

COURT OF APPEALS
DIVISION II
JAN 21 11:00 AM '09
STATE OF WASHINGTON
BY: *[Signature]*
JERRY

NO. 40534-2-II
Cowlitz Co. Cause NO. 09-1-001167-0

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JOHN DOBBS,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by information with (I) stalking , (II) felony harassment, (III) intimidating a witness, (IV) drive-by shooting, (V) assault in the second degree, (VI) burglary in the first degree, (VII) unlawful possession of a firearm, and (VIII) obstructing a law enforcement officer. Counts I through VI were alleged to be domestic violence. The appellant waived his right to a jury trial, proceeding to a bench trial on January 25, 2010 before the Honorable Judge James Stonier. The trial judge found the appellant guilty of counts I, II, III, IV, VII, and VIII, but acquitted him of counts V and VI. The appellant received a sentence within the standard range. The instant appeal timely followed.¹

II. STATEMENT OF THE CASE

In the summer of 2009, the appellant began dating a woman named Casey Rodriguez. Ms. Rodriguez lived in a garage apartment located at 420 22nd Ave in Longview, Washington. RP 217, 66. James Applebury and Sarah Ellis lived in the main home on the property. RP 54-58. Sometime around Halloween, Ms. Rodriguez became angry with the appellant and broke off their relationship. RP 219.

¹ The appellant does not challenge his convictions for counts IV, VII, and VIII.

On November 7, 2009, Ms. Rodriguez called 911 to report an incident of domestic violence involving the appellant. Officer Matt Headley with the Longview Police Department went to the residence on 22nd Avenue and spoke with her. Ms. Rodriguez appeared nervous, and possibly afraid, during her contact with Ofc. Headley. RP 88-90. Ms. Rodriguez told Ofc. Headley her ex-boyfriend, who she knew as “Tim St. Louis”, had come to her apartment and beat on her door, demanding to come inside to talk about their relationship. She refused to let him in, telling him to leave. Ms. Rodriguez then heard a hissing noise, and when she went outside saw that the tires on her car were flat. RP 92. Ofc. Headley located a photo of the appellant, which Ms. Rodriguez identified as being “Tim St. Louis.” Ms. Rodriguez further stated the appellant had been following her for the past few days, and that he was carrying a black handgun. RP 94. She said the appellant had threatened to shoot her if she did not continue to date him. RP 95.

While Ofc. Headley was at the scene speaking with Ms. Rodriguez, she received a number of text messages from the appellant. She also received a phone call from the appellant, which Ms. Rodriguez allowed Ofc. Headley to listen to using the speaker phone function on her cellular telephone. The appellant confronted Ms. Rodriguez about calling the police, repeatedly demanding to know why she had done this. The

appellant ended the call by saying “I warned you not to call the police” and that Ms. Rodriguez was “going to get it.” RP 97.

Ms. Rodriguez told Ofc. Headley she was afraid of the appellant, and thought he would hurt her. She said the appellant had previously threatened to return and shoot up her house and everyone in it. RP 99. Ms. Rodriguez informed Ofc. Headley the appellant was transient, and the police were unable to locate him that night. Ms. Rodriguez made a sworn written statement for Officer Headley, which was admitted into evidence. Ofc. Headley also noted that the tires on her car had been slashed. RP 100-101.

On November 10, 2009, Ms. Rodriguez again called the police to report the appellant was continuing to threaten her. Ofc. Nick Woodard with the Longview Department responded, and found Ms. Rodriguez to be very upset and hysterical. Ms. Rodriguez reported the appellant had been stalking her. However, the appellant had fled the scene and again could not be located by the police. This upset Ms. Rodriguez greatly, as she told Ofc. Woodard that if the appellant wasn't found the police would find her dead. RP 108.

