FILED
COURT OF APPEALS
DIVISION II

08 JUN 30 PM 1:15

STATE OF WASHINGTON
BY
DEPUTY

NO. 37003-4-II

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

STATE OF WASHINGTON, Respondent

v.

PETER S. PETERSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00175-1

BRIEF OF RESPONDENT

Attorneys for Respondent:

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08017-0-II

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I. STATEMENT OF THE FACTS

Because of the nature of the assignments of error, the following Statement of Facts will be in supplement to the Statement of Facts set forth by the defendant. The defendant was charged by Amended Information (CP 2) with Assault in the Second Degree (Domestic Violence) which was alleged to have occurred on or about January 24, 2007. The alleged victim was his wife, Dana Petersen, and the claim was that he recklessly inflicted substantial bodily harm on her. Also filed was the aggravator of domestic violence against a household member.

To establish the elements of the crime, the State called Dana Petersen as a witness in its case in chief (RP 53). She indicated that she had been the wife of the defendant for approximately eleven years (RP 54). On the evening in question she indicated that she was sick in bed with her five year old daughter when the defendant came home from work and they began arguing about the fact that she had not prepared dinner (RP 55). She indicated that this argument was taking place in the kitchen area of the residence. She stated that they pushed each other and that she then ran to the bedroom and locked the door. (RP 55 – 56). She indicated that they were arguing through the door and ultimately he kicked in the bedroom door. (RP 56 – 57). She told the jury that she looked for

somewhere to go to get away from him and that she tried to get around him because there were no other exits in the room. (RP 57). She indicated at that point that she recalls that he hit her in the face (RP 58).

Dana Petersen appeared to be minimizing some of her statements and, after an offer of proof, the State was allowed to use information from her Smith affidavit. She told the officers when they responded to her 911 call that, at the time of the incident, she had clearly told the officer that the defendant had punched her in the eye and that she had fled to the bedroom to get away from him. (RP 72). She further indicated that she did not hit the defendant or did not try to hit him. (RP 73). She further indicated that she had a fracture to her eye socket as a result of being punched in the face by the defendant. (RP 73).

The Prosecution also called Clark County Sheriff's Office Deputy James Payne (RP 33). He indicated that he responded to the domestic assault and he came in contact there with the defendant (RP 35). The defendant told the officer that he had backhanded his wife about some frozen food and that she came after him and he hit her in the face. (RP 35, L. 13 – 15). Exhibits were put into evidence through the officer showing damage to the home and physical injuries to the wife. During the State's case in chief a stipulated agreement admitting evidence of injury was also put into evidence (CP 57). That document was an agreement that there

were fractures to the wife's face as a result of the assaultive behavior by the defendant.

II. RESPONSE TO ASSAIGMENT OF ERROR NUMBER 1

First assignment of error raised by the defendant is that there was insufficient evidence to convict the defendant of Second Degree Assault. The Defendant had lodged a self defense claim and the representation was that the State had failed to disprove beyond a reasonable doubt the affirmative defense of self defense.

In a claim of insufficient evidence, the appellate court examines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wn. 2d 118, 152, 110 P. 3d 192 (2005). Determinations of credibility are for the fact finder and are not reviewable on appeal. State v. Camarillo, 115 Wn. 2d 60, 71, 794 P. 2d 850 (1990). Another way of saying that is that the Appellate Court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P. 3d 1182 (2005); State v. Walton, 64 Wn. App. 410, 415 – 416, 824 P. 2d 533 (1992).

The elements of Assault in the Second Degree as alleged in the Amended Information (CP 2) are contained in the Courts instructions to the Jury (CP 65). In instruction number 7 the jury is told of the following elements:

> (1) That on or about the 24th day of January, 2007, the defendant intentionally assaulted Dana Petersen;
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Dana Petersen; and
> (3) That the acts occurred in the State of Washington.
> -(Courts instructions to the Jury (CP 65, Instruction No. 7)).

In addition to that instruction, the State was also obligated to disprove beyond a reasonable doubt the self defense claim by defendant.

