73250-1

NO. 73250-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BEE SAYKAO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of felony harassment of a criminal justice participant.

Issues Pertaining to Assignment of Error

1. Is a "threat" for purposes of the crime of felony harassment of a criminal justice participant insufficient to convict if it is apparent to the complaining witness that the person making the threat lacks the present ability to carry it out?

2. Was the evidence insufficient to convict appellant of felony harassment of a criminal justice participant where the undisputed evidence was that it was apparent to the complaining witness that appellant did not have the present ability to carry out his threat?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Bee Saykao with felony harassment of a criminal justice participant for allegedly threatening to shoot Kathleen Johnson, a Community Corrections Supervisor for the Washington State Department of Corrections (DOC). CP 2-5, 32. The prosecution alleged that on July 29, 2014, Saykao threatened to shoot Johnson as he was leaving her office after retrieving property stored there during his recent incarceration. CP 2.

Trial was held February 24, 2015 through March 3, 2015, before the Honorable Palmer Robinson, judge. RP 8-361.[1] The prosecution presented the testimony of Johnson and three of her co-workers, Doug Daviscourt, Daniel McDonagh and Rene Vertz. RP 126-274. Saykao did not testify or call any witnesses. A jury convicted Saykoa as charged. CP 83; RP 358.

On March 10, 2015, the court imposed a mid-range standard range sentence of 19 months. CP 108-15; RP 372. Saykao appeals. CP 117-27.

2. Substantive Facts

According to Johnson, Saykao came to her office on July 29, 2014, where he was seeking bus tickets and his backpack, which had been stored there while he was incarcerated. RP 144-45. Johnson recalled Saykao becoming upset about cigarettes missing from his backpack. RP 147-48. After her attempts to calm him failed, Johnson told Saykao to leave and two of her colleagues, Daviscourt and McDonagh (both DOC Community Corrections Officer, RP 201, 232), were outside the office to escort him away. RP 148-50.

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[1] The six-volumes consecutively paginated of verbatim report of proceedings for the dates of January 30, 2015 (pretrial before the Honorable Jim Rogers, judge), February 24 & 25, 2015, and March 2, 3 & 10, 2015, are collectively referred to herein as "RP."

Saykao complied. RP 150, 166. As he walked away from Johnson's office with Daviscourt and McDonagh close behind, Johnson reminded Saykao of his next report date with community corrections, to which Saykao replied loudly, "I'm not coming back." RP 150, 152-53. When Johnson replied "That's your choice[,]" Saykao turned towards Johnson and stated, "If you don't shoot me, I will shoot you." RP 153-54, 168. Despite this remark, Johnson directed Daviscourt and McDonagh to let Saykao leave, which he did. RP 155-56. After he left, however, Johnson met with her staff and decided to have Saykao arrested. RP 155.

The testimony of Daviscourt, McDonagh and Vertz confirmed Johnson's version of events, albeit with some minor discrepancies. RP 205-07, 210-12, 233-43, 254-60. For example, McDonagh did not recall anything about Saykao seeking bus tickets, and recalled Saykao's alleged threat as, "You'll have to kill me.. . . If you don't, I'll kill you." RP 241.

When asked to explain the impact of Saykao's parting remark, Johnson admitted she did not know him, and only assumed he had a violent criminal past because that was the type of offender usually under active community custody supervision. RP 129-30, 145-46. Although she was uncertain of Saykao's past, Johnson stated she "was literally stunned" by his remark, claiming she had only been threatened once before 27 year ago. RP 154.

Johnson admitted she was not concerned that Saykao would immediately act on his threat, particularly because he was being escorted out by two Community Corrections Officers at the time. RP 163. Only after looking up Saykao's criminal record, which included two convictions for second degree assault - one involving a knife- did Johnson become concerned Saykao might act on his threat in the future. RP 163-64. On cross examination Saykao confirmed she was not concerned Saykao could immediately carry out the threat, stating, "I wasn't worried about him coming back through the staff. What I was concerned about was that he was heading out a door and I would have to leave my office." RP 175. The following exchange occurred between Johnson and defense counsel at the conclusion of cross examination:

> [Defense Counsel]: Okay. So -- and you did not believe that, at the time he said it, that he had the present ability, present at the time, to carry out the threat?
>
> [Johnson]: At that point in time, he was -- you know, got two big officers behind him, so no.

RP 190.

On redirect, the prosecutor sought clarification:

> [Prosecutor]: [During cross examination] [y]ou were talking about this notion of current ability to carry out the threat. And [Defense Counsel] had asked you whether you believed he had the current ability to carry out the threat, and you said no. What did you mean by that?

