

NO. 35099-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

DAVID W. RISLEY,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
07 FEB 12 PM 1:27  
BY [Signature]

---

BRIEF OF APPELLANT

---

LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

1402 Broadway  
Longview, WA 98632  
(360) 425-8155

P.M. 2807

**TABLE OF CONTENTS**

Page

**I. ASSIGNMENTS OF ERROR ..... 1**

**1. THE TRIAL COURT ERRED WHEN IT ENTERED A GUILTY FINDING AGAINST DAVID RISLEY BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL..... 1**

**2. THE TRIAL COURT’S FAILURE TO INSTRUCT THAT JURY THAT KNOWLEDGE IS AN ELEMENT OF UNLAWFUL POSSESSION OF A FIREARM WAS ERROR. THE ERROR WAS NOT HARMLESS..... 1**

**II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1**

**1. WHETHER DAVID RISLEY WAS DENIED CONSTITUTIONALLY GUARANTEED COUNSEL WHEN HIS TRIAL ATTORNEY BOTH PROPOSED AND FAILED TO OBJECT TO JURY INSTRUCTIONS THAT OMITTED THE REQUIREMENT ELEMENT THAT RISLEY UNLAWFUL POSSESSION OF A FIREARM WAS A “KNOWING” POSSESSION? ..... 1**

**III. STATEMENT OF THE CASE ..... 1**

**IV. ARGUMENT ..... 3**

**TRIAL COUNSEL’S FAILURE TO PROPOSE THE CORRECT ELEMENTAL JURY INSTRUCTION FOR UNLAWFUL POSSESSION OF A FIREARM DENIED DAVID RISLEY EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT. .... 3**

**(i) Trial counsel’s performance fell below that required of a reasonably competent defense attorney when he proposed and accepted jury instructions that omitted an essential element of the charge..... 4**

**(ii) Trial counsel’s proposal of the insufficient instruction and failure to challenge the giving of the insufficient instruction caused prejudice..... 7**

**V. CONCLUSION..... 14**

**APPENDIX ..... 15**

## TABLE OF AUTHORITIES

Page

### Cases

<u>Church v. Kinchelse</u> , 767 F.2d 639 (9th Cir. 1985) .....	4
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) .....	8
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	7
<u>State v. Anderson</u> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	5
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	7, 8
<u>State v. Cobb</u> , 22 Wn.App. 221, 589 P.2d 297 (1978).....	4
<u>State v. Cuble</u> , 109 Wn. App. 362, 35 P.3d 404 (2001).....	4
<u>State v. Johnson</u> , 29 Wn.App. 807, 631 P.2d 413 (1981).....	4
<u>State v. Neher</u> , 112 Wn.2d 347, 771 P.2d 330 (1989).....	7
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	5
<u>State v. Shouse</u> , 119 Wn. App. 793, 83 P.3d 453 (2004) .....	8, 9, 10, 12, 14
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L.3d.2d 674, 104 S. Ct. 2052 (1984) .....	3, 4

### Statutes

RCW 9.41.040(2)(a).....	1, 5, 15
RCW 9.41.040(2)(a)(i).....	1

RCW 9A.04.100(1)..... 7, 16

**Other Authorities**

United States Constitution, Sixth Amendment ..... i, 3, 16

Washington Constitution, Article 1, § 22 ..... i, 3, 17

## **I. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED WHEN IT ENTERED A GUILTY FINDING AGAINST DAVID RISLEY BECAUSE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**
- 2. THE TRIAL COURT'S FAILURE TO INSTRUCT THAT JURY THAT KNOWLEDGE IS AN ELEMENT OF UNLAWFUL POSSESSION OF A FIREARM WAS ERROR. THE ERROR WAS NOT HARMLESS.**

## **II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

- 1. WHETHER DAVID RISLEY WAS DENIED CONSTITUTIONALLY GUARANTEED COUNSEL WHEN HIS TRIAL ATTORNEY BOTH PROPOSED AND FAILED TO OBJECT TO JURY INSTRUCTIONS THAT OMITTED THE REQUIREMENT ELEMENT THAT RISLEY UNLAWFUL POSSESSION OF A FIREARM WAS A "KNOWING" POSSESSION?**

## **III. STATEMENT OF THE CASE**

David Risley was charged with a single count of unlawful possession of a firearm in the second degree in violation of RCW 9.41.040(2)(a)(i). CP 1. The information charged that Risley knowingly owned, possessed, or controlled a firearm after having been convicted of a felony. CP 1.

A jury heard the case on June 13.

