

NO. 37686-5

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY cm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS SHAW

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Appeal from the Superior Court of Pierce County  
The Honorable Lisa Worswick

No. 07-1-05040-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the defendant fail to show that the court properly admitted the recording of the transaction with the informant where the State's foundation made prima facie showing that the recording was authentic?
2. Did the appellant fail to show that his confrontation rights were violated where the recording did not contain testimonial hearsay and therefore did not implicate the defendant's right to confront witnesses against him?
3. Was trial counsel effective where the court properly admitted the recording notwithstanding the fact that he sought to suppress the recording in preliminary hearings, and also objected to its admission asserting insufficient foundation?

B. STATEMENT OF THE CASE.

1. Procedure

On September 26, 2007 Marcus Shaw was charged with Count II: unlawful delivery of a controlled substance and Count III: unlawful possession of a controlled substance with intent to deliver. [There was no count I as that was charged against a co-defendant, but not against Shaw.] The case proceeded to trial and the jury convicted Shaw on Count II of unlawful delivery of a controlled substance, and on Count III of the lesser

included offense of unlawful possession of a controlled substance. The court sentenced Shaw on April 25, 2008. The notice of appeal was timely filed that same day.

## 2. Facts

On the 25<sup>th</sup> of September, Tacoma Police conducted an undercover buy-bust drug investigation using a confidential informant to make drug purchases. RP 142, ln. 11-22. Officers wired the informant up with an audio transmitter. RP 144, ln. 2-10. The conversation was also simultaneously recorded. RP 148, ln. 13-17. Officer Johnson was the officer who had direct control over the informant. RP 183, ln. 24ff. She searched the informant prior to conducting the operation. RP 84, ln. 11-13. She then provided buy money to the informant. RP 186, ln. 17-20. The serial numbers of the buy money had been pre-recorded. RP 147, ln. 5-15; RP 186, ln. 18-25.

Throughout the buy-bust investigation the informant was monitored by a surveillance vehicle that had both video and audio recording functions. RP 276, ln. 21 to p. 277, ln. 8. The audio recording was made by way of an electronic transmitter hidden on the informant. RP 280, ln. 1-5. The video and audio recording of the transaction were conducted by Officer McColeman. RP 276, ln. 13-8; 278, ln. 7-12. Officer McColeman was familiar with the equipment, having operated it hundreds of times previously. RP 278, ln. After the audio transmitter was

initially placed on the informant, the equipment was tested to ensure that it was working properly. RP 280, ln. 19ff.

The informant was dropped off in the area in which the investigation was to occur, near Wright park in Tacoma. RP 188, ln. 4-6. The informant was observed to make contact with a black male in the area of 4<sup>th</sup> and Tacoma Avenue. RP 279, ln. 7-8. The person the informant made contact with was Shaw. RP 467, ln. 10 to p. 468, ln. 8. Shaw and the informant were in front of an apartment building, which Shaw then entered and returned shortly thereafter. RP 279, ln. 12-19.

Officers observed a red Ford Explorer come into the area. RP 236, ln. 22ff. The red Explorer parked next to the informant and Shaw. RP 237, ln. 7-10. Shaw got into it. RP 11-143. The red Explorer drove around for less than five minutes and returned to the same location. RP 237, ln. 21 to p. 238, ln. 15. Shaw then got back out of the Explorer and re-contacted the informant. RP 238, ln. 19ff.

The two milled around for a few seconds and then made a hand-to-hand exchange in which Shaw dropped several small objects into the informant's hand before the two went on their separate ways. RP 395-96; 471, ln. 14-21. The informant returned to Officer Johnson and provided her with crack cocaine. RP 189, ln. 18-22; p. 189-191; RP 396, ln. 12-19; RP 441, ln. 1-6.

Officers arrested Shaw on the sidewalk. RP 321, ln. 5 to p. 17. In the booking area of the jail, officers observed Shaw to be fidgeting with

his hands behind his back and subsequently found cocaine on him. RP 336-38; RP 441, ln. 7-11.

Other officers continued to follow the red Explorer for a couple of minutes to a parking lot where it turned around. RP 239, ln. 7-14. Officers O'Neill and Smith contacted the red Explorer in the 800 block of south G and arrested the two occupants. RP 333-34; p. 360, ln 2-14; 361-363. The driver was a Hispanic female, while the front passenger was a black male. RP 239, ln. 18-19.; RP 360, ln. 15-23. The front passenger was Shaw's co-defendant at trial, Askia Garrett. RP 361, ln. 18ff.