Instruction 14

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of

> the facts and circumstances known to the person at the time of and prior to the incident.
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.
> If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.
>
> -(Courts instructions to the Jury (CP 65, Instruction No. 14)).

As indicated in the earlier section under Statement of Facts, the State demonstrated to the Jury that this was an intentional assault on the part of the defendant against his wife. He acknowledged to the officer that he had back handed her in the face and she had indicated that he had punched her in the face thus causing the fracture to an eye socket. The State maintains that the evidence also demonstrates that the defendant was the initial aggressor in this matter. He was angry when he came home from work, the wife fled the scene of the initial confrontation hiding in a bedroom and locking the door. The defendant then broke into that room and that's where the assault occurred. The State submits that there is sufficient evidence here to allow this question to go to the jury as question of credibility and also, certainly, a question of who was the initial aggressor in this matter. Further, as part of the information that she has supplied to the officers she indicated that she did not attempt to strike him and that she made no contact with him and that she was punched in the

eye in the bedroom where she had gone to get away from him. The State submits that there is sufficient evidence here to allow this issue to go to the jury.

III. RESPONSE TO ASSAIGNMENT OF ERROR NUMBER 2

The second assignment of error raised by the defendant is a claim that the trial court erred in giving the "first aggressor" jury instruction.

As part of the Court's Instructions to the Jury (CP 65) were instructions number 18 and 16. Instruction number 18 is usually referred to as the first aggressor instruction and Instruction number 16 is usually referred to as the necessity instruction. The instructions read as follows:

> INSTRUCTION NO. 18
>
> No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.
>
> -(Courts instructions to the Jury (CP 65, Instruction No. 18)).

INSTRUCTION NO. 16

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.
>
> -(Courts instructions to the Jury (CP 65, Instruction No. 16)).

The right of self defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he in good faith first withdraws from the combat at a time and in a manner to let the other person know that he is withdrawing or intends to withdraw from further aggressive action. State v. Craig, 82 Wn. 2d 777, 783, 514 P. 2d 151 (1973). Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self defense, an aggressor instruction is appropriate. State v. Hughes, 106 Wn. 2d 176, 191 – 192, 721 P. 2d 902 (1986); State v. Kidd, 57 Wn. App. 95, 100, 786 P. 2d 847 (1990). If there is credible evidence that the defendant made the first move (for example, by drawing a weapon) the evidence supports the giving of an aggressor instruction. State v. Thompson, 47 Wn. App. 1, 7, 733 P. 2d 584 (987). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's

conduct precipitated a fight. State v. Davis, 119 Wn. 2d 657, 666, 835 P. 2d 1039 (1992).

The State submits that there was credible evidence to support that the defendant provoked the need to act in self defense. It is interesting to note that the evidence clearly indicates that the wife, prior to the assault, had fled the scene and was attempting to get away from the defendant. She went so far as to lock herself in a room to avoid having additional contact with the defendant. At that point, it is the intentional act of the defendant in kicking in the door that leads to the assaultive behavior. That aggressive act is an intentional act other than the actual crime. The jury can reasonably assume that that type of conduct would provoke a response in the alleged victim. The response that she gave was a further attempt to flea by getting around him and thus exiting the room. He prevented her from doing so and in the course of that assaulted her. State v. Kidd, 57 Wn. App. at 100; State v. Wasson, 54 Wn. App. 156, 159, 772 P. 2d 1039 (1989).

The defendant, in his appellate brief, argues that her lunging at the defendant was a belligerent act that required response. However, if you go back just a few seconds earlier, the initial aggressive act was breaking in the door to continue the angry actions that the alleged victim was trying to avoid and get away from. Clearly, there was enough evidence in this

record to support the giving of the first aggressor instruction by the court. As indicated in State v. Davis, 119 Wn. 2d 657, 665 – 666, 835 P. 2d 1039 (1992), the reason to give a first aggressor instruction is to prevent a defendant from claiming self defense when the defendant provokes the reaction against which it was necessary to use force. The State submits that the evidence is sufficient to have allowed the first aggressor instruction to be given in this case.