Risley was the front seat passenger in a car stopped for speeding. RP 38. Lloyd Hawkins was the driver. RP 38. Skamania County Deputies Garcia and Flood testified that when

they contacted the car, there was a rifle sitting where the emergency brake and the gear shift would be. RP 38, 82. Both Garcia and Flood testified that Hawkins and Risley said that "they" had been using the rifle for target shooting earlier in the day. RP 39, 84-85. During the traffic stop, it was discovered the Risley was a convicted felon which lead to the subsequent charging. RP 39-40.

At trial, Hawkins and Risley testified that Risley had not been with Hawkins during target shooting. RP 58, 74. Rather, Hawkins picked Risley up later in the day. RP 58, 74. Also, both Hawkins and Risley testified that the gun was in the car's backseat and not on the center console when contacted by the police. RP 59-60, 78. During cross examination, Risley was less then clear about whether and when he knew the rifle was in the car. RP 78.

Defense counsel proposed both a definitional and a to-convict instruction omitting the statutorily proscribed requirement that Risley must "knowingly" possess the firearm. Supplemental Designation 49-59. The court gave a modified version of defense counsel's proposed instructions with no objection from defense counsel. RP 90. The court's instructions also omitted the knowledge element. CP 15 & 16.

Risley was convicted as charged and on June 15 given a sentence within his standard range. CO 21, 22-33. This appeal followed on July 10.

#### IV. ARGUMENT

#### **TRIAL COUNSEL'S FAILURE TO PROPOSE THE CORRECT ELEMENTAL JURY INSTRUCTION FOR UNLAWFUL POSSESSION OF A FIREARM DENIED DAVID RISLEY EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent

defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Church v. Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing Strickland, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068). The standard under the Washington Constitution is identical. State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client). Risley's claim of ineffective assistance of counsel satisfies both prongs of the Strickland test.

- (i) **Trial counsel's performance fell below that required of a reasonably competent defense attorney when he proposed and accepted jury instructions that omitted an essential element of the charge.**

Whether a jury instruction correctly states the applicable law is a question of law that the court reviews de novo. State v. Cuble, 109 Wn. App. 362, 368, 35 P.3d 404 (2001), citing State v. Pirtle,

127 Wn.2d 628, 656, 904 P.2d 245 (1995). RCW 9.41.040(2)(a) defines unlawful second degree possession of a firearm in pertinent part as follows:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if . . . the person owns, has in his or her possession, or has in his or her control any firearm (i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section . . . .

Although the statute does not expressly mention "knowledge" as an element of unlawful firearm possession, our Supreme Court held that this crime includes "knowledge" as a necessary element. State v. Anderson, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000).

Here, defense counsel proposed the following definitional and "to-convict" instructions for unlawful possession of a firearm in the second degree.

INSTRUCTION NO. \_\_\_\_

A person commits the crime of unlawful possession of a firearm in the second degree when he owns a firearm or has a firearm in his possession or control and he has previously been convicted of a felony which is not a serious offense.

INSTRUCTION NO. \_\_\_\_

To convict the defendant of the crime of unlawful possession of a firearm in the first [sic] degree, each of the following

elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 4, 2006, the defendant owned a firearm or had a firearm in his possession or control;

(2) That the defendant had previously been convicted of Theft in The Second Degree; and

(3) That the ownership or possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will by our duty to return a verdict of not guilty.

Supplemental Designation of CP 49-59. The State proposed identical instruction although it correctly identified the degree of the charge as second degree in the definitional instruction. Supplemental Designation of CP 35-48. The court instructed the jury using the above instructions with two modifications: (1) it corrected the "second" degree language to "first" degree and (2) deleted the reference to ownership of a firearm. CP 15 & 16 (Instructions 6 & 7, see attached as Appendix A).

Because the instructions omitted the required element of knowledge, they were in error. Each element of a charged crime must be proved by competent evidence beyond a reasonable

doubt. RCW 9A.04.100(1). And so an instruction that relieves the State of its burden to prove every element of the crime requires automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The State may argue here that defense counsel invited the error by proposing the flawed instructions thereby precluding Risley from raising the issue on appeal. State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989) (the invited error doctrine bars claims of appellate error when the flawed instructions were proposed by defense counsel). However, in a criminal case, where the offering of an incorrect jury instruction may constitute ineffective assistance of counsel, the reviewing court may reach the merit of the challenge anyway in determining if counsel was ineffective. State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (review is not precluded when invited error is the result of ineffectiveness of counsel). There was no reason for defense counsel to propose an instruction limiting the State's obligation to prove each element of the charge against Risley. This is especially true because whether Risley knew the gun was in the car was a contested issue.