Officer Smith conducted a search of the vehicle incident to arrest and found a purse in the middle console between the two seats. RP 363, ln. 14-21. The purse contained two \$20 bills, the serial numbers of which matched the pre-recorded buy money. RP 152, ln. 8 to p. 153, ln. 23; p. 364, ln. 15 to p. 356, ln. 14. When asked about the money in the purse, Garrett responded, "Fuck you."

At trial the defense brought a motion *in limine* to exclude the use of and any reference to a recorded audio tape because, according to the defense, the State failed to turn the recording over as part of discovery. RP 12, ln. 14-21; p. 74, ln. 14-25. The defense also sought to exclude the audio because the police failed to issue a wire authorization document prior to making the recording and/or defense was not provided a copy of it.. RP 12, ln. 2-4; p. 26, ln. 7-8; p. 27, ln. 19-22. The State acknowledged that there was in fact no audio intercept form, and argued that it was

because such a form was unnecessary. RP 74, ln. 16-20. The court denied the defense motion with regard to the alleged discovery violation because in fact there was no discovery that was withheld where there was no audio intercept. RP 74, ln. 21-25.

The court decided that contrary to the initial representations of the parties, it would need to listen to the audio recording to determine whether or not it was a private conversation. RP 75, ln. 1-18. The court also reviewed the video recording. RP 75, ln. 12-18. Apparently, the audio cassette and the audio on the video recording was the same audio, captured via the wire on the informant. *See* RP 28-29.

During trial, the original audio and video tapes were identified and the jury was told that they were in substantially the same condition. RP 282, ln. 1 to p. 283, ln. 14. They were not entered into evidence because a redacted version of the recording was admitted. RP 475, ln. 1-10p p. 477, ln. 17.

Defense also brought a motion to exclude the video recording where, under the informer's privilege, the State did not intend to call the informant as a witness. RP 26, ln. 15-20. The video included both visual images and audio sounds of the transaction. *See* RP 89, ln. 22-25.

From the audio portion of the video recording the court excluded descriptive statements by the informant that were made for the benefit of the officers. RP 411-416. The court held that admitting such statements would violate the defendant's right to confront witnesses against him. RP

89, ln. 1-24. However, the court held that the informant's statements to the defendant in the course and in furtherance of the transaction were admissible. RP 411-4156. The court also held that the audio portions of the video recording that contained statements by the defendant were admissible. RP 90, ln. 2-7.

As to the foundational requirements for the admissibility of the recording, Detective Yenne testified that he could hear the conversation as it was broadcast to the surveillance van and played over a loudspeaker behind his head. RP 466-67. He indicated that he also had visual contact with the informant, could recognize the informant, and identified Shaw as the person who had the conversation with the informant. RP 467, ln. 10 to p. 468, ln. 8. Detective Yenne also related to the jury the course of the conversation between the informant and Shaw as he observed the transaction progress. RP 468 to p. 472.

Detective Yenne testified that he made several copies of the video, that he viewed the redacted recording in its entirety and that it accurately depicted the events as they occurred on September 25, 2007, and that it was a true and accurate copy of the original. RP 473-478, especially 476, ln. 15-20; p. 477, ln. 14-19. The court admitted the recording and it was published to the jury. RP 478, ln. 2-10. Detective Yenne identified for the jury both the informant and Shaw. RP 478, ln. 16-17.

Defense counsel had an opportunity to view the redacted video recording with the related statements and acknowledged that it complied with the court's order. RP 462, ln. 4-12.

C. ARGUMENT.

1. THE AUDIO PORTION OF THE RECORDING WAS PROPERLY AUTHENTICATED.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. *Univ. of Wash. Med. Ctr. V. Dep't of Health*, 164 Wn.2d 95, 103-04, 187 P.3d 243 (2008)(quoting ER 103(a)). A trial court's evidentiary rulings are reviewed for abuse of discretion. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 104. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). "The reviewing court will only hold that an abuse of discretion occurred if the trial court relies upon unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard or bases its ruling on an erroneous view of the law." *Lord*, 161 Wn.2d at 284.