IV. RESPONSE TO ASSAINGNMENT OF ERROR NUMBER 3

Third assignment of error raised by the defendant is a claim of ineffective assistance of counsel. He claims error in the Jury Instructions that the defendant proposed and were given by the trial court. Specifically, the instruction in question deals with a faulty self defense instruction.

As part of the defendant's proposed jury instructions (CP 30) the defendant offered a self defense instruction that was ultimately given by the court (CP 65) as Instruction number 15 which reads as follows:

INSTRUCTION NO. 15

A person is entitled to act on appearances in defending himself if that person believes in good faith and

> on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.
>
> -(Courts instructions to the Jury (CP 65, Instruction No. 15))

The claim of ineffective assistance of counsel was raised by maintaining the phrase "Great Bodily Harm" should have been replaced with the phrase "Great Personal Injury" in WPIC 17.04. State v. Freeburg, 105 Wn. App. 492, 507, 20 P. 3d 984 (2001).

As noted in Strickland v. Washington, 466 US 668, 104 Supreme Court 2052, 80 L. Ed. 2d 674 (1984) even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the Judgment." Strickland, 466 US at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." Strickland, 466 US at 693. "In doing so, the defendant must show that there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Crawford, 159 Wn. 2d 86, 99 – 100, 147 P. 3d 1288 (2006) (quoting Strickland, 466 US at 694).

The jury is presumed to read the trial court's instructions as a whole, in light of all other instructions. State v. Hutchinson, 135 Wn. 2d 863, 885, 959 P. 2d 1061 (1998). The State submits that there was no ineffective assistance of counsel in the presenting of the jury instructions for this jury because the defendant cannot show any prejudice and also because of the nature of the factual allegations being made and the nature of the argument being made by both parties.

The defendant primarily cites to four cases which he claims supports his position that this is ineffective assistance of counsel. These particular cases all (with the exception of the Juvenile case) dealt with not only the giving of the instruction that this court gave in our situation, but also definitions of "great bodily injury" which created a conflict and denied the defendant his right to a fair trial. For example, in State v. Walden, 131 Wn. 2d 469, 473, 932 P. 2d 1237 (1997) the court questioned the use of the WPIC instruction because of the conflict created by also giving a definition of "great bodily harm". This could possibly cause confusion with the jury. Likewise, in State v. Freeburg, 105 Wn. App. 492, 502 – 503, 20 P. 3d 984 (2001) the jury instructions in a homicide case provided both definitions of "great bodily harm" and "great personal injury" and it was felt that the conflict might confuse the jury. In State v. Rodriquez, 121 Wn. App. 180, 186, 87 P. 3d 1201 (2004) the court again

gave the definition of "great bodily injury". Finally, in State v. L.B., 132 Wn. App. 948, 135 P. 3d 508 (2006) the use of the terminology in the Juvenile setting without a jury was considered harmless under the circumstances.

It had been noted in the Walden, case that the terms "great bodily injury" and "great bodily harm" and "great personal injury" had been used by the courts interchangeably and that the Supreme Court had advocated the use of "great personal injury" Walden, 131 Wn. 2d at 475, n.3. The problem appeared that by defining the terms, a juror could read the instruction to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances. In our situation, the court gave no definition of "great bodily harm". Further, this entire concept was never argued to the jury by either side. The State in its closing argument characterized the defendant's comments when he testified as an accidental contact with the alleged victim. The defense attorney when he argued to the jury also discussed it in terms of an accidental or unintentional type of activity, merely a mistake and it being over blown and that she was the aggressor throughout. Nowhere in the discussion with the jury are these concepts of bodily harm even raised. The only definitions of bodily harm that were provided to this jury were those that dealt with a substantial

bodily harm done to the alleged victim and that was stipulated to by the parties.