Later this same day, November 10, James Applebury, the resident of the main house at 420 22nd Avenue was upstairs using his computer. Through his window, he observed a black male and a black car. He

believed the black male was the appellant, as he had seen the appellant driving this car before. RP 39. Mr. Applebury noticed the car leave then return after a minute or so. He then observed the car pulling into the alley behind Ms. Rodriguez's apartment and heard gunshots coming from the alley. RP 40-41. Mr. Applebury saw an arm sticking out the car window when the shots were fired, he believed this was the appellant's arm. RP 50, 63. Mr. Applebury stated the shots sounded like a handgun. RP 38.

Sarah Ellis, the other resident of the main house at 420 22nd Avenue, testified to knowing the appellant as "St. Louis" and to seeing the appellant in the vicinity of the residence two to three times after Ms. Rodriguez broke up with him. RP 66-67. On the night of November 10, 2009, Ms. Ellis was on the front porch when the appellant walked up. The appellant was angry and was saying Ms. Rodriguez was his girlfriend, he was also demanding some of his property be returned. RP 68. The appellant told Ms. Ellis "I don't have no gun" and "I didn't shoot up the house." Not convinced by these disclaimers, Ms. Ellis went inside the house. She then saw that the appellant had gone to the back of the property, where Ms. Rodriguez lived. Shortly thereafter Ms. Rodriguez ran inside the main house screaming "He has a gun, call the cops." Mr. Applebury looked outside and saw the appellant was outside in Ms. Rodriguez's apartment, and that he was carrying a black handgun. RP 42-

44. Mr. Applebury then called the police. RP 54. After calling the police, Mr. Applebury observed the appellant jump the fence into his neighbor Ken Norton's yard. RP 45-46.

Ofc. Woodard, along with several other officers, responded to Mr. Applebury's 911 call. RP 109. As Ofc. Woodard approached the residence, he saw a male matching the appellant's description walk out from the driveway. He ordered this person to stop, but the appellant instead fled and ran between the residence at 420 22nd Avenue and the neighboring house. Ofc. Woodard last saw the appellant running down the alley behind the house. RP 110-113.

Officer Tim Deisher also responded to the scene with his police tracking dog Chase. RP 201-204. Using his dog, Ofc. Deisher tracked the appellant from 420 22nd Avenue to a nearby Laundromat. The appellant was found inside the store, attempting to hide behind two young women. The appellant was then arrested and booked into jail. RP 208-209.

After the appellant was apprehended, Ofc. Woodard returned to the house to speak with Ms. Rodriguez, who was extremely upset and hysterical. Ms. Rodriguez was very frightened by the appellant's return, saying the appellant had shot at her house earlier in the day and that she had told the police they would find her dead. RP 116. Ms. Rodriguez said that later in the evening on November 10, there was a knock on her door.

When she opened the door, the appellant forced his way inside. She argued with the appellant, who was armed with a revolver, before fleeing towards the main house. RP 117. Ms. Rodriguez made a sworn written statement regarding this event to Ofc. Woodard. RP 117. Ms. Rodriguez also gave Ofc. Woodard a threatening note the appellant had left for her earlier in the day. RP 118-119. This note had the words “D is on you bitch” on the back, while the front contained this message for Ms. Rodriguez:

Last days. The countdown on your ass. You should know me by now, Casey. You fucked up and tripped with the wrong brother. You will regret what you did and said to me. You never loved me. You never cared about me and now you will reap a world of trouble and pain. Number 1, you can apologize to me and talk with me face-to-face or Number 2, you know you can't and won't be in Longview or Washington. I'm going all out on this with you. You're fucked up bitch.

RP 120.

Ofc. Woodard went back to the residence on November 11, 2009 to check in on Ms. Rodriguez. During this visit, Ms. Rodriguez played for Ofc. Woodard two voicemails the appellant had left for her. The first message said “You heard that. That was me and that's what I can do.” Ms. Rodriguez believed this was an allusion to the drive-by shooting of her apartment. The second message had been left after the appellant had been arrested on November 10. In this message the appellant began by pleading with the victim not to press charges against him, then transitioned to

threats of “don’t do this to me or you’ll regret it.” RP 123. Ms. Rodriguez also showed Ofc. Woodard text messages the appellant had sent her. RP 124. These text messages stated:

Next time it is you, bitch. On, Bloods.

