
COURT OF APPEALS
DIVISION II

08 APR 21 AM 9:11

STATE OF WASHINGTON
BY
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,)	Case No.: 06-1-00096-8
)	Court of Appeals No.: 36884-6-II
Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
JAMES NANCE, JR.,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On April 18, 2008, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

On April 18, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

ORIGINAL

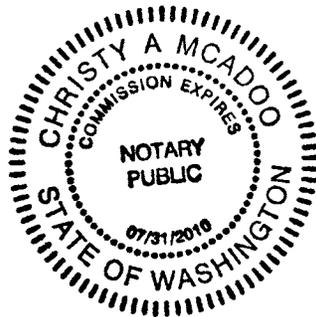
1 On April 18, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
2 Mr. James Nance, DOC #794237, Washington State Reformatory, Post Office Box 777, Monroe,
3 WA 98272-0777.

4 Dated this 18th day of April, 2008.

5
6 

7 Thomas E. Weaver
8 WSBA #22488
9 Attorney for Defendant

10 SUBSCRIBED AND SWORN to before me this 18th day of April, 2008.



13
14 

15 Christy A. McAdoo
16 NOTARY PUBLIC in and for
17 the State of Washington.
18 My commission expires: 07/31/2010