ER 901 governs authentication. Authentication or identification is a condition precedent to admissibility that it is established by evidence sufficient to support a finding that the matter in question is what its

proponent claims it is. ER 901(a). The proponent is only required to make a prima facie showing that the evidence is authentic, and contrary evidence is disregarded for purposes of determining authenticity under ER 901. Tegland, Karl B., *Washington Practice: Evidence, Law and Practice*, vol. 5C, p. 286, n. 4, Thompson West, c. 2004. (citing *State v. Danielson*, 37 Wn. App. 469, 471-72, 681 P.2d 260 (1984)). Said otherwise, “[t]he court should admit the evidence if there is sufficient proof to permit a reasonable trier of fact to find in favor authentication or identification.” *State v. Rodriguez*, 103 Wn. App. 693, 14 P.3d 157 (2000); *Danielson*, 37 Wn. App. at 471.

The procedure for authenticating video recordings parallels the procedure for authenticating a film rather than audio recordings. *See State v. Early*, 36 Wn. App. 215, 674 P.2d 179 (1983). However, here the State established a foundation for authenticity that complied with the more stringent requirements for authentication of audio recordings.

ER 901(b) provides a number of illustrative examples of when authentication or identification conforms with the rule. The rule expressly states that those examples are by way of illustration only and not by way of limitation. ER 901(b). One example relates to voice identification. It provides that “Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording by opinion based upon hearing the voice at any time under circumstances connecting it with the

alleged speaker.” ER 901(b)(5). However, as indicated, that is merely an example is by way of illustration and not limitation.

The identity of a party to a conversation may be established by either direct or circumstantial evidence. *Danielson*, 37 Wn. App. at 472. The same applies to audio recordings of conversations, so that it is not necessary that someone familiar with the speaker’s voice identify it. *United States v. Restrepo*, 814 F.2d 1236, 1239 (7<sup>th</sup> Cir. 1987)(citing *United States v. Bonanno*, 487 F.2d 654, 259 (2<sup>nd</sup> cir. 1973)).<sup>1</sup>

Authentication of audio recordings may be established by circumstantial evidence, such as the similarity between what was discussed by the speakers and what each subsequently did. *Restrepo*, 814 F.2d at 1239 (citing *United States v. Hassel*, 547 F.2d 1048, 1055 (8<sup>th</sup> Cir. 1977), *cert. denied*, 430 U.S. 919, 97 S. Ct. 1388, 51 L. Ed. 2d 599 (1977)).

Here, to establish the foundational requirements for the admissibility of the recording, Detective Yenne testified that he could hear the conversation as it was broadcast to the surveillance van and played over a loudspeaker behind his head. RP 466-67. He indicated that he also had simultaneous visual contact with the informant, could recognize the informant, and identified Shaw as the person who had the conversation

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<sup>1</sup> ER 901(a) and ER 901(b)(5) are identical under the Washington and the Federal versions. See Tegland, Karl B., *Washington Practice Series, vol. 5D, Courtroom Handbook On Washington Evidence, 2008-2009 ed.*, p. 544-45, Thompson West, c. 2008.

with the informant. RP 467, ln. 10 to p. 468, ln. 8. Detective Yenne also related to the jury the course of the conversation between the informant and Shaw as he observed the transaction progress. RP 468 to p. 472.

Detective Yenne testified that he made several copies of the video and that he viewed the redacted version of the admitted recording in its entirety and that it accurately depicted the events as they occurred on September 25, 2007 and that was a true and accurate copy of the original. RP 473-478, especially 476, ln. 15-20; p. 477, ln. 14-19. The court admitted the video and it was published to the jury. RP 478, ln. 2-10. Detective Yenne then identified the informant and Shaw for the jury. RP 478, ln. 16-17.

The appellant has failed to meet his burden to show that the trial court abused its discretion when it admitted the redacted video recording that included the transmitted audio recording of the conversation between the informant and Shaw. The Court did not abuse its discretion when, by admitting the recording, it implicitly held that the State made a prima facie showing that the recording was authentic.

2. THE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM.

In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment right to confront witnesses meant that out-of-court *testimonial* statements were not admissible against a criminal

defendant unless the declarant was available for cross examination by the defendant (either at trial, or at some prior opportunity). *Crawford v.*

*Washington*, 541 U.S. 36, 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004).

No Washington courts have held that the protections granted by Article I § 22 of the Washington Constitution are greater than those provided under the federal constitution. *State v. Sandoval*, 137 Wn. App. 532, 154 P.3d 271 (2007); *State v. Saunders*, 132 Wn. App. 592, 132 P.3d 743 (2006); *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990). *But see State v. Mason*, 160 Wn.2d 910, 917 n. 1, 162 P.3d 396 (2007)(stating that they did not reach the issue because it was not adequately briefed, thereby possibly implying that it remains an open question).