Bitch, you move and there will be hell to pay. Plus, my bro lives down there and he’s a known figure. You can’t get away from me. I told you you’re mines.

RP 126-127.

The following day, November 11, the next-door neighbor, Ken Norton, found a fully loaded .22 caliber revolver in his backyard. RP 80-81. Mr. Norton had been in his yard several times on the 10th, and the revolver was not there on that day. RP 84. Mr. Norton turned the gun over to the police. RP 84-85.

As part of his investigation, Det. Sgt. Mike Hallowell of the Longview Police Department examined Ms. Rodriguez’s apartment. He found two bullet holes on the outside of her residence, the appearance of which was consistent with a small caliber round such as a .22. RP 170-171. Further investigation indicated the trajectory of the bullets was from the alleyway behind the apartment. RP 172.

Det. Sgt. Hallowell also interviewed the appellant at the Cowlitz County jail. The appellant admitted he had been in an on again/off again dating relationship with Ms. Rodriguez since July or August of 2009. The

appellant stated he lived with his mother, not at 420 22nd Ave. The appellant claimed he loved Ms. Rodriguez, and cared for her greatly. RP 217-219. The appellant said that on Halloween Ms. Rodriguez became upset with him, and that she was “tripping” because she believed the appellant had a gun. The appellant denied this, claiming it was a toy gun that Ms. Rodriguez had mistaken for an actual gun. RP 221. The appellant said this toy gun resembled a revolver but had an orange tip, he stated he could not possess actual firearms due to a robbery conviction in Missouri. RP 227-228. The appellant denied leaving the threatening note or slashing Ms. Rodriguez’s tires, ascribing these acts to other “enemies” of hers. RP 222.

The appellant stated that he went to Ms. Rodriguez’s apartment on November 10th to visit her and to bring her some money to help out with the damaged tires. Ms. Rodriguez was fearful of the appellant, began yelling at him, and fled. The appellant said he then began to leave, but was confronted by a person he couldn’t see clearly. When he realized this person was a police officer, he supposedly ran because he had been smoking marijuana. RP 223-225.

When confronted by Det. Sgt. Hallowell, the appellant admitted he went to Ms. Rodriguez’s residence on November 7th, but denied slashing her tires. RP 231-232. Det. Sgt. Hallowell began to leave, but the appellant

asked if he “wanted the gun.” After hearing a description of the revolver, the appellant admitted to having handled the gun about a week before. RP 236. However, the appellant claimed that other persons had been with him on November 10, and implied these persons had dropped the gun in the neighbor’s yard. RP 237.

Later in November, Det. Sgt. Hallowell attempted to recontact Ms. Rodriguez. However, she never returned his calls or appeared for appointments. RP 241. The evening before trial, Ofc. Headley went to Ms. Rodriguez’s residence and instructed her to appear at court by 9:00. Ms. Rodriguez said she would appear. However, Ms. Rodriguez did not appear the next day, despite having been served with a subpoena by the State. The trial court then issued a material witness warrant for her. RP 77. On the first day of trial, Det. Sgt. Hallowell dispatched officers to Ms. Rodriguez’s apartment to locate her, but she was not there. Officers continued to check her residence throughout the day, and also went to several motels in the area looking for her. Det. Sgt. Hallowell contacted an informant and other persons who knew Ms. Rodriguez, but was unable to locate her. Attempts to find Ms Rodriguez on the second day of trial were also unsuccessful. RP 238-240.

After hearing this testimony, the trial court found that the appellant had forfeited his constitutional right to confront Ms. Rodriguez by

intentionally causing her nonappearance at trial. RP 254-256. The trial court ruled this had been established by clear, cogent, and convincing evidence. RP 254. The trial court further found the appellant had also forfeited the protections against hearsay afforded by the evidentiary rules. RP 282-283. The trial court then admitted all the testimony described above, and after deliberating, found the appellant guilty of stalking with a firearm enhancement (count I), felony harassment (count II), intimidating a witness (count III), drive-by shooting (count IV), unlawful possession of a firearm in the first degree (count VII), and obstructing a law enforcement officer (count VIII). RP 306-307, CP 1-4.