This was explained to some extent in State v. Rodriguez, Supra. The Appellate Court noted that the trial court had instructed using the WPIC 17.04 and retained the phrase "great bodily harm". The court set forth what the problem was in that particular case:

> Now, standing alone or with other instructions to this jury on the question of self defense, this statement would at least be innocuous and perhaps even an accurate statement of the law. The problem here is that the court also instructed the jury on the requirements of Assault in the First Degree. And as part of that charge to the jury, the court defined "great bodily harm" as follows: Great bodily harm means bodily injury that creates a probability of death or which causes significant serious permanent disfigurement, or that causes a serious permanent loss or impairment of the function of any bodily part or organ. CP at 90 (Instruction No. 9); CWPIC 2.04.
>
> This is the only definition of "great bodily harm" in the instructions to the jury. And when this definition is read into the self defense instruction, the problem becomes apparent. Based on this definition of "great bodily harm," The jury could easily (indeed may have been required to) find that in order to act in self defense, Mr. Rodriguez had to believe he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function. And this is precisely the problem the Supreme Court warned against in State v. Walden. Like the instructions that the Court found objectionable in Walden, the instructions here "by defining great bodily injury to exclude ordinary batteries, a reasonable juror could read the instruction to prohibit consideration of the defendant's subjective impressions of all of the facts and circumstances,

> i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury." Walden, 131 Wn. 2d 469, 477 (1977).
>
> -(State v. Rodriquez, 121 Wn. App., 185 – 185)

This type of conflict between different definitions is also explained recently in State v. Lucero, 140 Wn. App. 782, 786, 167 P. 3d 1188 (2007).

The Lucero case also brings up the concept of invited error. In that case, Lucero had prepared and proposed the jury instruction that they now were complaining about on Appeal. By performing an affirmative, knowing and voluntary act of proposing this instruction, the court found that the defendant had invited the error. Lucero, 140 Wn. App. at 786 787.

The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on Appeal. State v. Pam, 101 Wn. 2d 507, 511, 680 P. 2d 762 (1984); State v. Breedlove, 138 Wn. 2d 298, 312, 979 P. 2d 417 (1999). As part of that doctrine it has been held that a party may not request an instruction and later complain on appeal that the requested instruction was given. Ball v. Smith, 87 Wn. 2d 717, 556 P. 2d 936 (1976). As stated in State v. Henderson, 114 Wn. 2d 867, 870, 792 P. 2d 514 (1990) this has been the law in this State for more than twenty years that the party is precluded from challenging the Court's giving of an

instruction that he has proposed. This also applies to an assertion that his counsel was ineffective in requesting that the Court give a jury instruction. State v. Summers, 107 Wn. App. 373, 380 – 382, 28 P. 3d 780, 43 P. 3d 526 (2001). In the past, this has also been applied to situations where ineffective assistance of counsel was claimed in giving a proposed flawed self defense instruction. State v. Studd, 137 Wn. 2d 533, 546 – 547, 973 P. 2d 1049 (1999).

As indicated previously, the State submits that there was no possibility that the jury was confused about the definitions being provided or about the standard. This was not an area where either party argued, made complaint, or attempted to sway the jury concerning the defendant's subjective belief in the amount of potential battery or injury he was to receive at the hands of his wife. Nothing prevented the defense from arguing its version of the facts and law. The usual test for the sufficiency of a jury instruction is whether it correctly states the law, is not misleading, and permits the attorney's to argue their theory of the case. State v. Mark, 94 Wn. 2d 520, 526, 618 P. 2d 73 (1980). In our situation, it was a correct statement of the law because no further definitions were provided to confuse the jury. The instructions were not misleading and it allowed the parties to argue their theory of the case.

On appeal, this matter should be evaluated in terms of whether or not the instructions as a whole provide an accurate statement of the law and allow each party to argue its theory of the case to the extent that it is supported by the evidence. State v. Benn, 120 Wn. 2d 631, 654 – 655, 845 P. 2d 289 (1993). The State submits that this was accomplished in this particular case and there was no ineffective assistance of counsel, this was invited error, and the jury was properly instructed given the nature of the instructions that were proposed and given.

