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February 10, 2017  
Court of Appeals  
Division I  
State of Washington

Supreme Court No. 94134.3  
(COA No. 73921-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID MOORE,

Petitioner.

FILED  
FEB 16 2017  
WASHINGTON STATE  
SUPREME COURT

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

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PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES.....iii

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION ..... 1

C. ISSUES PRESENTED FOR REVIEW ..... 1

    1. Whether the failure of the government to disprove an essential element of self-defense requires a new trial..... 1

D. STATEMENT OF THE CASE..... 1

    1. Mr. Moore’s background has made him sensitive to brutality. ...2

    2. Mr. Moore was quietly playing phone based video games with his grandchildren when he was confronted by King County Metro security. ....3

    3. The King County Metro officer escalated the confrontation with Mr. Moore. ....4

    4. Mr. Moore hit the King County Metro officer in an attempt to protect himself.....5

    5. The Court of Appeals found the record is sufficient for a reasonable fact finder to find the elements of the crime beyond a reasonable doubt.....6

E. ARGUMENT.....7

    1. Review should be granted to address whether the failure of the government to disprove essential elements of self-defense requires reversal. ....7

        a. When self-defense is properly raised, the government must disprove the elements of it beyond a reasonable doubt. ....7

        b. The government failed to disprove self-defense beyond a reasonable doubt. ....9

    2. Whether the government must disprove Mr. Morris subjective belief he was entitled to defend himself warrants review. .... 11

F. CONCLUSION..... 12

TABLE OF AUTHORITIES

**Cases**

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 8  
*Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560  
(1979) ..... 8  
*State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984)..... 9  
*State v. Dyson*, 90 Wn.App. 533, 952 P.2d 1097 (1997)..... 9, 10  
*State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 9, 12  
*State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996) ..... 9  
*State v. O’ Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009) ..... 9  
*State v. Rodrigues*, 21 Wn.2d 667, 152 P.2d 970 (1944) ..... 9  
*State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004) ..... 9, 12

**Rules**

RAP 13.3..... 1  
RAP 13.4..... passim

#### A. IDENTITY OF PETITIONER

David Moore, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

#### B. COURT OF APPEALS DECISION

David Moore seeks review of the Court of Appeals decision dated January 23, 2017, a copy of which is attached as Appendix A.

#### C. ISSUES PRESENTED FOR REVIEW

1. Whether the failure of the government to disprove an essential element of self-defense requires a new trial.

#### D. STATEMENT OF THE CASE

Mr. Moore lives in Ballard comes into downtown Seattle every Sunday so he can take advantage of services for homeless and low income persons like himself. 7/20/15 RP 20.<sup>1</sup> He knows that there is a foyer right outside the Starbucks coffee shop located at Third Avenue and Seneca Street near the University Street Metro station where he can access Starbucks' Wi-Fi for free. 7/20/15 RP 20.

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<sup>1</sup> Because each volume of the transcript begins with new pagination, references to the record are made by the date stated on the cover page of the volume and then the page number.

**1. Mr. Moore's background has made him sensitive to brutality.**

Mr. Moore has had a hard life, starting with a difficult childhood. 7/20/15 RP 7. As a child growing up in the South in the 1960's, Mr. Moore experienced the "animosity and racism" of the times. 7/20/15 RP 9.

Mr. Moore stopped living regularly at home when he was seven years old, spending much of his time "jumping box cars." 7/20/15 RP 7. He moved around between family members living in Mississippi, Tennessee and Illinois. 7/20/15 5. His mother sent him to a reform school in Mississippi, where he suffered from punishment most now would term as abuse. 7/20/15 RP 10.

Mr. Moore was shot in the head when he was eleven or twelve years old while staying with his father in Chicago. 7/20/15 RP 15. The bullet hit him on the left side of his head and went into his brain. 7/20/15 RP 15. It is still lodged in his brain and contributes to his blackouts and other problems. 7/10/15 RP 15. Mr. Moore believes that if his head is hit in the wrong way he could be "gone." 7/20/15 RP 18. Mr. Moore tries to avoid places where there are a lot of people, so no one accidently bumps his head. 7/20/15 RP 18.

Mr. Moore has lived in Seattle since 2005. 7/20/15 RP 12. He is disabled, having been hit by a car approximately three to four years prior to his arrest. 7/20/15 RP 13. He also suffers from traumatic arthritis. 7/20/15 RP 13. At the time of his trial, he was confined to a wheel chair. 7/20/15 RP 13. He also suffers from other maladies, including tuberculosis and chronic obstructive pulmonary disease. 7/20/15 RP 14, 17.