[Johnson]: I didn't mean that at that point in time. He had two staff behind him and he was being escorted out of the building. I didn't believe he was going to turn around and chase me at that point or chase after me down the hallway. That didn't mean that I didn't mean -- didn't believe that he had the ability to reach me later on in the day when I was outside or on my way home or on my way to work.

[Prosecutor]: So he had the current ability to leave the building; is that right?

[Johnson]: Yes.

[Prosecutor]: And from there, anything could have happen?

[Johnson]: Anything could have happened.

[Prosecutor]: So when [Defense Counsel] asked you about current ability, that's confined to --

[Johnson]: That specific moment in time as he was being escorted out the door.

[Prosecutor]: Okay. That he wasn't going to turn and shoot you right that second?

[Johnson]: Right.

RP 192-93.

In closing argument, the prosecutor conceded Johnson did not fear Saykao would "instantaneously pull out a gun and shoot" her in the office because she knew that was not possible with "two big guys" escorting him out. RP 326. The prosecutor argued instead that Johnson feared Saykao had the "present ability to leave and come back and do her harm." Id. In

rebuttal the prosecutor attempted to clarify that what Johnson really feared was not that Saykao would return immediately and harm her, but instead "[s]he was afraid in the context of his future contacts with the Department of Corrections." RP 352.

C. ARGUMENTS

1. A THREAT IS INSUFFICIENT TO CONVICT FOR FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT IF IT IS APPARENT TO THE CRIMINAL JUSTICE PARTICIPANT THAT THE PERSON MAKING THE THREAT DOES NOT HAVE BOTH THE PRESENT AND FUTURE ABILITY TO CARRY OUT THE THREAT.

The pertinent statute clearly and unambiguously provides that a conviction for felony harassment of a criminal justice participant is unlawful if it was apparent to the criminal justice participant that the person making the threat lacked both the present and future ability to carry out the threat. A conviction for gross misdemeanor harassment might be lawful, but not felony harassment. Moreover, to the extent the pertinent statutory language is susceptible to more than one reasonable interpretation, the rule of lenity requires interpreting it in favor of the accused. Because it was indisputably apparent to Johnson that Saykao did not have the present ability to carry out his threat, Saykao's conviction for felony harassment conviction must be reversed.

The crime of "harassment" is defined by statute:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
>
> (ii) To cause physical damage to the property of a person other than the actor; or
>
> (iii) To subject the person threatened or any other person to physical confinement or restraint; or
>
> (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
>
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020(1).

The crime of harassment is generally a gross misdemeanor. RCW 9A.46.020(2)(a). There are, however, special provisions that can elevate the offense to a Class C felony. For example, harassment constitutes a Class C felony if the prosecution proves the accused has a prior conviction for harassing the same person or someone in that person's family, or if committed in violation of a no contact or no harassment order. RCW 9A.46.020(2)(b)(i). Likewise, a threat to kill constitutes felony harassment. RCW 9A.46.020(2)(b)(ii).

In 2011 the legislature amended the language of RCW 9A.46.020(2)(b) to make harassment of a "criminal justice participant"[2] a felony under additional circumstances. Laws of 2011, ch. 64, §1. The statute now provides felony harassment is committed if the accused

> (iii) . . . harasses a criminal justice participant who is performing his or her official duties at the time the threat is made; or (iv) the person harasses a criminal justice participant because of an action taken or decision made by the criminal justice participant during the performance of his or her official duties. For the purposes of (b)(iii) and (iv) of this subsection, the fear from the threat must be a fear that a reasonable criminal justice participant would have under all the circumstances. Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the **present and future** ability to carry out the threat.

RCW 9A.46.020(2)(b)(emphasis added).

To date, only a one published decision addresses harassment in the context of a "criminal justice participant," State v. Boyle, 183 Wn. App. 1,

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[2] A "criminal justice participant" is defined as:

> any (a) federal, state, or local law enforcement agency employee; (b) federal, state, or local prosecuting attorney or deputy prosecuting attorney; (c) staff member of any adult corrections institution or local adult detention facility; (d) staff member of any juvenile corrections institution or local juvenile detention facility; (e) community corrections officer, probation, or parole officer; (f) member of the indeterminate sentence review board; (g) advocate from a crime victim/witness program; or (h) defense attorney.

RCW 9A.46.020(4).