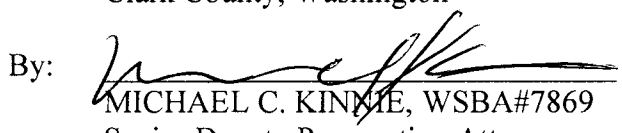
V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 26 day of June, 2008.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

AMENDED INFORMATION

2

#5

FILED

JAN 31 2007

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. PETER STIG PETERSEN, AKA PETER STIG PETERSON, Defendant.	**AMENDED INFORMATION** No. 07-1-00175-1 (CCSO 07-1219)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - ASSAULT IN THE SECOND DEGREE (DOMESTIC VIOLENCE) - 10.99.020/9A.36.021(1)(a)
That he, PETER STIG PETERSEN, AKA PETER STIG PETERSON, in the County of Clark, State of Washington, on or about January 24, 2007. did intentionally assault another person, to wit: Dana Petersen, and thereby did recklessly inflict substantial bodily harm; contrary to Revised Code of Washington 9A.36.021(1)(a).

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

And further, that this crime was committed by one family or household member against another, and that this is domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040. [DV]

ARTHUR D. CURTIS
Prosecuting Attorney in and for
Clark County, Washington

Date: January 31, 2007

BY: _____
for Jeannie M. Bryant, WSBA #17607 37015
Deputy Prosecuting Attorney

Domestic Violence Prosecution Center
210 East 13th Street
P.O. Box 1995
Vancouver Washington 98660
(360) 735-8862
(360) 735-8866 (FAX)

DEFENDANT: PETER STIG PETERSEN, AKA PETER STIG PETERSON			
RACE: W	**SEX:** M	**DOB:** 8/19/1954 AKA 7/19/1954	
DOL: PETERPS460NR WA		**SID:** WA23749193	
HGT: 508	**WGT:** 165	**EYES:** BRO	**HAIR:** BRO
WA DOC:		**FBI:** 442654DA3	
LAST KNOWN ADDRESS(ES):			
H - 9911 NE 105TH AV, VANCOUVER			

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210 East 13th Street
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Vancouver Washington 98660
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APPENDIX "B"

COURT'S INSTRUCTIONS TO THE JURY

24

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

FILED

OCT 02 2007

Sherry W. Parker, Clerk, Clark Co.
Recd - 10:52 am
Deputy Clerk

STATE OF WASHINGTON,	)	
	)	NO. 07-1-00175-1
Plaintiff,	)	
	)	COURT'S INSTRUCTIONS
vs.	)	TO THE JURY
	)	
PETER STIG PETERSEN	)	
	)	
Defendant.	)	

DATED this 2nd day of October, 2007.

R. C. Lewis
JUDGE OF THE SUPERIOR COURT

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INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It is also your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called a complaint, informing the defendant of the charge. You are not to consider the filing of the complaint or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go into the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witnesses, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorney's remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatsoever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of those facts or circumstances from which the existence or nonexistence of other facts may be a reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 6

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

INSTRUCTION NO. 7

To convict the defendant of the crime of Assault 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 24th day of January, 2007, the defendant intentionally assaulted Dana Petersen;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Dana Petersen; and

(3) That the acts 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 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.

INSTRUCTION NO. 8

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 10

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 11

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 12

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION No. 13

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

Instruction 14

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION 15

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 16

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION No. 17

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 18

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 19

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form.

You must fill-in the blank provided in the verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 20

You will also be furnished a special verdict form. If you find the defendant not guilty, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer a special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 21

For purposes of this case, "family or household member" means spouses.

APPENDIX "C"

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

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FILED

OCT 01 2007

Sharry W. Parker, Clerk, Clark Co.

THE SUPERIOR COURT OF CLARK COUNTY IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff vs. PETER STIG PETERSEN, Defendant	Case No: : **07-1-00175-1** DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Randal B. Fritzler, #6093
Attorney at Law
PO Box 61451
Vancouver, WA 98666
(360) 737-9335

ANNOTATED COPY

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INSTRUCTION _____

This is a criminal case brought by the State of Washington against the defendant, Peter Petersen. The prosecuting attorney is Camara Banfield. The defense attorney is Randal Fritzler.

