

FILED
COURT OF APPEALS
DIVISION II

08 DEC -3 AM 11:47

STATE OF WASHINGTON
BY cm
DEPUTY

NO. 37306-8-II
Cowlitz Co. Cause NO. 07-1-00685-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

RODNEY KEITH WARNER,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
MIKE NGUYEN/#31641
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

001111000

TABLE OF CONTENTS

Page

I. ISSUES..... 1

1. SHOULD A DEFENDANT’S CONVICTION FOR ASSAULT IN THE SECOND DEGREE BE CONFIRMED WHEN THERE IS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE DEFENDANT INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO THE VICTIM AND THE VICTIM HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY? 1

2. SHOULD A TRIAL COURT DENY TO GIVE A LESSER INCLUDED JURY INSTRUCTION WHEN THE EVIDENCE DOES NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE? 1

II. SHORT ANSWERS..... 1

1. YES. A DEFENDANT’S CONVICTION FOR ASSAULT IN THE SECOND DEGREE BE CONFIRMED WHEN THERE IS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE DEFENDANT INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO THE VICTIM AND THE VICTIM HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY. 1

2. YES. A TRIAL COURT SHOULD DENY TO GIVE A LESSER INCLUDED JURY INSTRUCTION WHEN THE EVIDENCE DOES NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE. 1

III. FACTS 1

IV. ARGUMENTS..... 10

1. THE APPELLANT’S CONVICTION FOR ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNT 1 SHOULD BE AFFIRMED BECAUSE JAMES WILCOX INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO BRANDON PINKARD AND BRANDON PINKARD HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY. 10

2. THE TRIAL COURT CORRECTLY DENIED TO GIVE THE LESSER INCLUDED JURY INSTRUCTION BECAUSE THE EVIDENCE DID NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE. 14

V. CONCLUSION 16

TABLE OF AUTHORIES

Page

CASES

State v. Joy, 121 Wn.2d 333, P.2d 654 (1993)11

State v. Delmarter , 94 Wn.2d 634, P.2d 99 (1980).....11

State v. Elmi, 138 Wash.App. 306 (2007).....13

State v. Green, 94Wn.2d 216, P.2d 628 (1980).....10

State v. Jackson, 129 Wash,App.95 (2005)11

State v. Jones, 63 Wn.App. 703, P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992)10,11

State v. Karp, 60 Wash, App. 369, (1993)15

State v. Krup, 36 Wash.App. 454, (1984).....15

State v. Porter, 150 Wash.2d 732 (2004).....14

State v. Prado, 144 Wash.App.227 (2008).....14

State v. Walton, 64 Wn.App. 410, P.2d 533, review denied, 119 Wn.2d 1011 (1992).....11

OTHER AUTHORITIES

WPIC 35.5011

I. ISSUES

1. SHOULD A DEFENDANT'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE BE CONFIRMED WHEN THERE IS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE DEFENDANT INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO THE VICTIM AND THE VICTIM HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY?

2. SHOULD A TRIAL COURT DENY TO GIVE A LESSER INCLUDED JURY INSTRUCTION WHEN THE EVIDENCE DOES NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE?

II. SHORT ANSWERS

1. YES. A DEFENDANT'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE SHOULD BE CONFIRMED WHEN THERE IS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE DEFENDANT INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO THE VICTIM AND THE VICTIM HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY.

2. YES. A TRIAL COURT SHOULD DENY TO GIVE A LESSER INCLUDED JURY INSTRUCTION WHEN THE EVIDENCE DOES NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE.

III. FACTS

On May 18, 2007, Chelsea Keefe, Brandon Pinkard, Gail Lewis, and a couple of other friends were celebrating a friend's birthday and met at the Cadillac Casino in the City of Longview, County of Cowlitz, State

of Washington. Transcript, p. 60. Chelsea Keefe is married to Brandon Pinkard and is a close friend of Gail Lewis. Transcript, p. 59 and 87. Shortly after they arrived at the casino, Chelsea Keefe and Gail Lewis went to the pool room to play some pool. While in the pool room, Chelsea Keefe and Gail Lewis got into an argument with some unknown individuals over the availability of one of the pool tables. The appellant and his friend, James Wilcox, were not in the casino, not in the pool room, and not part of this argument.

