NOS. 14-24-00236-CR, 14-24-00237-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

SHAWN DOMINIQUE WASHINGTON
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Numbers 2450648 & 2450649
From the Harris County Texas Court at Law Number 9

BRIEF FOR APPELLANT

Oral Argument Not Requested

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Statutes, Rules, and Miscellaneous

STATEMENT OF THE CASE

Nature of the Case: This is an appeal of two convictions.[1] Mr. Washington was convicted of assault family member. [CRI 126-27]. He was also convicted of terroristic threat family/household. [CRII 133-34].

Trial Court: Harris County Criminal Court Number 9, the Honorable Toria Finch presiding. The guilt/innocence portion of the trial was heard by a jury. Punishment was one year in the county jail, probated for one year in each case.

Trial Court's Disposition: Mr. Washington entered a plea of not guilty. A jury heard evidence and convicted Mr. Washington of terroristic threat family member and assault family member. [[4 RR 5]. The trial court sentenced Mr. Washington to one year probations with the condition he attend the Batterer's Intervention and Prevention Program. [4 RR 9-11].

Jurisdiction: The trial court granted Mr. Washington the right to appeal and signed a certification of the right to appeal. [CRI 132; CRII 139]. Mr. Washington timely filed notice of appeal from his convictions and sentence. [CRI 140; CRII 151]. *See* TEX. R. APP. P.§ 26.2 (1)(A).

[1] There are two clerks records and they will be designated as follows:. Cause number 2450648, 14-24-00236-CR (assault family violence) will be cited as CRI. Cause number 2450649, 14-24-00237-CR (terroristic threat) will be cited as CRII.

ISSUE PRESENTED

Issue One: The trial court erred when it denied a mistrial after the state's witness tainted the jury with information about Mr. Washington's criminal history.

STATEMENT OF FACTS

Background

Mr. Shawn Washington and Ms. Bianca Fisher (the complainant) were in a year-long relationship, spending much of their time together. [3 RR 22]. Ms. Fisher went on a trail-horse ride through a Houston street on February 5th, 2023, and fell from her horse. [3 RR 22-23, 45]. Mr. Washington and Ms. Fisher spoke on the phone that day and met up in-person at Mr. Washington's grandmother's house after Ms. Fisher's horse-ride fall. [3 RR 23, 47]. Mr. Washington reached back out after Ms. Fisher had gone home - informing Ms. Fisher that he would be coming by. [3 RR 35]. Ms. Fisher initially refused Mr. Washington's company at this point but would go on to provide Mr. Washington the gate code. [3 RR 35]. Mr. Washington arrived at Ms. Fisher's door, knocked, and was let in. [3 RR 49].

The offense

The evening took a turn for the worse when Mr. Washington asked to see Ms. Fisher's phone, and upon rejection Mr. Washington purportedly slapped Ms. Fisher. [3 RR 35-36]. The two stood by Ms. Fisher's door where she attempted to leave, and Mr. Washington was alleged to have punched and threatened Ms. Fisher. [3 RR 36, 51-52]. He also pulled her hair and left a bald spot. [3 RR 42]. She still had a scar on her arm at the time of the trial from a scratch she received. [3 RR 42]. Ms. Fisher

testified that Mr. Washington told her he was "going to kill her" and "[i]t's going to be a dangerous night." [3 RR 37]. These statements made her fearful. [3 RR 37-38].

Ms. Fisher, aware that Mr. Washington knew of the gun she kept on her bedside table, left the apartment via the door to her first-floor balcony - proceeding over the fence and into her truck. [3 RR 39, 42, 43].