**2. Mr. Moore was quietly playing phone based video games with his grandchildren when he was confronted by King County Metro security.**

Mr. Moore has six children and twenty four grandchildren who live in Mississippi, Tennessee and Illinois. 7/20/15 RP 19. When he is able to access the internet, he tries to play a game called “Miniclip Pool” with some of his grandchildren. 7/20/15 RP 21, 22.

On the quiet Sunday morning when Mr. Moore was confronted by King County Metro, he was sitting on a window sill outside Starbucks smoking a cigarette and playing videogames with his grandchildren. 7/20/15 RP 23. He had just bought a pack of Newport cigarettes. 7/20/15 RP 24. Mr. Moore was approached by Jessica Branson, who was employed as a security guard by King County Metro. 7/16/15 RP 60. No one had approached Ms. Branson to

complain of Mr. Moore's behavior. 7/16/15 RP 112. Mr. Moore was not bothering anyone. 7/16/15 RP 112. He was ordered to put out his cigarette, ultimately flicking it away when Ms. Branson got closer to him. 7/16/15 RP 64.

While King County Metro has a no smoking policy, witnesses from the sheriff's office recognize it is a policy which is selectively enforced. 7/15/15 RP 130. The area where Mr. Moore was accessing the Wi-Fi is an area where a number of people smoke and where a number of cigarette butts were visible. 7/16/15 RP 65. When asked if she engaged Mr. Moore because of the color of his skin, Ms. Branson denied that she did, asserting that some of the people she stopped were "just little white people that are, you know, on drugs and they're smoking cigarette butts that are found on the ground." 7/16/15 RP 65.

### **3. The King County Metro officer escalated the confrontation with Mr. Moore.**

After he had gotten rid of his cigarette, Ms. Branson told Mr. Moore he had to move from where he was sitting. Ms. Branson engaged Mr. Moore in argument, talking over him when he was speaking. 7/16/15 RP 114-15. Ms. Branson continued to come closer to him, aggressively ordering him to leave. 7/16/15 RP 64, 116. Mr. Moore took his phone and attempted to take a picture of her. 7/16/15



RP 67. Ms. Branson became upset and raised her hand, getting very close to Mr. Moore's face. 7/16/15 RP 67. At this point, her hand was approximately three inches from Mr. Moore's face. 7/16/15 RP 67. Mr. Moore believed Ms. Branson was close enough to him that her spit went inside his mouth. 7/20/15 RP 31. Ms. Branson continued to get madder. 7/20/15 RP 44. Mr. Moore warned Ms. Branson of the bullet lodged in his head and his fear that an assault on his face might dislodge the bullet. 7/20/15 RP 32.

The security guards contracted by King County Metro are trained to keep a distance from persons they are engaging. 7/16/15 RP 116. They are also trained in de-escalation. 7/16/15 RP 105. Policy requires them to calm down and attempt to remain pleasant. 7/16/15 RP 105. Ms. Branson failed to follow these rules, so much so, that the firm contracted with King County Metro to provide security now uses her interaction with Mr. Moore as a training video about what not to do when engaging persons at Metro stations. 7/16/16 RP 117.

**4. Mr. Moore hit the King County Metro officer in an attempt to protect himself.**

Mr. Moore just wanted to be left alone. 7/20/15 RP 43. His mind was never on hitting Ms. Branson. 7/20/15 RP 43. But in an attempt to protect himself from Ms. Branson, Mr. Moore hit her. 7/16/15 RP 67.

He then got up and struck her a second time. 7/16/15 RP 71. Once it was clear Ms. Branson had retreated, Mr. Moore returned to the place where he was sitting. 7/16/15 RP 71. He did not attempt to engage Ms. Branson again. When the police arrived, Mr. Moore was in the same calm state he had been in when Ms. Branson first approached him. 7/16/15 RP 22. He was not screaming, yelling or otherwise acting belligerently when contacted by law enforcement. 7/16/15 RP 22.

Mr. Moore was charged with assault in the second degree. CP 1. He was convicted of the lesser included offense of assault in the fourth degree. 7/16/15 RP 88.

**5. The Court of Appeals found the record is sufficient for a reasonable fact finder to find the elements of the crime beyond a reasonable doubt.**

The Court of Appeals found the record to be sufficient for a fact finder to find all of the elements beyond a reasonable doubt. Slip Op. at 1. Significantly, the court found that the second time Mr. Moore hit Mr. Branson, he was no longer in danger because Ms. Branson had backed away some distance from him. Slip Op. at 6. Mr. Moore has brought this petition challenging this conclusion.