- (ii) **Trial counsel's proposal of the insufficient instruction and failure to challenge the giving of the insufficient instruction caused prejudice.**

The failure to instruct the jury as to the State's burden of proving every element of the crime beyond a reasonable doubt is subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In Brown, our Supreme Court adopted the reasoning of Neder. Brown, 147 Wn.2d at 340. By that rationale, our reviewing courts will not reverse a jury verdict based on the failure to instruct on the elements if the missing element is supported by uncontroverted evidence. This means that the courts should affirm if, after thoroughly examining the record, the court is convinced beyond a reasonable doubt that "the error complained of did not contribute to the verdict obtained." Brown, 147 Wn.2d at 344; Neder, 527 U.S. at 15. The missing element must be supported by uncontroverted evidence. Brown, 147 Wn.2d at 341; Neder, 527 U.S. at 18.

The holding in State v. Shouse, 119 Wn. App. 793, 83 P.3d 453 (2004), demonstrates that controverted evidence about knowledge of a firearm's existence should undermine the confidence of our jury's verdict and necessitate reversal. In Shouse, as in our case, the defendant was charged with unlawful possession of a firearm. And as in our case, the jury instructions did not include the knowledge element. Shouse was one of two

backseat passengers in a car stopped for a traffic stop. There was no front seat passenger but there was a holstered pistol on the floorboard in front of the passenger seat. Shouse told police the gun belonged to his girlfriend. The driver and other passenger told the officers they knew nothing of the gun. Shouse, a convicted felon, was charged with unlawful possession of the gun. At trial, the driver changed his story and said that he had seen Shouse with the gun earlier. The other passenger denied seeing Shouse with the gun earlier but was impeached with a sworn statement he gave police saying that he had seen Shouse with the gun earlier at a house. The other passenger had also told police that Shouse threw the gun onto the floor and jumped into the backseat when the car was being stopped; he retracted that statement at trial.

Based upon these facts, the court held that the missing knowledge element undermined the high degree of certainty it must have before concluding that an uninstructed element does not harm the verdict. The Shouse court had several concerns. First, the verdict required jury unanimity as to which act constituted the crime. Did the jury find that Shouse knowingly possessed the gun at the house or in the car? The court did not know. Second, the evidence of knowledge was disputed. The driver said that Shouse

possessed the gun at the house. The other passenger said that he did not. Both driver and passenger were impeached with their contrary statements. Finally, closing argument underscored the controversy over the knowledge element. The State argued that Shouse had constructive possession because he could reach the gun and knew it was in the car the moment he recognized it as his girlfriend's gun. Defense counsel argued that the gun could have just suddenly appeared when the passenger seat was moved backward. But, as the court noted, "[N]o one told the jury it could not base a guilty verdict on constructive possession unless it found beyond a reasonable doubt that Mr. Shouse knew the gun was in the car." Shouse, 119 Wn. App. at 799.

Our verdict is premised on the same uncertainty. First, four different acts of possession were offered (1) Risley used the gun for target shooting earlier in the day; (2) Risley possessed the gun because it was next to him at the time of the stop; (3) Risley knew the gun was in the backseat; or (4) Risley became aware of the gun as it was being passed from the backseat to Deputy Garcia. Who is to know which act of "possession" the jury unanimously agreed upon? Second, the evidence of knowledge is disputed. Deputies Garcia and Flood both testified that Hawkins and Risley both said

that "they" had been out target shooting with the gun. However, at trial, both Hawkins and Risley said that Risley had not been at the target practice. Additionally, Risley's testimony on cross-examination as to his knowledge of the gun was anything but clear.

PROSECUTOR: Yeah. And you had no idea there was a gun in the car?

RISLEY: (No response.)

PROSECUTOR: No clue?

THE COURT: You need to speak up, sir.

RISLEY: No.

THE COURT: Thank you.

PROSECUTOR: All right. Not until the officer pointed it out and asked you to -- asked Mr. Hawkins to give it to him for officer safety purposes?

RISLEY: Yeah, then I knew it was there.

PROSECUTOR: That was the first time you had any idea?

RISLEY: Oh, I probably knew it was back there, but I didn't really, you know.

PROSECUTOR: What do you mean? I didn't understand that.

RISLEY: You know, I knew it was back there, but I didn't think I was, you know --

PROSECUTOR: You knew it was back there?

RISLEY: Yeah.

PROSECUTOR: Okay.

RISLEY: But I'm not, you know, I didn't know I was in the wrong.

PROSECUTOR: Okay.

RISLEY:'Cause I didn't shoot it, you know.

RP 78.