The court in *Crawford* “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68. While the definition of “testimonial,” remains subject to refinement, the Court, however, gave guidance on the issue by noting various formulations of the “core class” of testimonial statements at which the Confrontation Clause was directed. The court identified one formulation of “testimonial” as, “affidavits, custodial examinations, prior testimony [...], or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford*, 541 U.S. at 51. A second description given by the court was, “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior

testimony, or confessions. *Crawford*, 541 U.S. at 51-52. A third description was “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at later trial.” *Crawford*, 541 U.S. at 51-52.

Nonetheless, the court’s formulation in *Crawford* has left some ambiguity in the definition of “testimonial” that remains subject to further clarification. 541 U.S. at 75-76 (Rehquist, CJ., dissenting); *State v. Mason*, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007)(citing *Davis v. Washington*, 1547 U.S. 813, 834, 26 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)(Thomsas, J., dissenting).

The three different descriptions have lead to two different tests: the “subjective” test, wherein the perceived intent and expectations of the out-of-court declarant determine whether a statement is testimonial; and the “objective” test, wherein whether a statement is testimonial if a reasonable witness would expect the statement to be used as evidence.

See Tegland, Evidence Law and Practice, Washington Practice, vol. 5C § 1300.10, (including 2008 pocket part supplement), c. 2007, 2008.

Washington initially followed a subjective test in *State v. Shafer*. *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006).

Notwithstanding earlier opinions to the contrary, the court in *Mason* appeared to indicate in dicta that an objective test is now the standard as identified in *Davis*. *Mason*, 160 Wn.2d at 919-20. (The court’s statement in *Mason* is dicta on this matter because the court never

reached the issue of whether the statements were testimonial where it held that the appellant had waived the right to cross examine the defendant because he had subsequently killed the defendant.). *Mason*, 160 Wn.2d at 922.

“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object...” *Crawford*, 541 U.S. at 53. The court noted, that while there have always been exceptions to the general rule of exclusion of hearsay evidence, “there is scant evidence that the exceptions were invoked to admit *testimonial* statements against the accused in criminal cases.” *Crawford*, 541 U.S. at 55-56 [emphasis added]. The court also noted that most hearsay exceptions covered statements that by their nature were not testimonial, and specifically refers to the business records exception, and the exception for statements in furtherance of a conspiracy. *Crawford*, 541 U.S. at 56.

Perhaps most important here, the court in *Crawford* also held that the Confrontation Clause does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted. *Crawford*, 541 U.S. at 59 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L. Ed. 2d 425, 105 S. Ct. 2078 (1985)).

Here Shaw’s confrontation rights were not violated for two reasons. The contents of the audio portion of the recording were not testimonial. The court excluded descriptive statements by the informant that were made for the benefit of the officers from the recording. RP 411-

416. In other words, the court properly excluded those statements on the recording which were testimonial. The court properly held that admitting such statements would violate the defendant's right to confront witnesses against him. RP 89, ln. 1-24.

However, the court held that the informant's conversation with the defendant in the course and in furtherance of the transaction were admissible. RP 411-4156. The court also held that the audio portions of the video recording that contained statements by the defendant were admissible. RP 90, ln. 2-7. The informant's portion of the conversation with Shaw was admissible for three reasons. The informant's comments in the conversation were not hearsay because they were not assertive statements; because they were not assertive statements, they were not offered to prove the truth of the matter asserted; and they were not testimonial hearsay because they were not statements intended to prove the defendant's guilt. They were statements made to further the drug transaction.

Hearsay consists of out of court statements offered to prove the truth of the matter asserted. ER 801(c). A Statement is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion. ER 801(a). ER 801 does not define "assertion" so the ordinary dictionary definition applies. "Assertion" means a declaration that something is the case. *See Webster's Third New International Dictionary of the English Language Unabridged, Merriam-*

Webster, Inc, Springfield MA, c. 2002. The informant asking Shaw for narcotics was not an assertion. It was a question. Because it was a question, the informant's request for narcotics was not hearsay, and therefore was admissible.

Because the informant's comments during the conversation were not testimonial hearsay, Shaw's right to confront the witness against him was not implicated by the admission of the audio portion of the recording.