335 P.3d 954 (2014). One issue in Boyle was whether the to-convict instruction for the charge of harassment of a criminal justice participant should have included as an element "[t]hat it was apparent to [the complaining witness] that the defendant had the present and future ability to carry out the threat[,]" as proposed by defense counsel. 183 Wn. App. at 10. This Court rejected Boyle's claim:

> RCW 9A.46.020 prohibits a threat that threatens bodily injury "immediately or in the future." For harassment elevated to a felony because the person threatened is a criminal justice participant, the statute specifies, "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat." Boyle misreads the statute when he argues, "Despite its structure, the sentence clearly states that threatening words only constitute harassment if it is apparent to the criminal justice participant that the defendant has the present and future ability to carry them out." To the contrary, as the trial court stated, "[T]his sentence is phrased as an exception, not as an element," and it plainly states that threatening words are not harassment if it is apparent to the criminal justice participant that (1) the speaker does not have the present ability to carry out the threat and (2) the speaker does not have the future ability to carry out the threat. Conversely, if it was apparent to the criminal justice participant that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment. RCW 9A.46.020(1), which defines harassment to include threats to cause bodily injury "immediately or in the future," is consistent with this conclusion.
>
> Boyle's suggested reading would produce some absurd results. If it must be apparent to the criminal justice participant that the speaker have both the present and the future ability to carry out the threats, then the statute would

> not prohibit many electronic threats, as it explicitly does. No threats made to third persons not in the speaker's presence would be actionable, nor would any threats of exclusively future harm. The court's instructions here correctly stated the law and did not diminish the State's burden.

Boyle, 183 Wn. App. at 11-12 (emphasis added). The Boyle Court's reasoning is flawed, violates basic rules of statutory construction, and should not be followed.

The "'fundamental objective in construing a statute is to ascertain and carry out the intent of the legislature.'" State v. Veliz, 176 Wn.2d 849, 854, 298 P.3d 75 (2013) (quoting State v. Morales, 173 Wn.2d 560, 567, 269 P.3d 263 (2012)). "If [statutory] language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume that the legislature says what it means and means what it says." State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Courts also construe statutes so that all of the language is given

effect, with no portion rendered meaningless or superfluous. State v. Reis, 183 Wn.2d 197, 351 P.3d 127, 133 (2015).

Unfortunately, the Boyle Court failed to adhere to these rules when it concluded, "if it was apparent to the criminal justice participant that the speaker had either the present ability or the future ability to carry out the threat, the statements would constitute harassment." 183 Wn. App. at 11 (emphasis added). The Boyle court is correct, a qualifying threat of immediate or future harm constitutes "harassment." But it is only felony harassment if it was committed against a criminal justice participant for whom it was not apparent the speaker did not have the "present and future ability to carry out the threat." RCW 9A.46.020(b) (emphasis added).

Contrary to the Boyle Court's conclusion, the pertinent verbiage from RCW 9A.46.020(2)(b) - "Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present and future ability to carry out the threat" - is clearly phrased in the conjunctive, i.e., it must be apparent to the criminal justice participant that the speaker has both the present and future ability to carry out the threat.

The word "and" is typically interpreted as the conjunctive, meaning something that connects or serves to join. Ahten v. Barnes, 158 Wn. App. 343, 352-53 n.5, 242 P.3d 35 (2010) ("'And' conveys a conjunctive

meaning, otherwise the legislature would have used 'or' if it meant to convey a disjunctive meaning."). Although "'or' is sometimes construed to mean 'and,' and vice versa . . . . the plain language of a statute can only be disregarded, and this exceptional rule of construction can only be resorted to where the act itself furnishes cogent proof of the legislative error." State v. Tiffany, 44 Wash. 602, 604, 87 P. 932 (1906) (emphasis added).

The Tiffany court considered Ballinger Code § 7154, a provision that made it unlawful to willfully or maliciously make any aperture in a structure built to conduct water for agricultural purposes. Tiffany, 44 Wash. at 603. The court rejected arguments that the "or" in between willfully and maliciously should be read as an "and," stating, "We are satisfied that the act under consideration contains no such evidence of error or mistake as would warrant us in disregarding its plain language." Id. at 604. As in Tiffany, there is no evidence in this case of a legislative error or mistake that would permit this court to disregard the plain language of RCW 9A.46.020(2)(b). This court should therefore apply the conjunctive meaning of "and."