Finally, just as in Shouse, closing argument underscored the controversy over the knowledge element. The State argued that a felon was guilty of unlawful possession of a firearm for just being around a gun.

So I'll give you an example of that. This gun is in my actual physical custody, right? But when I put it here, it's no longer in my actual physical custody, right? It's not in my hands, I'm not touching it, right? However, you know, two feet from me, any time I could reach out and grab it right here. That means I have dominion and control over it and it can be immediately exercised. It's right here. This is why it's so important for them to tell you a story, right, about it's in the back seat, right? He either didn't know it was there or, like he said later in his testimony, did know it was there, but it was in the back seat.

...

Again, that is a classic case. I mean, it's the, it's THE classic case of constructive possession. It's right here, reach down any time, the dominion and control may be immediately exercised. Just reach down and grab it.

...

It's not all about ownership, it's about possession. It's about just having, basically being around it. And unfortunately, that's a consequence of being convicted of a felony. You're not allowed to be around guns anymore. You're not allowed to be in a position where you can reach out and grab a gun. It's illegal and that's why we're here today.

RP 106-108.

Defense counsel argued that knowledge of and proximity to a gun was insufficient proof of the charge unless the defendant actually intended to immediately exert dominion and control over the gun.

That's what it comes down to. Mr. Kick is right; ownership's not at issue here. It's whether the limited facts as to where it was laying next to Mr. Risley as he was a passenger in a car, not that he was toting this across the mountain on his back, actual possession, but whether there was constructive possession here. And you've heard two deputies say that it was between the seats. You've heard Mr. Risley and Mr. Hawkins say it was somewhere behind the seat. It's a small car. Let's everybody get that, I admit that, it's a small car. But knowing something to be there doesn't actually mean you possess it or control it.

That possession, that control, that dominion and control, as the instruction tells you, as Instruction Number 8 tells you, must be immediately exercised. Be able to reach out and grab it. You didn't hear any testimony when Deputy Garcia asked about it, how easy it was, or easy at all for Mr. Hawkins to go get this firearm. It was produced to him. Mr. Risley talked about out the window, out behind Mr. — all right, that's right, didn't necessarily talk about that, but if

he said out Mr. Hawkins' window as far as getting it to Deputy Garcia.

RP 110-12.

Just as in Shouse, no one told the jury that it could not base a guilty verdict on constructive possession unless it found beyond a reasonable doubt that Risley knew the gun was in the car.

Accordingly, giving the exacting standard of proof beyond a reasonable doubt, it cannot be concluded that the missing knowledge element was harmless.

#### V. CONCLUSION

Risley's conviction must be reversed.

Respectfully submitted this 8<sup>th</sup> day of February, 2007.



LISA E. TABBUT/WSBA #21344  
Representing Appellant

## APPENDIX

### **RCW 9.41.040**

#### **Unlawful possession of firearms — Ownership, possession by certain persons — Penalties.**

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.320, \*71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

**RCW 9A.04.100**

**Proof beyond a reasonable doubt.**

(1) Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

(2) When a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest degree.

**United States Constitution**

**Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**WASHINGTON STATE CONSTITUTION  
ARTICLE I  
DECLARATION OF RIGHTS**

**SECTION 22 RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. **[AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]**

**APPENDIX A**

**JURY INSTRUCTIONS 6 & 7**

INSTRUCTION NO. 6

A person commits the crime of unlawful possession of a firearm in the second degree when he has a firearm in his possession or control and he has previously been convicted of a felony, which is not a serious offense.

INSTRUCTION NO. 7

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 4<sup>th</sup> day of March, 2006, the defendant had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of theft in the second degree; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

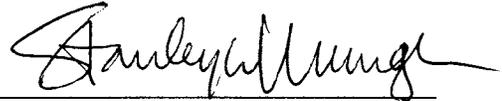
(1) BRIEF OF APPELLANT  
(2) AFFIDAVIT OF MAILING

Dated this 8<sup>th</sup> day of February 2007.

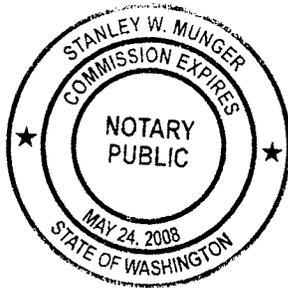


LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 8th day of February 2007.



Stanley W. Munger  
Notary Public in and for the  
State of Washington  
Residing at Longview, WA 98632  
My commission expires 05/24/08



AFFIDAVIT OF MAILING - 2 -

LISA E. TABBUT  
ATTORNEY AT LAW

1402 Broadway • Longview, WA 98632  
Phone: (360) 425-8155 • Fax: (360) 423-7499