## E. ARGUMENT

### **1. Review should be granted to address whether the failure of the government to disprove essential elements of self-defense requires reversal.**

RAP 13.4 authorizes review where a significant question of law under the Constitution of the State of Washington or of the United States is involved. The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). “*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

*a. When self-defense is properly raised, the government must disprove the elements of it beyond a reasonable doubt.*

Once properly raised, the burden to disprove self-defense falls upon the prosecution. *State v. Dyson*, 90 Wn.App. 533, 437, 952 P.2d

1097 (1997). If established, a claim of self-defense constitutes a complete justification and does not serve to mitigate or reduce the degree of assault. *State v. Rodrigues*, 21 Wn.2d 667, 668, 152 P.2d 970 (1944).

Self-defense requires a “subjective, reasonable belief of imminent harm.” *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds by *State v. O’ Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). Evidence of self-defense is evaluated “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (citing *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984)). Self-defense is established as an absolute defense to an assault charge where the accused is able to show they acted reasonably considering “all the surrounding facts and circumstances as they appeared to the defendant.” *State v. Rodriguez*, 121 Wn.App. 180, 185, 87 P.3d 1201 (2004).

This standard is both objective and subjective. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to that person. *Janes*, 121 Wn.2d at 238. The objective portion requires the jury to use this

information to determine what a reasonably prudent person similarly situated would have done. *Id.* The prosecution presents insufficient evidence of guilt where it is unable to disprove both the objective and subjective elements of this test.

*b. The government failed to disprove self-defense beyond a reasonable doubt.*

This Court should take review to address the question of whether the government disproved self-defense beyond a reasonable doubt. *Dyson*, 90 Wn.App. at 437. While the Court of Appeals found sufficient evidence, the facts of this case warrant review under RAP 13.4 and to address the important constitutional question of the protections a person has when they raise self-defense as a justification for an assault.

The King County Metro officer Ms. Branson only engaged Mr. Moore in argument after he had complied with her directive to extinguish his cigarette. 7/16/15/ RP 114-15. This was only done because he did not extinguish the cigarette fast enough for her satisfaction. 7/20/15 RP 21-22.

Mr. Moore's testimony established he believed he was in danger of continuing to be assaulted by Mr. Branson if he did not act in self-defense after she pushed his phone into his head. Mr. Moore was

especially sensitive to assaultive conduct because of the consequences to his health should he suffer an injury. 7/20/15 RP 15.

Mr. Moore used no more force than was necessary to protect himself from what he reasonably believed to be a potential assault by Ms. Branson. 7/16/15 RP 71. Instead of following company policy, Ms. Branson aggressively engaged Mr. Moore. She got within three inches of his face and ordered him to leave the spot where he was sitting. 7/16/15 RP 67. Her actions were so severe that her security firm created a training video demonstrating how not to engage a person violating Metro policies. 7/16/16 RP 117.

Mr. Moore reasonably believed an assault was imminent when Ms. Branson came within three inches of his face and prevented him from taking a photograph of her. 7/16/15 RP 67, 7/20/15 RP 31. His actions were consistent with his intent to use no more force than was necessary to prevent what he believed to be a significant injury to himself if actually assaulted by Ms. Branson. 7/16/15 RP 22.

Mr. Moore warned Ms. Branson of his concern she was going to hit him in the head. 7/20/15 RP 32. When she persisted in engaging him, he hit her two times. 7/16/15 RP 71. Once he felt safe, he stepped back and returned where he had been before Ms. Branson's aggressive

behavior caused him to fear for his health and safety. 7/16/15 RP 71.

He remained calm and cooperative until law enforcement arrived.

7/16/15 RP 22.

2. *Whether the government must disprove Mr. Morris subjective belief he was entitled to defend himself warrants review.*

The Court of Appeals focus upon the second strike as beyond the definition of self-defense is in error, recognizing the conflicting testimony with regard to the first blow. Slip Op. at 6. However, what is clear from the evidence is that Mr. Morris believed he was in danger of a significant and dangerous assault. Mr. Morris used the force he perceived to be reasonably necessary to protect himself under the circumstances as he reasonably perceived them to be. *Janes*, 121 Wn.2d at 238. These facts, which established that Mr. Morris believed that he was in serious danger of assault because of the actions of Ms. Branson and that such an assault could result in irreparable injury justified Mr. Morris' actions and established Mr. Morris acted in self-defense. *Rodriguez*, 121 Wn.App. at 185. The government's failure to disprove this element violated Mr. Morris' due process rights. This Court should grant review under RAP 13.4.