The investigation

Ms. Fisher called 911, and although the initial responders declined to file charges; she went to the police station later and spoke with Detective Adnan Shaikh with the Houston Police Department who was on duty. [3 RR 88, 90-91 104-105, 113]. He saw scratches on her face and a swollen chin. [3 RR 92]. Ms. Fisher gave him identifying information about Mr. Washington. [3 RR 98]. Detective Shaikh had a phone conversation with Mr. Washington. [3 RR 104-05]. He also stated he filed charges on Mr. Washington because he "believed" an assault had occurred. [3 RR 105]. Det. Shaikh was not on the scene the night of the offense nor did he speak with the patrol officer who did the initial investigation. [3 RR 112-113]. There were no charges filed on the day of the offense despite an officer arriving on the scene. [3 RR 113]. Between February 9, 2023 and March 17, 2023 - nothing was done, but after a phone call where Mr. Washington denied assaulting her, Det. Shaikh decided to pursue charges, [3 RR 124-125].

The defense

There were many discrepancies in Ms. Fisher's testimony that the defense elicited through cross-examination.

Ms. Fisher had fallen off a horse the day of the offense and stated that it did not hurt her. [3 RR 45-47]. She could not remember how tall the horse was nor who the horse belonged to. [3 RR 46]. She also had been riding on the streets of Houston for this trail ride. [3 RR 44-47]. She stated she was not injured from her falling off a horse. [3 RR 47].

Ms. Fisher had been with Mr. Washington that day at his grandma's house. [3 RR 47]. When she left his grandma's house, he did not go with her. [3 RR 47]. She stated that she did not want Mr. Washington to come to her apartment but she did give him the gate code that night. [3 RR 48-49]. Despite Ms. Fisher stating that Mr. Washington had a key to her apartment, he knocked on the door when he came over. [3 RR 49]. Ms. Fisher was standing in front of the door when she asked Mr. Washington to leave. [3 RR 51-52]. She denied blocking the door, but conceded that he would have been unable to walk out the door from where she was standing. [3 RR 52-53]. And although Mr. Washington knew where her gun was, he never went and got it. [3 RR 55]. She also stated that even though Mr. Washington was slapping and punching her - she would not testify that he had been aggressive to her. [3 RR 57]. She stated "I didn't say he was being aggressive." [3 RR 57]. And after being shown body cam footage of a police officer using her keys to get into her apartment, Ms. Fisher insisted the door had been unlocked. [3 RR 70-72]. On redirect, Ms. Fisher

added that he pushed her to the ground and tried to prevent her from leaving the house. [3 RR 75]. Detective Shaikh stated that Ms. Fisher never said she had been pushed down. [3 RR 118-119].

The district attorney's expert employee

Ms. Fisher testified as to her version of events. [3 RR 17-86]. Her testimony included some discrepancies such as whether Mr. Washington had a key to her apartment, or how officers gained access to her apartment on the night of February 5th, 2023. [3 RR 49, 57-58, 65, D. Ex. 1]. To bolster Ms. Fisher's credibility, the state proffered the expert testimony of Catherine Simpkins. [3 RR 134-135]. The state filed notice of intention to use an expert on February 26, 2024, using a boilerplate notice form containing 22 different names accompanied by accreditations. [CRI 71, CRII 56]. Trial counsel challenged (and re-raised) Simpkins' status as an expert as there was "nothing else other than a statement that says expert" provided to defense counsel, yet the Judge determined defense had not yet challenged Simpkins' expertise. [3 RR 7, 133, 136]. Defense counsel re-urged their objection once expert testimony began, stating Simpkins "hasn't been tendered as an expert and I believe she's now giving expert testimony." [3 RR 143]. Judge Finch overruled this objection.[3 RR 143]. Trial counsel also objected on relevance and prejudice grounds that Simpkins had no personal knowledge of the events nor of Ms. Fisher. [3 RR 135].

Simpkins testified that she was a licensed social worker who worked as an assessment/intake caseworker at the District Attorney's office, and had been doing

this work since 2001. [3 RR 139-40]. Prompted by the state to elaborate on her "special training in the area of family violence[,]" Simpkins stated, "[w]e do various conferences." [3 RR 140]. Simpkins testified that she had never spoken at a professional conference nor was she a supervisor of any kind, but had testified in court approximately six times. [3 RR 140-41].