III. ISSUES PRESENTED

1. Did The Trial Court Err by Finding the Appellant Had Intentionally Caused Ms. Rodriguez to Absent Herself from His Trial?
2. Did the Trial Court Err by Ruling the Appellant Forfeited both His Right to Confront Ms. Rodriguez and the Protections Against Hearsay?

IV. SHORT ANSWERS

1. No.
2. No.

V. ARGUMENT

I. The Trial Court Correctly Found the Appellant Had Intentionally Caused Ms. Rodriguez to Absent Herself from His Trial.

The appellant argues the trial court erred by finding he acted with the intent to prevent Ms. Rodriguez from appearing at trial, and that his actions did in fact cause her failure to appear. However, the trial court's factual finding is supported by substantial evidence, and should not be disturbed on appeal.

An appellate court reviews a trial court's findings of fact under a substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Substantial evidence" is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. Here, the trial court found, pursuant to Giles v. California, 544 U.S. 353, 128 S.Ct. 2678 (2008) and State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), that the State had proved by clear, cogent, and convincing evidence the appellant had acted with the intent to prevent Ms. Rodriguez from appearing at trial, and these actions did in fact cause her nonappearance. RP 254-255. The question for this Court is not whether it would make the same finding, but whether the trial court's finding is

supported by substantial evidence. See State v. Fallentine, 149 Wn.App. 614, 620-621, 215 P.3d 945 (2009).

The evidence admitted at the forfeiture hearing established that the appellant had engaged in repeated and persistent acts of violence against Ms. Rodriguez. Indeed, the appellant's violence was escalating as time went by, progressing from slashing Ms. Rodriguez's tires, to shooting at her residence, to forcing his way into her residence while armed with a handgun. The appellant also demonstrated to Ms. Rodriguez that he was not deterred by her reporting his crimes to police. After the November 7th incident, the appellant berated Ms. Rodriguez for calling the police and stated she would "get it" for cooperating with law enforcement. RP 97. The appellant also left a threatening note for Ms. Rodriguez on November 10th, stating she would regret what she had done and that she was no longer safe in Longview. RP 120.

Finally, after the police arrested the appellant on November 10th, he continued to threaten Ms. Rodriguez by calling her from the jail. In this call, the appellant told Ms. Rodriguez not to press charges against him, or else she would regret it. RP 123. After this penultimate threat by the appellant, Ms. Rodriguez's cooperation declined precipitously. RP 241. This was unsurprising, as the appellant had repeatedly demonstrated to Ms. Rodriguez she would not be safe as long as she cooperated with the

police, even after he was apprehended. This evidence is more than sufficient to support the trial court's finding the appellant acted with the intent to prevent Ms. Rodriguez from testifying against him, and that he succeeded in his plan.

The appellant argues there was no "direct evidence" of the appellant's intent. Appellant's brief at 13. However, the law does not require any proposition be proved solely by direct evidence, as circumstantial evidence is just as valuable. See WPIC 5.01. The appellant further contends there was no evidence he threatened Ms. Rodriguez after he was formally charged with these crimes. Appellant's brief at 14. The appellant provides no authority to support the claim that forfeiture may only be found where a defendant engages in wrongdoing after an information has been filed against him. The reason for this absence of authority is that a defendant is best able to intimidate and terrify the witnesses against him *before* he is apprehended and incarcerated. It defies common sense to allow a defendant carte blanche to terrorize and strike fear into the hearts of his accuser up until the point the State files formal charges against him. It is similarly absurd to believe that the violent acts a defendant takes before he is arrested and charged have no impact on the cooperation of witnesses. Even leaving aside these points, in the instant

case the appellant did in fact contact and threaten Ms. Rodriguez after his arrest, thus this argument by the appellant misstates the record.