The argument escalated into a fight with people throwing pool cues, pool balls, and beer bottles at each other. During the fight, Chelsea Keefe was elbowed in the mouth and sustained a bloody lip. The fight lasted between five to ten minutes before everyone involved in the fight were told to leave the casino. Prior to leaving the casino, Gail Lewis saw a guy, with whom she and Chelsea Keefe had a fight with, get on his cell phone and say to her, "I'm calling my friends now. They're gonna come down and they're gonna - - (inaudible) kick you (inaudible)." Melvin Stroud, an employee of the casino responsible for the video surveillance, called 911 to report the fight. Transcript, p. 23, 27-29, 61-65, 88-89, 100-106, 108, and 185-202.

Brandon Pinkard, Chelsea Keefe, and Gail Lewis left through the casino front door and emerged onto Commerce Street. They crossed the

street and walked half a block North down Commerce Street. Gail Lewis was walking ahead of Brandon Pinkard and Chelsea Keefe. Two men, the appellant and James Wilcox, approached Brandon Pinkard and Chelsea Keefe. James Wilcox, a male approximately six feet tall with an average build, wore a green flannel shirt and approached Brandon Pinkard from behind with a knife. Brandon Pinkard felt a poke to his lower back and heard his wife scream, "run Brandon, he's got a knife." Brandon Pinkard took off running to the other side of Commerce Street and did not look at the individual that poked him, did not see the knife, and did not see what happened to his wife. James Wilcox continued to chase Brandon Pinkard with the knife down the other side of Commerce Street. Subsequently, Officer Berndt noticed that Brandon Pinkard had a cut to his shirt and a cut approximately an inch by an inch to the right side of his lower back. Transcript, p. 91-96, 108-110, 112, 120, 123-124, 144, 153, 173, and 230.

The appellant was also armed with a knife and chased Chelsea Keefe down the opposite side of Commerce Street. While chasing Chelsea Keefe, the appellant got within inches of Chelsea Keefe and motioned to stab her with the knife. Chelsea Keefe ran towards Gail Lewis and told Gail Lewis that the appellant was chasing her with a knife. Chelsea Keefe was really scared of the appellant. Transcript, p. 110-116. Chelsea Keefe grabbed Gail Lewis by her arm and they both ran from the

appellant. During the pursuit, Gail Lewis turned around and saw the appellant chasing her and Chelsea Keefe with a big knife. Gail Lewis did not see Brandon Pinkard and did not know what had happened to him. Both Gail Lewis and Chelsea Keefe positively identified the appellant and the appellant's knife. During the pursuit, Gail Lewis, Brandon Pinkard, and Chelsea Keefe became separated. The appellant continued to chase Chelsea Keefe with the knife around a car before running down an alley back towards the Cadillac Casino upon hearing someone yell the cops are coming. Shortly after being chased by the appellant, Chelsea Keefe was contacted by police officers. Transcript, p. 66-68, 70, 74-81, 84, 90, 94, 107-115, 119-120, and 123-126.

Officer Ken Hardy and Officer Michael Berndt of the Longview Police Department were dispatched to Cadillac Casino fight. Transcript, p. 40-41 and 133-134. When Officer Hardy arrived on scene, he saw Chelsea Keefe and Gail Lewis standing in the middle of Commerce Street within a block of the Cadillac Casino. Both appeared pretty excited and pretty upset. Transcript, p. 41-43. During his initial contact with Chelsea Keefe, the appellant and James Wilcox walked by and were identified by Chelsea Keefe as the two men who assaulted her and her husband. Officer Hardy and Officer Berndt contacted the appellant and James Wilcox. Transcript, p. 45-47, 50, 137, 142, and 150. The appellant was calm and

did not appear surprised when contacted by police officers. Transcript, p. 46. Initially, the appellant indicated that he knew there had been a fight at the casino, but that he was not involved in the fight and knew nothing about a knife or a knife used in a fight. Transcript, p. 137-138.

After initially contacting the appellant, Officer Berndt took statements from Chelsea Keefe, Brandon Pinkard, and Gail Lewis. Chelsea Keefe had a hard time communicating with Officer Berndt because she was excited, upset, and worked up about the whole incident. There was a flood of emotions from her and Officer Berndt had to redirect her several times and ask her the same questions several times to get information from her. Chelsea Keefe sometimes told a story in order and sometimes out of order. She jumped back and forth as she told Officer Berndt about the events that took place in the casino and about the events that took place with the appellant and James Wilcox. Transcript, p. 139-142 and 158. Officer Berndt noticed that Brandon Pinkard had a cut on his shirt and a cut of approximately an inch by an inch on the right side of his lower back. Transcript, p. 144, 153, and 230. Gail Lewis identified the appellant and James Wilcox as being the two men that attacked Chelsea Keefe and Brandon Pinkard. Transcript, p. 150-151.