F. CONCLUSION

Based on the foregoing, petitioner David Morris respectfully requests this that review be granted pursuant to RAP 13.4 (b).

DATED this 10th day of February 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant



## APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 73921-2-1  
 )  
 v. ) DIVISION ONE  
 )  
 DAVID MOORE, ) UNPUBLISHED OPINION  
 )  
 Appellant. ) FILED: January 23, 2017

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COURT OF APPEALS  
STATE OF WASHINGTON  
2017 JAN 23 AM 8:47

SPEARMAN, J. — Evidence is sufficient to support a criminal conviction where a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. David Moore challenges the sufficiency of the evidence supporting his conviction for assault in the fourth degree. He specifically asserts that the State failed to disprove his claim of self-defense. But because the evidence in the record is sufficient for a reasonable fact finder to find the elements of the crime beyond a reasonable doubt, we affirm.

FACTS

Early one Sunday morning, Moore was sitting in an entrance to the Metro transit tunnel smoking a cigarette. Jessica Branson, a Metro security guard, informed Moore that smoking is prohibited on Metro property. In the ensuing altercation, Moore struck Branson twice. Branson suffered an injury that required

No. 73921-2-1/2

several stitches. The incident was recorded by surveillance video. Moore was charged with second degree assault.

At trial, Branson and Moore each recounted the incident. According to Branson, she noticed Moore from about 20 feet away and called to him to take his cigarette outside. She continued on her rounds but stopped as she passed a few feet from Moore because he had not complied with her request. Branson advised Moore that the tunnel is a non-smoking area. Moore flicked his cigarette onto the floor.

Branson objected to the action as littering and told Moore to pick up the cigarette. Moore replied "make me." Verbatim Report of Proceedings (VRP) (7/16/15) at 64. Branson advised him that he had to comply with Metro policies or leave the tunnel. As Branson was advising him about Metro policies, Moore continued talking. Branson could not understand what he was saying so she moved closer to Moore and faced him. Moore calmly said he was going to "knock [Branson] out." Id. at 66. Branson did not take him seriously, but she called her supervisor, reported the threat, and asked for assistance.

Moore raised his phone to take Branson's photo. According to Branson, she raised her hand so that it was in front of the phone's camera but not touching the phone or any part of Moore's body. In one fluid motion, Moore stood and hit Branson in the face. Branson swung around and stumbled in a daze. Id. When she looked up, Moore was approaching her with his fist raised. Branson backed away to the far end of the tunnel entrance. Moore moved with her and struck her again, this time causing her to fall. As Branson was getting up, she saw that

No. 73921-2-1/3

blood was pooling on the floor. She realized that the first blow had split her lip and she was bleeding profusely. She again called for assistance and other security officers soon arrived.

Moore argued that he acted in self-defense. According to Moore, he suffers from numerous old injuries, including a gunshot wound to his head and a crushed leg. He keeps a distance from people to avoid painful contact with these old injuries. Moore stated that a bullet remains lodged in his head and contact with his head could be fatal.

Moore testified that he was sitting peacefully in the tunnel when Branson yelled at him to put out his cigarette. He complied immediately but Branson continued to yell at him and stood so close that he could feel her spit. Moore told Branson that he was going to report her and held up his phone to take her picture. Branson moved even closer and touched his injured leg with her knee. When he tried to take her picture again, Branson grabbed Moore's phone. Moore testified that he begged Branson not to touch his head but she ignored his pleas and shoved the phone into his forehead.

Moore stated that when he saw Branson was going to touch his head he knew the motion could kill him. He was in fear for his life and automatically stopped Branson by striking her. Moore testified that he followed Branson across the entrance and struck her a second time because he did not know what she was capable of doing.

On cross examination, Moore was unable to identify on the surveillance video a point at which Branson touched him with her knee. He stated that, even if

No. 73921-2-1/4

there was no contact, she got too close to his injured leg. Moore disowned a signed statement in which he stated that Branson kneed him in the ribs. He stated that he did not leave before the incident escalated because Branson had already called her supervisor and transit security could invent a reason to arrest him.

The court instructed the jury in the charge of assault in the second degree and the lesser included offense of assault in the fourth degree. The court also instructed the jury that the State had the burden of disproving Moore's claim of self-defense.

In closing, the State argued that Moore did not reasonably believe that he was about to be injured because the evidence established that Branson never touched him. The State further argued that, even if Moore subjectively believed that Branson was about to assault him, he had options other than force available to him. And even if Moore reasonably believed that force was his only option in the first instance, it was not reasonable for him to hit Branson a second time after she backed away from him.