### 3. DEFENSE COUNSEL WAS EFFECTIVE.

To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must rebut the presumption that the trial counsel's failure to object "can be characterized as *legitimate* trial strategy or tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating counsel's strategic decisions." *In re Pers.*

*Restraint of Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d at 362).

Here, on appeal the defendant claims that the trial counsel was ineffective for two reasons. First, the appellant claims that while trial counsel objected to the admission of the audio recording, he failed to articulate sufficient appropriate grounds for the motion where he failed to object to lack of foundation. Br. App. 14. Second, the appellant claims that trial counsel failed to object to Detective Yenne's statement that the CI asked Shaw for narcotics. Br. App. 15.

The appellant's first claim for ineffective assistance fails for several reasons. First and foremost, and dispositive in and of itself, contrary to the appellant's representation Shaw's trial counsel did object to the admission of the audio recording based upon insufficient foundation. RP 477, ln. 23-24. The court overruled the defense counsel's objection. RP 478, ln. 2.

Moreover, as explained in section A.1 above, the audio portion of the video recording was properly authenticated where Detective Yenne was able to identify Shaw as the speaker based upon his simultaneous observation of the transaction while listening to the audio transmission. The totality of the circumstances would permit a reasonable person to find that prima facie, the audio recording was authentic and was of Shaw.

Further, trial counsel for the defendant could not object to lack of foundation at the time he brought the motion to exclude the audio portion

of the recording because such an objection would have been premature where the State had not yet made any attempt to lay a foundation because it was not yet seeking to admit the evidence. Such an objection could only be proper at the point where the State sought to admit the recording.

Trial counsel was not ineffective because at each stage in the proceedings, he made appropriate arguments against the admission of the recording. The fact that he ultimately failed to keep the recording out was not a consequence of his being ineffective, but rather was due to the fact that the court properly admitted the recording.

Finally, even if the recording had been admitted in error, it was harmless where detective Yenne testified to the conversation between the informant and Shaw based upon his simultaneous observation of the transaction and hearing the audio transmission in the van.

The second claim regarding ineffective assistance is that the trial counsel failed to object to Detective Yenne's testimony that the informant asked Shaw for narcotics. The brief of appellant merely asserts that Detective Yenne's testimony was inadmissible, but fails to state why, or to cite any relevant authority in support of that claim. Per RAP 10.3(a)(6) the appellant has failed to cite to relevant authority on this issue.

Arguments not supported by citation to relevant authority are waived.

*State ex rel. M.M.G. v. Graham*, 123 Wn. App. 931, 99 P.3d 1248 (2004); *State v. Law*, 110 Wn. App. 36, 38 P.3d 374 (2002). Accordingly, the court should decline to consider the appellant's argument on this matter.

Moreover, the appellant's argument is without merit where Detective Yenne's statement was admissible because it was not hearsay. Hearsay consists of out of court statements offered to prove the truth of the matter asserted. ER 801(c). A Statement is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion. ER 801(a). ER 801 does not define "assertion" so the ordinary dictionary definition applies. "Assertion" means a declaration that something is the case. *See Webster's Third New International Dictionary of the English Language Unabridged*, Merriam-Webster, Inc, Springfield MA, c. 2002. The informant asking Shaw for narcotics is not an assertion. It is a question. Because it is a question, the informant's request for narcotics was not hearsay, and therefore was admissible.

Defense counsel was not ineffective where he objected to the admission of the recording but proper foundation had been laid for the admissibility of the recording, including the audio portion. Even if trial counsel were ineffective, the result of the trial would not have been different where Detective Yenne properly testified to the informant's conversation with Shaw because the conversation between the informant and Shaw was not hearsay where the conversation did not consist of assertive statements, and was not offered to prove the truth of any such assertions.

D. CONCLUSION

The appellant has failed to meet his burden to show that the State did not make a prima facie showing that the recording was authentic. The court properly admitted the recording where it was properly authenticated.

Because the informant's comments in the conversation with Shaw were not testimonial hearsay, Shaw has failed to meet his burden to show that the admission of the recording violated his confrontation rights.

Shaw has also failed to meet his burden to show that trial counsel was ineffective. Not only did trial counsel seek to suppress the recording, he also objected to its admission based upon insufficient foundation. Nonetheless, the court admitted the recording because a proper foundation had been established and it was appropriate to do so.

DATED: DECEMBER 31, 2008.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/31/08 [Signature]  
Date Signature