Simpkins would go on to testify that in her experience domestic violence is "typically behind closed doors" and isolation is a characteristic of domestic violence. [3 RR 143-44]. Simpkins also testified that victims of domestic violence present in different ways and sometimes "forget or misremember details of an incident" as they "get to a safe place." [3 RR 147]. Simpkins acknowledged that each case is not the same on cross-examination, and that she had no prior knowledge of the case involving Mr. Washington and Ms. Fisher nor the parties themselves. [3 RR 149-151].

Extraneous offenses

Months before trial, the defense requested notice for extraneous offenses. [CRI 57; CRII 47]. The Court simultaneously entered a standing discovery order which compelled state disclosure of extraneous offenses under points 3f, 5, and 14. [CRI 62-63; CRII 45-46]. In the lead up to trial, defense counsel filed a motion in limine requesting no mention or allusion to extraneous offenses, and that if the state intended to introduce them, that a hearing would take place "[p]rior to specific mention of extraneous offenses." [CRI 91; CRII 63]. Defense counsel also filed a

Theus motion asserting that the probative value of Mr. Washington's prior convictions was outweighed by the prejudicial effect of introduction. [CRI 98-99; CRII 80].

Before opening statements, Judge Finch acknowledged the importance of the extraneous offense issue by verifying whether the state had redacted extraneous offense details from a 911 call. [3 RR 7-8].

During the state's case-in-chief, the state directed Detective Adnan Shaikh, who oversaw the investigation into Mr. Washington. [3 RR 88]. In response to a question of how Det. Shaikh identified Mr. Washington, Det. Shaikh said, "I performed a criminal history check on him and him identify - - and complainant identified the person by his Harris County AFIS mug shot." [3 RR 98]. Immediately, defense counsel objected prompting parties to approach, where the following colloquy occurred:

> Mr. Vargas: Judge, this witness has just gone into the extraneous offenses. It goes into character evidence, which we have filed motions pretrial on. So I would object to that. And I'll wait for your response, Judge.
>
> The Court: ... Response?
>
> Mr. Jurisich: Your Honor, you know, it wasn't bringing specific acts. I think he just was going through the procedures of how he identified the suspect. We haven't offered evidence about mug shots or AFIS or anything like that. We're not going to –
>
> The Court: Well, testimony is evidence, right?
>
> Mr. Jurisich: Oh, I understand that, Your Honor –
>
> The Court: Okay.

Mr. Jurisich: – but he hasn't discussed the actual incidents and the actual nature of those incidents or the incident. He's just going through his procedures of how he identified the suspect.

The Court: Yeah, but, I mean, any testimony, any criminal history –

Mr. Jurisich: No. I understand.

The Court: – that has been improperly notified to the defense is improper. And so we will refrain from any further conversation about any prior history.

Mr. Jurisich: Okay. We would ask for – we would ask for a limiting instruction then in that case.

Mr. Vargas: And, Judge, I move for a mistrial.

The Court: Okay. That request is denied. I will give a limiting instruction for the jury to – we'll strike this last answer and they are to disregard it. And then you'll rephrase your question and start over.

* * *

The Court: All right. Defendant's objection is sustained. The Court is going to give the jury a limiting instruction as to what you just heard. All testimony that was given at the point of asking the witness how he went to identify the defendant, I'm asking you to disregard that and not to use that information in your consideration when deliberation comes. Okay?
So you're instructed to follow that instruction. Disregard everything from that point down. [3 RR 99-100].

Jury instructions in light of the limiting instruction

Judge Finch gave a limiting instruction. [3 RR 100]. The final jury instructions included the boilerplate definition of evidence, including witness testimony, but no mention of the juror's duty to follow Judge Finch's instruction to disregard the testimony rendered by Detective Shaikh. [CR1 107-14; CRII 112-19]. On the contrary, the instructions included the guidance that "[n]othing the judge has said or

done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or another." [CR1 109; CRII 114].