The defendant is charged in an "Amended Information" with the crime of Assault in the Second Degree (domestic violence). Specifically, this charge alleges that Peter Steig Petersen in the County of Clark, State of Washington, on or about January 24, 2007 did intentionally assault Dana Petersen a family or household member contrary to the laws of the State of Washington, and thereby did recklessly inflict substantial bodily harm; contrary to RCW 9A.36.021(1)(a). The crime alleged is a "most serious offense" pursuant to the Persistant Offender Accountability Act (RCW 9.94A.030 (28), RCW 9.94A.505 (2)(a)(v) and RCW 9.94A.570). It is also alleged that the alleged crime was committed by one family member or household member against another, and that this is a domestic violence offense as defined by RCW 10.99.020 and within the meaning of RCW 9.41.040.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

To the charge alleged by the prosecution, the defendant has entered a plea of not guilty. The plea of not guilty means that you, the jury, must decide whether the State has proved every element of *the* crime charged. The State has the burden of proving every

element beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists. The defendant has no duty to call witnesses, produce evidence, or testify.

The defendant is presumed to be innocent. The **presumption of innocence** continues throughout the entire trial. The presumption means that you must find the defendant not guilty unless you conclude at the end of your deliberations that the evidence has established the defendant's guilt beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

I will now explain the procedure to be followed during the trial.

First: The prosecuting attorney may make an opening statement outlining the testimony of witnesses or other evidence that she expects to be presented during the trial. The defense attorney may then make an opening statement or may choose to make an opening statement later.

Next: The prosecuting attorney will present the testimony of witnesses or other evidence to you. When the prosecuting attorney has finished, the defense attorney may, but need not, present the testimony of witnesses or other evidence. Each witness who testifies may be cross-examined by the lawyer for the other side.

Next: When all of the evidence has been presented to you, I will instruct you on what law applies to this case. I will read the instructions to you. You will have copies of the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the clerk where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the trial. Evidence is a legal term. Evidence includes testimony of witnesses, documents, and physical objects.

It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law from my instructions to the facts, and in this way decide the case.

The only evidence you are to consider consists of testimony of witnesses and exhibits admitted into evidence. When witnesses testify, please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. However, the lawyers' statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard anything the lawyers say that is at odds with the evidence or the law in my instructions.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should

consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

Our state constitution prohibits a trial judge from making a comment on the evidence. Because it is your role to evaluate the evidence, it would be improper for me to express, by words or conduct, my personal opinion about the value of a particular witness's testimony or an exhibit. I will not intentionally do this. If it appears to you that I have indicated in any way my personal opinion concerning any evidence, you must disregard this entirely.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, the internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult any reference materials, such as dictionaries and the like. Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us.

Thank you for your willingness to serve this court and our system of justice.

WPIC 1.01 Advance Oral Instruction—Beginning of Proceedings

INSTRUCTION No. _____

Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

WPIC 2.03 Bodily Injury—Physical Injury—Bodily Harm—Definition

INSTRUCTION NO. _____

For purposes of this case, "family or household member" means persons who have a child in common, regardless of whether they have been married or have lived together at any time or adult persons who are presently residing together or who have resided together in the past, or persons 16 years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship.

"Dating relationship" means a social relationship of a romantic nature. In deciding whether two people had a "dating relationship," you may consider all relevant factors, including a (A) the nature of any relationship between them; (B) the length of time that any relationship existed; and (C) the frequency of any interaction between them.

WPIC 2.27

INSTRUCTION _____

The defendant has entered a plea of not guilty. That plea puts in issue every element of *each* crime charged. The *State* is the plaintiff and has the burden of proving each element of *each* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

WPIC 4.01 Burden of Proof—Presumption of Innocence—Reasonable Doubt

INSTRUCTION NUMBER _____

The defendant has entered a plea of not guilty. That plea puts an issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

The defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases he law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must get him the benefit of the doubt and find him not guilty.