Moore argued in closing that he struck Branson after she slammed the phone into his head. He argued that he reasonably believed he was about to be injured and reacted accordingly. As to the second blow, Moore argued that even if the jury did not believe he struck that blow in self-defense, it did not constitute second-degree assault because it did not result in injury.

The jury convicted Moore of assault in the fourth degree. He appeals.

DISCUSSION

Moore argues that the State failed to present sufficient evidence to disprove his claim of self-defense. In reviewing whether sufficient evidence supports a criminal conviction, we review the evidence in the light most favorable to the State. State v. Drum, 168 Wn.2d 23, 34, 225 P.3d 237 (2010) (citing State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). We defer to the fact finder on issues of credibility. Id. (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The question is whether, viewing the evidence in that light, “any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” Id. (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

Where a defendant properly raises a claim of self-defense, the State has the burden to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)). Evidence of self-defense is evaluated under both a subjective and an objective prong. Id. at 474. Under the subjective prong, the jury considers the apparent threat from the defendant’s point of view. Id. Under the objective prong, the jury considers what “a reasonably prudent person similarly situated would have done.” Id. Self-defense justifies only the degree of force that “a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” Id. (citing State v. Bailey, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979)).

No. 73921-2-1/6

Moore contends the State failed to disprove self-defense because his testimony established that he believed Branson was about to assault him, satisfying the subjective prong. And, he asserts, the record gives evidence that he used only the degree of force that a reasonably prudent person in his circumstances would have used.

We disagree. The record contains conflicting evidence as to the first blow. But viewed in the light most favorable to the State, a rational juror could conclude that Moore used more force than reasonably necessary in striking a first blow that inflicted an injury requiring several stitches. And even if we were to conclude otherwise as to the first blow, we would reach the same result because Moore struck Branson a second time. The evidence is undisputed that the second blow occurred after Branson backed some distance away from him. Even in his own testimony, Moore does not suggest that he perceived an imminent threat of harm from Branson at that time. Thus, the evidence amply supports the jury's determination that Moore was not acting in self-defense when he struck the second blow.

Moore raises three further challenges in a statement of additional grounds (SAG). He first asserts that he was sitting peacefully in the tunnel entrance until Branson disturbed him. The record supports this assertion. But we reject Moore's argument as irrelevant because his behavior prior to Branson's arrival has no bearing on whether his use of force was justified.

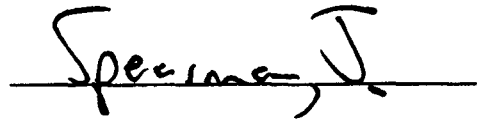
Moore next appears to assert that Branson's employer is targeting him by using the surveillance video in training. The record supports the assertion that

No. 73921-2-1/7

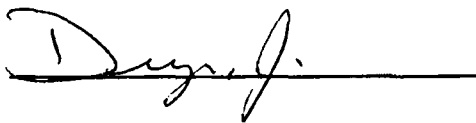
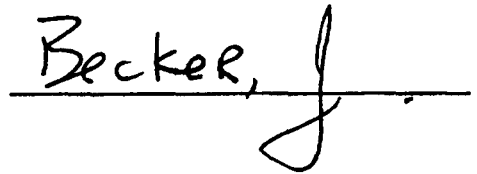
the company uses the video in training. But as this argument is also irrelevant to Moore's conviction, we reject it.

Finally, Moore contends that he received ineffective assistance of counsel. Ineffective assistance of counsel requires proof that counsel's performance was deficient and resulted in prejudice. State v. Humphries, 181 Wn.2d 708, 719-720, 336 P.3d 1121 (2014) (citing Strickland v. Washington, 466 U.S. 448, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Moore asserts that counsel made racist comments and attempted a "falsified representation." SAG at 2. Because we have found nothing in the record to support these claims, we reject them.

Affirmed.

Handwritten signature of Specina, J. in cursive script, written over a horizontal line.

WE CONCUR:

Handwritten signature of Dwyer, J. in cursive script, written over a horizontal line.Handwritten signature of Becker, J. in cursive script, written over a horizontal line.



### DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73921-2-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: February 10, 2017

# WASHINGTON APPELLATE PROJECT

**February 10, 2017 - 4:24 PM**

## Transmittal Letter

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Court of Appeals Case Number: 73921-2

Party Represented: PETITIONER

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- Cost Bill
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- Affidavit
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