Verdict

After argument of counsel, the jury returned with a verdict of guilty in both cases. [4 RR 5; CRI 115; CRII 119]. The trial court sentenced Mr. Washington to one year in the county jail, probated for one year. [4 RR 9-15].

SUMMARY OF THE ARGUMENT

The police officer in charge of this case informed the seated jury that Mr. Washington had a criminal history. The defense objected and despite getting a limiting instruction, their motion for mistrial was denied. Because this case hinged on just the allegation of the complainant, this evidence was especially harmful. The trial court erred in not granting the mistrial.

ARGUMENT

Issue One: The trial court erred when it denied a mistrial after the state's witness tainted the jury with information about Mr. Washington's criminal history.

A. Preservation of error.

During the state's case-in-chief, the state directed Detective Adnan Shaikh, who oversaw the investigation into Mr. Washington. [3 RR 88]. In response to a question of how Det. Shaikh identified Mr. Washington, Det. Shaikh said, "I performed a criminal history check on him and him identify - - and complainant identified the person by his Harris County AFIS mug shot." [3 RR 98]. Immediately, defense counsel objected prompting parties to approach, where the following colloquy occurred:

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> Mr. Jurisich: Your Honor, you know, it wasn't bringing specific acts. I think he just was going through the procedures of how he identified the suspect. We haven't offered evidence about mug shots or AFIS or anything like that. We're not going to –
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Mr. Jurisich: No. I understand.

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Mr. Jurisich: Okay. We would ask for – we would ask for a limiting instruction then in that case.

Mr. Vargas: And, Judge, I move for a mistrial.

The Court: Okay. That request is denied. I will give a limiting instruction for the jury to – we'll strike this last answer and they are to disregard it. And then you'll rephrase your question and start over.

* * *

The Court: All right. Defendant's objection is sustained. The Court is going to give the jury a limiting instruction as to what you just heard. All testimony that was given at the point of asking the witness how he went to identify the defendant, I'm asking you to disregard that and not to use that information in your consideration when deliberation comes. Okay?
So you're instructed to follow that instruction. Disregard everything from that point down. [3 RR 99-100].

The defense moved for a mistrial, which was denied. [3 RR 100].

B. Standard of Review

The standard of review used for a trial court's ruling on a motion for mistrial is abuse of discretion. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2006). If the trial court's ruling is within the zone of reasonable disagreement given the arguments before the trial court at the time of the ruling, that ruling will be upheld. *See id. citing* to *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990); TEX. R. APP. P. 33.1. In "extreme circumstances, where the prejudice is incurable" a mistrial will be required. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). When considering curative instructions, the reviewing court is to consider whether the error is "clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors." *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999) (analyzing a motion for mistrial based on an improper question made by the state).

Despite the underlying logic of propensity evidence and the weight such logic carries in the minds of jurors, the common-law disallowed such evidence for its unique ability to enable prejudgment of "one with a bad general record" thus denying the accused a "fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). The tradition of excluding evidence going to the propensity of the accused is long-standing. *Id.* at 476 n. 9 *quoting Regina v. Rowton*, 10 Cox's Criminal Cases 25, 29-30 (1865) ("[Y]ou cannot, on the part of the prosecution, go into evidence as to character."). Preventing issue confusion, unfair surprise, and undue prejudice is the "practical experience" of excluding propensity

evidence. Id. citing to 1 Wigmore, Evidence (3d ed., 1940) § 57. Raising erroneous admission of such evidence through testimony requires (1) objection; (2) request for a disregarding instruction; (3) motion for mistrial. *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984) *citing to Koller v. State*, 518 S.W.2d 373, 375 (Tex. Crim. App. 1975).

C. Mr. Washington was incurably harmed by the admission of the evidence there was a criminal history for Mr. Washington and he had an AFIS mug shot on file with the police.