Division Three's opinion in Mount Spokane Skiing Corp. v. Spokane County, 86 Wn. App. 165, 936 P.2d 1148 (1997), interpreting "and" to mean "or," is instructive. There, Division Three interpreted former RCW 35.21.730(4) (1985), amended by Laws of 2002, ch. 218, §23 (codified as amended at RCW 35.21.730(5)). Mount Spokane Skiing, 86 Wn. App. at

173-74. Former RCW 35.21.730(4) gave cities, towns, and counties the power to create public corporations, commissions, and authorities to "[a]dminister and execute federal grants or programs; receive and administer private funds, goods, or services for any lawful public purpose; and perform any lawful public purpose or public function." Mount Spokane Skiing Corporation asserted that "[b]ecause the word 'and' connects the three listed functions of a public corporation, . . . all three functions must be undertaken by the municipal corporation." Mount Spokane Skiing, 86 Wn. App. at 174. Rejecting this argument, the court stated,

> It is clear from a plain reading of the statute that the powers listed in paragraph (4) are the possible functions a public corporation may undertake. Nowhere does it appear from the statutory language that the corporation must undertake each and every function in order to be valid and legal.

Id. (emphasis added).[3] Because former RCW 35.21.730 (4) provided only a list of a public corporation's possible functions, Division Three held that the legislature did not intend to require every function be performed for the public corporation to be acting within its lawful authority.

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[3] The Washington Supreme Court agreed with this interpretation when it construed the same statute seven months later. See CLEAN v. City of Spokane, 133 Wn.2d 455, 473-74, 947 P.2d 1169 (1997) ("Although it is true the word 'and' appears in the statute, all three statutory elements need not be present for a [Public Development Authority] to be acting lawfully.").

Mount Spokane Skiing focused on the fact that the plain language of former RCW 35.21.730 (4) compelled a particular reading. 86 Wn. App. at 174. It was clear from the language employed by the legislature that the legislature did not intend to require public corporations to perform each of the three functions listed in former RCW 35.21.730(4), but instead meant that any or all of them could be performed. The Mount Spokane Skiing court disregarded legislative language because the statute "itself furnishe[d] cogent proof of the legislative error." Tiffany, 44 Wash. at 604; see also Bullseye Distrib. LLC v. Wash. State Gambling Comm'n, 127 Wn. App. 231, 239, 110 P.3d 1162 (2005) ("In certain circumstances, the conjunctive 'and' and the disjunctive 'or' may be substituted for each other if it is clear from the plain language of the statute that it is appropriate to do so." (emphasis added)).

More recently, this Court analyzed how to interpret the "and" appearing in the definition of "Domestic violence" under RCW 9.94A.030(20), which provides, "'Domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010." Emphasis added. State v. Ross, __ Wn. App. __, __ P.3d __, 2015 WL 4086930 (slip op. filed July 6, 2015). Adopting the reasoning of Division Two in State v. Kozey, 183 Wn. App. 692, 334 P.3d 1170 (2014), review denied, 182 Wn. 2d 1007, 342 P.3d 327 (2015), and this Court's previous decision in State v. McDonald, 183

Wn. App. 272, 333 P.3d 451 (2014), the Court held a prior conviction constitutes "Domestic violence" under RCW 9.94A.030(20) if it met the meaning under either RCW 10.99.020 or RCW 26.50.010, noting that any other interpretation would render portions of the statue superfluous and would defeat the legislative purpose of increased punishment for domestic violence perpetrators. Ross, WL 4086930 at 2-3.

Here, there is no proof of error --- let alone cogent proof -- in RCW 9A.46.020's language that shows the legislature meant that 'Threatening words do not constitute harassment if it is apparent to the criminal justice participant that the person does not have the present or future ability to carry out the threat.' To the contrary, the legislature's use of "and" to separate references to "present" and "future" should be given a plain, ordinary, and unambiguous reading: the language chosen shows the legislature intended that to constitute felony harassment under RCW 9A.46.020(2)(b)(iii) or (iv), the criminal justice participant must reasonably fear the speaker's both "present and future ability to carry out the threat[,]" and if that combined fear does not exists then it is not felony harassment of a criminal justice participant. RCW 9A.46.020(2)(b) (emphasis added).

Moreover, the statute in this case is readily distinguished from the statute at issue in Ross. Whereas a conjunctive interpretation of "and" in the definition of "Domestic violence" under RCW 9.94A.030(20) would have

rendered portion of the statute superfluous and defeat legislative intent, no such problems arise when the "and" in the last sentence of RCW 9A.46.020(2)(b) is given its normal conjunctive meaning. Ross, WL 4086930 at 2-3.