While Officer Berndt took statements of the parties, Officer Hardy went to the Cadillac Casino and recovered two knives, exhibits # 2 and #

3, and a video, exhibit # 1. Transcript, p. 31 and 47-48. The Cadillac Casino has a pool room, casino, lounge, poker room, and restaurant. Inside the casino there is a camera overlooking a pay phone located in a hallway by the men's and women's restrooms. The camera is connected to a monitor and a video system that records the events in the casino. Transcript, p. 24-26. On May 18, 2007, the camera overlooking the payphone captured footages, exhibit # 1, of the appellant and James Wilcox placing two knives by the payphone. The appellant ditched one knife, exhibit # 3, on the floor and James Wilcox ditched one knife, exhibit # 2, behind the phone book. A casino porter recovered both knives and Chelsea Keefe and Gail Lewis positively identified one of the knives, exhibit # 3, as belonging to the appellant. Transcript, p. 30-32, 202, 205, and 230.

Subsequently, Officer Berndt learned of the two knives and security video and recontacted the appellant. When confronted with information of the two knives and security video, the appellant changed his story. Appellant indicated that a cousin or niece, who was inside the Cadillac Casino and involved in the initial fight in the casino, had called the appellant and asked the appellant for help. The appellant and James Wilcox proceeded to go to the Cadillac Casino to help the appellant's

family member. The appellant continued to deny having or carrying a knife to the scene. Transcript, p. 156-157.

At trial, the appellant indicated that on May 18, 2007, four to six of his family members were at the Cadillac Casino. At some point during the night, Randy Stout, the appellant's nephew, received a call from his brother asking for a ride home because they had been involved in an altercation and some people were trying to attack him at the bar. Transcript, p. 161-164, 186-187, and 202. Prior to going to the casino, the appellant took with him two very intimidating knives from the kitchen because his family indicated they were in trouble and the appellant thought the knives might come in handy. Transcript, p. 187-188, 206-207, and 219. Initially, Randy Stout did not see the appellant carry the two knives as he drove James Wilcox and the appellant to the casino. Transcript, p. 161-165. Randy Stout drove a small Ford with two front seats and two back seats. The appellant was the front passenger and James Wilcox was the rear passenger. They drove one vehicle and went to the casino to pick up four or five of the appellant's family members. Transcript, p. 203-205.

After arriving at the casino and parking their vehicle, they made their way to the casino and were confronted by Brandon Pinkard. Brandon Pinkard appeared hostile, said some words, and came towards

Randy Stout. The appellant stepped in between Randy Stout and Brandon Pinkard to protect his nephew. Initially, the appellant tried to shoo Brandon Pinkard away and when that did not work, the appellant held up and showed Brandon Pinkard one of the knives and told Brandon Pinkard to go away. Chelsea Keefe said the appellant's got a knife and pulled Brandon Pinkard away. Brandon Pinkard backed away and there was no further incident between them. Randy Stout did not see James Wilcox with a knife. Appellant indicated that he had both of the knives at the time and that was the only time he had pulled one of the knives. Appellant testified that he never chased, went after, poked, or made any other movement towards Brandon Pinkard, Chelsea Keefe, or Gail Lewis. Transcript, p. 166-167, 174-175, 189-193, 197-198, 210-211, and 216.

After the altercation with Brandon Pinkard, the appellant gave one of the knives to James Wilcox and all three proceeded into the casino to look for the appellant's family members. Transcript, p. 166-167, 190, and 195. Inside the casino, there were lots of people at all of the gambling and pool table areas. Transcript, p. 213. The appellant proceeded straight to the payphone, located in the hallway by the men's and women's restrooms, where no people were present and got rid of his knife by placing it on the floor. James Wilcox got rid of his knife by placing it behind the phone book. After getting rid of the knives, all three exited the

casino. Transcript, p. 30-32, 195, 202, 205, 213-215, and 230. As he exited the casino with James Wilcox and Randy Stout, the appellant was assaulted by Chelsea Keefe. Chelsea Keefe was alone when she assaulted the appellant by hitting him twice and throwing him against a plate glass window. The police arrived shortly thereafter and detained the appellant. Transcript, p. 170-171, 195-196, and 214-215.