The prosecutor asked Detective Shaikh: "And what procedures did you take to identify the suspect without meeting him first?" And Detective Shaikh answered:

> I performed a criminal history check on him and him identify – and complainant identified the person by his Harris County AFIS mug shot. [3 RR 98].

Revelation of Mr. Washington's criminal history presented incurable prejudice, tainting the juror's minds despite the curative instruction. The testimony by Det. Shaikh was prejudicial to Mr. Washington because it informed the jury that Mr. Washington has a criminal history and prior Harris County mug shots.]3 RR 98]. This was not an "indirect hint;" in *Hernandez*, the Court of Criminal Appeals ruled that testimony by a detective that a police computer system logged "active offenders" among other information was not error because it was only an indirect hint without necessarily meaning the accused fell into the "active offenders" category of the information stored in the computer system. *See Hernandez v. State*, 805 S.W.2d 409, 413 (Tex. Crim. App. 1990).

Det. Shaikh responded directly to a question regarding his identification of the accused, referencing the accused's prior criminal history and mug shots specifically. [3 RR 98]. Interpreting Det. Shaikh's words as meaning Mr. Washington has had prior run-ins with the law required no kind of special legal understanding. This is not an indirect hint which left open the door of inferential possibility.

Knowledge of Mr. Washington's prior criminal history fueled a jury decision based on "emotional, irrational, or other similarly improper decisional grounds." See Blakely, *Article IV: Relevancy and Its Limits*, 30 HOUS. L. REV. 281, 308-09 (1993). This kind of evidence is impermissible as it informs the jury that the "accused is of a wicked or criminal disposition" thereby significantly increasing the chance that the jury is "to find him guilty of the offense charged regardless of whether it is proved by the evidence." *See Robbins v. State*, 88 S.W.3d 256, 263 (Tex. Crim. App. 2002) *citing* 2 Ray and Young, Texas Laws of Evidence (2d ed., 1956), § 1492. Ultimately, courts are interested in ensuring "that a person is tried for the offense he has allegedly committed, and not for the type of person that he is." *Mayes v. State*, 816 S.W.2d 79, 86 (Tex. Crim. App. 1991).

D. Factors to consider

In determining whether a trial court abused its discretion by denying a mistrial, the reviewing court is to balance three factors: (1) the severity of the misconduct or magnitude of the prejudicial effect, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998).

1. The severity of the misconduct or magnitude of the prejudicial effect

"As a trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury may properly render justice. Thus the prosecutor is more than a mere advocate, but a fiduciary to fundamental principles of fairness." *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) *citing Berger v. United States*, 295 U.S. 78, 88 (1935). The prosecution's question "placed before the jury new, prejudicial information" about other sexual improprieties. *Reed v. State*, 991 S.W.2d 354, 363 (Tex. App.—Corpus Christi 1999, pet. ref'd). The prosecutor's remark knowingly violated a court order.

2. The measures adopted to cure the misconduct

Each reaction of the trial parties underscored the severity of the error. Defense counsel's immediate objection to the testimony and later motion for mistrial. [3 RR 98-99]. Judge Finch's ordered that "[n]o one say anything" while she considered and

finally ordered the State to "refrain from any further conversation about any prior history." [3 RR 98-99]. Her entire remark was:

> The Court is going to give the jury a limiting instruction as to what you just heard. All testimony that was given at the point of asking the witness how he went to identify the defendant, I'm asking you to disregard that and not to use that information in your consideration when deliberation comes. Okay? [3 RR 100].

Judge Finch gave a curative instruction at the time the objection was raised, but no further instruction was given at the time of deliberations - thus reducing the efficacy of a limiting instruction. [3 RR 100]. The instruction stated:

> Nothing the Judge has said or done in this case should be considered by you as an opinion about the facts of this case or influence you to vote one way or the other. [CRI 109; CRII 114].