WPIC 4.01A

INSTRUCTION NO. _____

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of those facts or circumstances from which the existence or nonexistence of other facts may be a reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

WPIC 5.01

INSTRUCTION _____

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

WPIC 6.41 Out of Court Statements by Defendant

Instruction _____

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

WPIC 10.01 Intent—Intentionally—Definition

INSTRUCTION _____

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

WPIC 10.02 Knowledge—Knowingly—Definition

Instruction _____

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

LAWFUL FORCE—DEFENSE OF SELF AND OTHERS

INSTRUCTION No. _____

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 16.08 No Duty to Retreat

INSTRUCTION _____

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04 Lawful Force—Actual Danger not Necessary

Instruction _____

In order to establish self-defense, finding of actual danger is not necessary.

State v. Riley, 137 Wash. 2d 904, 976 P.2d 624 (1999).

Instruction _____

In order to establish self-defense, finding of actual danger is not necessary. It is sufficient that defendant reasonably believed that he was in imminent danger of being assaulted.

State v. Riley, 137 Wash. 2d 904, 976 P.2d 624 (1999).

Instruction _____

You may find self-defense on the basis of the defendant's subjective, reasonable belief that he was about to be assaulted by the alleged victim.

State v. Corn, 95 Wash. App. 41, 975 P.2d 520 (Div. 3 1999).

Instruction _____

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC: LAWFUL FORCE—DEFENSE OF SELF AND OTHERS

INSTRUCTION_____

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

WPIC 35.50; ASSAULT—DEFINITION

INSTRUCTION _____

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

WPIC 1.04 Jurors' Duty to Consult with One Another

Instruction _____

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

WPIC 151

WPIC 151.00; BASIC CONCLUDING INSTRUCTION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF CLARK

Plaintiff, STATE OF

WASHINGTON

v. No. 07-100175-1

PETER STIG PETERSEN VERDICT FORM A

Defendant.

We, the jury, find the defendant PETER STIG PETERSEN

_____(write in not guilty or guilty) of the crime of assault in the fourth degree (domestic violence) as charged in Count I.

IF YOU FIND THE DEFENDANT NOT GUILTY answer the following questions and indicate your answers below:

	answer yes or no
1. Was the finding of not guilty based upon self-defense?	.....
2. If your answer to question 1 is no, do not answer the remaining questions.	

3. If your answer to question 1 is yes, was the defendant:

a. Protecting himself or herself? .....

b. Protecting his or her family? .....

c. Protecting his or her property? .....

d. Coming to the aid of another who was in imminent danger of a heinous crime? .....

_____

Presiding Juror

COURT OF APPEALS
DIVISION II
08 JUN 30 PM 1:31
STATE OF WASHINGTON
BY Cm
DEPUTY

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

STATE OF WASHINGTON, Respondent, v. PETER S. PETERSEN, Appellant.	No. 37003-4-II Clark County No. 07-1-00175-1 DECLARATION OF MAILING

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On June 26, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to counsel for Appellant, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Peter Tiller Attorney At Law PO Box 58 Centralia WA 98531-0058

DOCUMENT(S): Verbatim Report of Proceedings - 2 volumes

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

Jennifer L. Jackson
Date: 6/26, 2008.
Place: Vancouver, Washington

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
(360) 397-2230 (FAX)

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

STATE OF WASHINGTON, Respondent, v. PETER S. PETERSEN, Appellant.	No. 37003-4-II Clark Co. No. 07-1-00175-1 DECLARATION OF TRANSMISSION BY MAILING

FILED
COURT OF APPEALS
DIVISION II
08 JUN 30 PM 1:31
STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On June 26, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	PETER B. TILLER ATTORNEY AT LAW PO BOX 58 CENTRALIA WA 98531-0058
	PETER S. PETERSEN 9911 NE 105 AVENUE VANCOUVER WA 98662	

DOCUMENTS: Brief of Respondent

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

Jennifer L. Jackson
Date: 6/26/08, 2008.
Place: Vancouver, Washington.