At trial, the defense attorney asked the judge for a lesser included jury instruction for Unlawful Display of a Weapon. Transcript, p. 222. In count I of an amended information, the appellant was charged as an accomplice to James Wilcox's assault of Brandon Pinkard with a deadly weapon. In count II of the amended information, the appellant was charged with assaulting Chelsea Keefe with a deadly weapon. Transcript, p. 222 and 236-238 and CP 8-10. The judge did not give the defense attorney's proposed lesser included jury instruction as applied to count II because the defense for count 2 was a denial. Defense counsel did not object to the judge not giving the proposed lesser included jury instruction for count II. Transcript, p. 222.

The judge also did not give the proposed lesser included jury instruction as applied to count I because the State was alleging that someone other than the appellant assaulted Brandon Pinkard. In count I, James Wilcox was alleged to have assaulted Brandon Pinkard; thus, the

facts do not support the proposed lesser included jury instruction. The proposed jury instruction would have applied had the appellant been charged with assaulting Brandon Pinkard and not charged as an accomplice to James Wilcox's assault of Brandon Pinkard. Transcript Volume 1, p. 223.

IV. ARGUMENTS

1. **THE APPELLANT'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE AS CHARGED IN COUNT I SHOULD BE AFFIRMED BECAUSE JAMES WILCOX INTENDED TO CREATE APPREHENSION AND FEAR OF BODILY INJURY TO BRANDON PINKARD AND BRANDON PINKARD HAD A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY.**

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A reviewing court need not itself be convinced beyond a reasonable doubt, State v. Jones, 63 Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses,

and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-416, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. Jones, 63 Wn.App. at 707-708. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

“An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intent to inflict bodily injury.” WPIC 35.50. Viewing the totality of the evidence in the light most favorable to the State, the evidence indicates beyond a reasonable doubt that James Wilcox assaulted Brandon Pinkard. “A jury may infer criminal intent from a defendant's conduct where it is “plainly indicated as a matter of logical probability.” State v. Jackson, 129 Wash.App. 95, 109-111 (2005). In Jackson, the court held that “it was permissible for a jury to infer from this evidence that Jackson did and intended to create an apprehension and fear of bodily harm because he repeatedly pointed a gun at Pratt's head and threatened him.” *Id.*

In the present case, there was sufficient evidence for the jury to infer that James Wilcox intended to create apprehension and fear of bodily injury to Brandon Pinkard. James Wilcox, a complete stranger, approached Brandon Pinkard from behind with a very intimidating knife and poked Brandon Pinkard in the back with presumably the knife. In the area where he was poked, Brandon Pinkard had a cut to his shirt and a cut approximately an inch by an inch to the right side of his lower back. After his wife screamed for him to run because James Wilcox was armed with a knife, Brandon Pinkard took off running, left his wife behind, and was pursued by James Wilcox down Commerce Street. Based on James Wilcox's action, it was reasonable for the jury to infer that he intended to create apprehension and fear of bodily injury to Brandon Pinkard.

Likewise, the evidence was also sufficient for the jury to infer that Brandon Pinkard had a reasonable apprehension and imminent fear of bodily injury. Brandon Pinkard felt someone poke him in the lower back and heard his wife scream, "run Brandon, he's got a knife." Immediately, Brandon Pinkard took off running across Commerce Street, did not look back, and left his wife behind. It was reasonable for the jury to infer that he heard his wife's warning, took her warning seriously, and had a reasonable apprehension and imminent fear of bodily injury as evidenced by his immediate flight and abandonment of his wife.

In State v. Elmi, 138 Wash.App. 306 (2007), the defendant fired a shot into a house and caused two three year old boys and one five year old girl to cry and scream. The defendant was charged with assaulting the three children and the three children never testified at trial. Id. at 311-313. In Elmi, the court held that the evidence was sufficient for a jury to conclude that the children were put in reasonable apprehension of imminent bodily harm as evidenced by their screams and sounds of distress. Id. at 320-321. Like Elmi, Brandon Pinkard's immediate flight and abandonment of his wife, after hearing of the knife, was sufficient evidence for the jury to find that he had a reasonable apprehension and imminent fear of bodily injury.