The instruction for jurors to not allow anything that the Judge had said or done to influence the way in which they vote may well have worked to convince the jurors to not apply the limiting instruction. [CRI 109; CRII 114]. If the jurors were reading and dutifully applying their instructions using the plain meaning of the words before them then the Judge's limiting instruction would fall squarely within actions not to be taken into consideration by the jurors pursuant to those instructions.

3. The certainty of conviction absent the misconduct

The cross-examination of Ms. Fisher established that while she could barely remember her fall from a horse, she had no trouble recalling her time with Mr. Washington.

a. The jury notes establish there was some question about the complainant's testimony.

The first note in the clerks' record is:

> Could we have a transcript of the complainant's testimony in full? [CRI 122; CRII 129].

The second note was:

> Could we be provided with the portion of the complainant's {Ms. Fisher] testimony related to the altercation that took place on 2-5-23. [CR! 121; CRII 128].

Another note from the jury was:

> The jury disagrees about the specifics related to the physical altercation on 2-5-23. The jury requests any portion of the complainant's testimony that pertains to the details of where and how she was struck. [CRI 124; CRII 131].

Here, Det. Shaikh's response was straightforward, no other extraneous offense information had been admitted, and the case at bar was a misdemeanor thus there was no significant disparity of offense severity. [3 RR 98]. Only the lack of corroborating evidence of Mr. Washington's criminal history weighs in favor of the curative instruction's efficacy. Once that seed of criminal history had been planted via Det. Shaikh's testimony, the idea of Mr. Washington's "wicked or criminal disposition" took root amongst the jurors, an impression which once left cannot be remedied. *See Robbins*, 88 S.W.3d at 263 citing to 1 Wigmore, Evidence (3d ed. 1940), § 57 ("tendency of human nature to punish, not because our [defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury.") (emphasis added).

E. Mr. Washington was harmed by the trial court's denial of the mistrial.

The jury had questions about the complainant's testimony. To bolster the complainant's testimony, the prosecutor had a colleague testify that all of the actions of the complainant were consistent with abuse.

Because of the information that the jury received - that Mr. Washington had a criminal history - this resulted in the scale being tipped against Mr. Washington. The defense's concern was that Mr. Washington would be on trial not for the offense he had allegedly committed but for the type of person Mr. Washington was once reduced to his prior criminal history.

The jury had questions about the complainant's testimony. To bolster the complainant's testimony, the prosecutor had a colleague testify that all of the actions of the complainant were consistent with abuse.

The Court's denial of a motion for mistrial based on Det. Shaikh's testimony revealing Mr. Washington's criminal history was an abuse of discretion falling outside of the zone of reasonable disagreement. Det. Shaikh's testimony caused the jurors to "prejudge [Mr. Washington] and deny him a fair opportunity to defend himself[.]" *See Robbins*, 88 S.W.3d at 262-63 *citing* to *Michelson v. United States*, 335 U.S. 469, 476 (1948). Det. Shaikh's testimony is thus clearly prejudicial, and even with a curative instruction was of a nature unlikely to be erased from the minds of its audience. The appropriate remedy is reversal for a new proceeding. TEX. CRIM. PROC. CODE ANN. ART 44.29(a).

PRAYER

Mr. Washington prays that this Court reverse and remand for a new trial.

Respectfully submitted,

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/s/ Jani Maselli Wood

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CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. Proc. 9.5, this certifies that on October 23, 2024, a copy of the foregoing was emailed to counsel for the state (through texfile.com) at the following address:

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CERTIFICATE OF COMPLIANCE

Pursuant to proposed Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of TEX. R. APP. PROC. 9.4(e)(i).

1. Exclusive of the portions exempted by TEX. R. APP. PROC. 9.4 (i)(1), this brief contains 5,279 words printed in a proportionally spaced typeface.

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3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in TEX. R. APP. PROC. 9.4(J), may result in The Court's striking this brief and imposing sanctions against the person who signed it.

/s/ Jani J Maselli Wood

JANI J. MASELLI WOOD

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