Finally, the appellant argues that perhaps Ms. Rodriguez failed to appear at trial because she resumed her relationship with the appellant and was back “in love” with him. Appellant’s brief at 14, 19. This claim lacks any support in the record, and is based wholly on speculation and appellate counsel’s personal opinions regarding victims of domestic violence. As such, this Court should disregard this claim entirely. Instead, the context of domestic violence supports the trial court’s finding, as the dynamics of such relationship are highly relevant to the forfeiture inquiry.

As noted by the United State Supreme Court in Giles:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution-rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

554 U.S. at 377.

Furthermore, this argument misses the point of the issue before this Court. Doubtlessly there are other *possible* explanations for Ms.

Rodriguez's failure to appear, the question is whether the trial court's finding is supported by substantial evidence. As the finding is supported by the record, the fact there may other hypothetical explanations does not vitiate the actual findings at trial.

The trial court correctly found the appellant had intentionally caused the unavailability of the key witness against him, Ms. Rodriguez. This finding is supported by substantial evidence, and should be upheld on appeal. This Court should reject any argument otherwise.

II. The Trial Court Correctly Found the Appellant Forfeited The Protections Against Hearsay.

The appellant argues that, even if the trial court properly found he had forfeited his right to confront Ms. Rodriguez, the trial court erred by further finding he also forfeited his right to object under the rules against hearsay. As a question of law, this Court reviews this issue de novo. State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993). However, the trial court correctly decided this issue, and its decision should not be overturned.

In State v. Fallentine, 148 Wn.App. 1012, 215 P.3d 945 (2009) rev. denied 166 Wn.2d 1028, 217 P.3d 337 (2009), the State offered evidence by a codefendant implicating the defendant in an arson. The codefendant refused to testify citing his fear of the defendant, and the trial court found forfeiture by wrongdoing and admitted the codefendant's statements

through third parties (i.e. as hearsay). On appeal, the court found the trial court's finding of forfeiture was supported by substantial evidence. Notably, the court also found, and the defense conceded, that a finding of forfeiture prohibits the defense from challenging the admission of statements on hearsay as well as confrontation grounds. Fallentine, 148 Wn.App. at fn. 34. The conclusion the defendant also forfeited the right to object on hearsay grounds was inherent in the admission of the codefendant's statements, as these statements, made to other persons, were rank hearsay and did not meet any of the exceptions under the rules of evidence. Id.

The United States Supreme Court recognized that forfeiture applies to both the rules against hearsay and the right in confrontation in the Giles decision. 554 U.S. 353. The court noted:

No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfuted. See, *e.g.*, 2 Hawkins 606 (6th ed. 1787); 2 M. Bacon, A New Abridgment of the Law 313 (1736). As the plurality said in Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), “[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”

554 U.S. at 365.

Courts in a number of states have reached the same conclusion: that forfeiture of the right to confrontation also results in forfeiture of the ability to object on hearsay grounds. See Com. v. Edwards, 444 Mass. 526, 540, 830 N.E. 2d 158 (2005); State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000); Devonshire v. U.S., 691 A.2d 165, 168-169 (D.C. 1997); State v. Henry, 76 Conn. App. 515, 536-538, 820 A.2d 1076 (2003) (cited with approval in Mason, 160 Wn.2d at 925). These cases, which predate Giles, are nonetheless in accord with the Supreme Court's decision that hearsay rights may also be forfeited.

This conclusion is unsurprising, as the right to confront witnesses flows from the constitution, while the protections against hearsay are promulgated by the Washington Supreme Court and the legislature. If a defendant's wrongdoing may cause his constitutional right to confront a witness to be extinguished, which is clearly the law, why would the same principle not operate to extinguish the rule based protections against hearsay? Even if Giles and Fallentine had not answered this question, a comparison of the importance of the respective rights conclusively shows there would be no reason for a different rule to apply to hearsay than confrontation. The same equitable considerations that lead to forfeiture of the right to confrontation also lead inexorably to forfeiture of hearsay

objections. As noted in Mason, “[t]hough justice may be blind it is not stupid.” 160 Wn.2d at 925.