Despite the Boyle Court's contrary interpretation, giving "and" its normal conjunctive meaning does not "produce some absurd results." Boyle, 183 Wn. App. at 12. The Boyle Court erroneously assumed that if interpreted in the conjunctive, "the statute would not prohibit many electronic threats," and thwart prosecution of "threats made to third persons not in the speaker's presence" and "any threats of exclusively future harm." Id. This is simply wrong.

What the Boyle Court failed to recognize is that the statute sets forth two forms of harassment; gross misdemeanor harassment under RCW 9A.46.020(1), and felony harassment under RCW 9A.46.020(2)(b). Thus, even if prosecution for felony harassment under subsection (2)(b) fails because it is apparent to the criminal justice participant that the person making the threat does "not have the present and future ability to carry out the threat," prosecution for a gross misdemeanor under subsection (1) is still possible. This is because threats of harm that produce reasonable fear they will be carried out in the future are always actionable under subsection (1). No present ability is required.

Moreover, under the Boyle Court's interpretation, the very language at issue - the last sentence of RCW 9A.46.020(2)(b) - is rendered superfluous. This is because under subsection (1), the general crime of harassment is not limited to threats of either present or future harm. It allows for both. Thus, in the context of all gross misdemeanor harassments, and all felony harassments except those involving criminal justice participants, a threat of immediate or future harm will suffice. If, however, the last sentence of subsection (2)(b) means what the Boyle Court said - that it must only be apparent to the criminal justice participant that the speaker had either the present or future ability to carry out the threat - then the sentence itself is superfluous because that concept is already conveyed in subsection (1).

Under the plain meaning of the last sentence of RCW 9A.46.020(2)(b), to convict a person of felony harassment of a criminal justice participant, it must not have been apparent to the criminal justice participant that the speaker did not have the present and future ability to carry out the threat. Any other interpretation violates several well-established rules of statutory construction.

To the extent there is any ambiguity in RCW 9A.46.020, it should be interpreted in Saykao's favor under the rule of lenity. "If a statute is ambiguous, the rule of lenity requires [courts] to interpret the statute in favor of the defendant absent legislative intent to the contrary." State v. Jacobs,

154 Wn.2d 596, 600, 115 P.3d 281 (2005). When a choice must be made between two readings of a statute, "'it is appropriate, before [courts] choose the harsher alternative, to require that [the legislature] should have spoken in language that is clear and definite.'" State v. Tvedt, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 217, 221-22, 73 S. Ct. 227, 97 L. Ed. 260 (1952)).

Thus, even assuming for the sake of argument that RCW 9A.46.020 is susceptible to more than one reasonable interpretation and is therefore ambiguous, the rule of lenity requires this Court to apply the interpretation that favors Saykao. The rule of lenity mandates interpreting RCW 9A.46.020(2)(b) in a manner requiring reversal of a conviction for felony harassment of a criminal justice participant if it was apparent to the criminal justice participant that the person making the threat did not have both the present and future ability to carry it out.

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT SAYKAO OF FELONY HARASSMENT OF A CRIMINAL JUSTICE PARTICIPANT BECAUSE IT WAS APPARENT TO JOHNSON THAT SAYKAO LACKED THE PRESENT ABILITY TO CARRY OUT THE THREAT.

As discussed above, to convict a person of felony harassment of a criminal justice participant, it must not have been apparent to the criminal justice participant that the accused lacked the present ability to carry out the

threat. If it was apparent, then the threat does not constitute "harassment" for purposes of that offense. RCW 9A.46.020(2)(b).

Here, Johnson testified her concern with Saykao's threat was not that he had the present ability to shoot her, but instead that he might carrying it out in the future once she left her office. RP 163-64, 175, 190, 192-93. Johnson's undisputed testimony makes clear that it was apparent to her Saykao lacked the present ability to carry out his threat. Saykao's conviction for felony harassment should therefore be reversed.

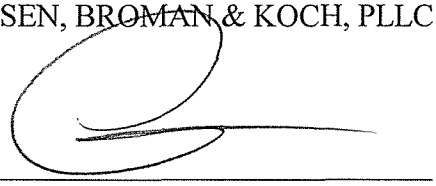
D. CONCLUSION

For the reasons stated, this Court should reverse Saykao's conviction for felony harassment of a criminal justice participant.

DATED this 5th day of August 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73250-1-I
	)	
BEE SAYKAO,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BEE SAYKAO
NO. 855455
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF AUGUST 2015.

X Patrick Mayovsky