Taking all of the evidence in the light most favorable to the State and leaving issues of conflicting testimony and credibility to the trier of fact, the court should affirm the appellant's conviction for assault in the second degree as charged in count I because the jury could reasonably infer that James Wilcox intended to create apprehension and fear of bodily injury to Brandon Pinkard and that Brandon Pinkard had a reasonable apprehension and imminent fear of bodily injury.

2. THE TRIAL COURT CORRECTLY DENIED TO GIVE THE LESSER INCLUDED JURY INSTRUCTION BECAUSE THE EVIDENCE DID NOT SUPPORT THE INFERENCE THAT ONLY THE LESSER INCLUDED

OFFENSE WAS COMMITTED TO THE EXCLUSION OF THE CHARGED OFFENSE.

“A trial court’s refusal to submit a proposed jury instruction is reviewed for an abuse of discretion.” State v. Prado, 144 Wash.App. 227, 241(2008). “The jury must be fully instructed on the law, but there is no right to an instruction that is not supported by the evidence.” Id. “A defendant may be convicted of a lesser included offense even if the State did not charge the lesser included offense.” Id. “But a defendant is only entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser included offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that the defendant committed the lesser crime.” Id. These requirements are known as “the ‘legal’ and ‘factual’ prongs of the lesser included offense test.” Id. and State v. Porter, 150 Wash.2d 732, 736-738 (2004).

With regards to the first legal criteria, “the elements of the lesser offense must be “necessary” and “invariably” included among the elements of the greater charged offense.” Porter, 150 Wash.2d at 736. To satisfy the second factual requirement, “there must be “a factual showing more particularized than [the sufficient evidence already] required for other jury instructions”: “Specifically, we have held that the evidence must raise an inference that only the lesser included...offense was

committed to the exclusion of the charged offense.” Id. at 737. “In other words, ‘the evidence must affirmatively establish the defendant’s theory of the case – it is not enough that the jury might disbelieve the evidence pointing to guilty.’” Id and State v. Karp, 60 Wash.App. 369, 376 (1993).

In the present case, the State concedes that the charge of unlawful display of a weapon meets the first legal criteria of the lesser included offense test, State v. Krup, 36 Wash.App. 454, 456-457 (1984), and will focus its argument on whether the facts in the case support the inference that only the lesser included offense was committed to the exclusion of the charged offense. The facts articulated by the appellant do not support the less included jury instruction because it amounted to a complete denial. The appellant indicated James Wilcox did not have a knife and never chased and poked Brandon Pinkard with a knife. Therefore, the lesser included jury instruction is not warranted because according to the appellant, James Wilcox did not have a weapon and did not unlawfully display a weapon.

The jury chose not to believe the appellant and chose to believe Chelsea Keefe, Gail Lewis, Brandon Pinkard, Officer Hardy, and Officer Berndt when they found the appellant guilty as charged in count I. Based on the facts articulated by the State’s witnesses, the lesser included jury instruction is not warranted because the facts do not support the inference

that only the lesser included offense of unlawful display of a weapon was committed to the exclusion of the charged offense of assault in the second degree. As discussed above, the evidence was sufficient for the jury to find that the appellant was an accomplice to James Wilcox's assault of Brandon Pinkard. Therefore, the trial court correctly denied to give the lesser included jury instruction because the evidence did not support the inference that only the lesser included crime was committed.

V. CONCLUSION

The appellant's appeal should be denied because there was sufficient evidence for the jury to find the appellant guilty as an accomplice to assault in the second degree as charged in count I and the

judge correctly denied to give a lesser included jury instruction because the evidence did not support the inference that only the lesser included crime was committed.

Respectfully submitted this 1st day of December 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:


~~MIKE K. NGUYEN / WSBA 31641~~
Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	NO. 37306-8-II
)	Cowlitz County No.
Appellant,)	07-1-00685-8
)	
vs.)	CERTIFICATE OF
)	MAILING
RODNEY KEITH WARNER,)	
)	
Respondent.)	

08 DEC -3 11:11:47
 STATE OF WASHINGTON
 DEPUTY
 COURT OF APPEALS
 DIVISION II

I, Michelle Sasser, certify and declare:

That on the 15th day of December, 2008, I deposited in the mails

of the United States Postal Service, first class mail, a properly stamped
and address envelope, containing Respondent's Brief addressed to the
following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Valerie Marushige
Attorney at Law
23619 55th Place S.
Kent, WA 98032-3307

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

Dated this 1 day of December, 2008.

Michelle Sasser
Michelle M. Sasser