The appellant argues that ER 804(a)(6) indicates that in Washington a “declarant is deemed *not* unavailable when his or her failure to testify was procured by the wrongdoing of the party objecting to the admission of the statement.” Appellant’s brief at 22. This argument completely misapprehends the meaning of ER 804(a)(6), which in fact states that a declarant is not unavailable as a witness if the unavailability is due to the wrongdoing of the *proponent* of the statement. The text of the rules states the opposite rule of what the appellant claims, undermining his argument. ER 804 does not speak to the issue at hand.

Next, the appellant argues that forfeiture of the hearsay objection is inequitable because it results in unjust enrichment by the State. Nothing could be further than the truth. The State is not unjustly enriched by admission of hearsay statements in lieu of Ms. Rodriguez’s live testimony, rather the State is simply restored the bare minimum of what her testimony would have been had the appellant not successfully procured her unavailability. In truth, the absence of Ms. Rodriguez deprived the State of the key witness against the appellant, and potentially prevented the State from introducing more detailed, coherent, and incriminating testimony than her hearsay statements. It is notable that the trial court acquitted the

appellant of the most serious charge against him, burglary in the first degree with a firearm enhancement. Had Ms. Rodriguez appeared and testified, the appellant would likely have been convicted of this count as well.

Finally, the State does not suggest that a finding of forfeiture necessarily allows the admission of any and all evidence against a defendant, irrespective of its nature or character. The admission of facially unreliable evidence may raise due process concerns in some cases. See Edwards, 444 Mass. at fn. 21; Devonshire 691 A.2d at fn. 6. Also, some evidentiary objections not based on hearsay grounds, such as relevance, may well survive. See Giles at 554 U.S. at 365 (linkage between hearsay and confrontation is why both are subject to forfeiture). However, this issue need not be decided in this case as the statements admitted into evidence had sufficient indicia of reliability to satisfy due process. Ms. Rodriguez's written statements were made under oath, the oral statements were made close in time to the events, and her version of events was corroborated by the physical evidence and other witnesses' testimony.

As there is no principle, reason, or authority cited by the appellant that demonstrates why forfeiture should not apply to hearsay objections as well as confrontation, the State asks this Court to uphold the ruling of the trial judge. The weight of authority holds that a finding of forfeiture

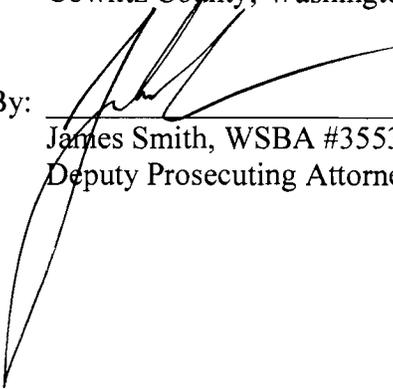
applies to both hearsay and confrontation, and equity requires such an outcome.

VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The trial court's finding of forfeiture is supported by substantial evidence, and the law indicates forfeiture applies to both confrontation and hearsay. The appellant's conviction should stand.

Respectfully submitted this 17th day of April, 2011.

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON,)
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 Respondent,)
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 vs.)
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 TIMOTHY J. DOBBS,)
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 Appellant.)
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NO. 40534-2-II
Cowlitz County No.
09-1-01167-0

CERTIFICATE OF
MAILING

I, Michelle Sasser, certify and declare:

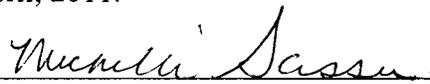
That on the 19th day of April, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

ERIC J. NIELSEN
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SEATTLE, WA 98122-2842

COURT OF APPEALS, CLERK
950 BROADWAY, SUITE 300
TACOMA, WA 98402

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

Dated this 19th day of April, 2011.


Michelle Sasser