

62992-1

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NO. 62992-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

THANH NGOC LY,

Appellant.

REC'D

AUG 26 2009

King County Prosecutor
Appellate Unit

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COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Charles Mertel, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel rendered ineffective assistance of counsel by proposing an instruction that was not warranted by the evidence and denied the defendant his sole trial defense.

Issue Pertaining to Assignment of Error

The State charged Ly with assault in the second degree for stabbing Jorge Fortun-Cebada. The State's evidence showed that Ly believed Fortun-Cebada had stolen a soda from him, so Ly pulled out a knife and began attacking Fortun-Cebada. Ly claimed that Fortun-Cebada was the initial aggressor and that he had pulled out the knife in self-defense. At defense counsel's request, the court issued an aggressor instruction. Did defense counsel render ineffective assistance of counsel by requesting the aggressor instruction where the instruction was not supported by the evidence and barred Ly from effectively advancing his claim of self-defense?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged appellant Thanh Ngoc Ly with Assault in the Second Degree while armed with a deadly weapon (a knife). CP 4. The case proceeded to trial

in December 2008. A jury found Ly guilty and concluded that he had been armed with a deadly weapon. CP 5-6.

The court sentenced Ly to 22 months on the assault charge and added 12 months for the deadly weapon enhancement. CP 64-66. Ly filed a timely notice of appeal. CP 72.

2. Trial Testimony

The encounter between Ly and Fortun-Cebada occurred in the early morning hours on July 1, 2008.¹ 3RP 9. Ly, a homeless man, had worked all day cutting grass. 3RP 33. After work, he returned to the shelter where he normally stays for the night to find that it was full. 3RP 33. Later that evening, Ly was at a Shell gas station near Dearborn and Fourth Avenue in South Seattle. 3RP 34. He purchased a soda, some cigarettes, and a lighter. 3RP 34. Ly was unhappy with the purchase because he believed that the clerk at the Shell station had charged him for a large lighter, but had given him a small lighter. 3RP 35.

Angry about the situation, Ly left his soda near the clerk's window at the gas station and walked around the corner of the building. 3RP 35-36. Ly returned to pick up his soda a few

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moments later and when he did, he saw that another man, Jorge Fortun-Cebada, had already picked it up. 3RP 37. Ly testified that he had not yet put his money away after purchasing his items. 3RP 37.

Ly testified that he gestured for Fortun-Cebada to give the soda to him, and Fortun-Cebada responded by hitting him in the face. 3RP 37. Fortun-Cebada lunged at him and Ly believed that he was trying to steal his money. 3RP 38. Ly said that he tried to get away from the fight, but Fortun-Cebada followed him. 3RP 39-40. Ly pulled out a knife in order to scare Fortun-Cebada away. 3RP 40. Fortun-Cebada then took off the backpack that he had been wearing and used it to strike Ly. 3RP 40.

Fortun-Cebada, however, testified that Ly immediately came at him with a knife and hit him. 2RP 89. Fortun-Cebada stated that Ly cut him on the arm during the incident. 2RP 90. When police arrived, the fight was still underway, but police were unable to determine which man was the primary aggressor. 2RP 30. Police eventually arrested Ly. 2RP 41.

At trial, the defense theory was that Fortun-Cebada instigated the assault and Ly pulled a knife in order to defend himself. CP 36-37. Defense counsel proposed that the court

include an aggressor instruction, WPIC 16.04, in the jury instructions. CP 54. The trial court included the instruction in the packet issued to the jury. CP 26.

During closing argument, the prosecutor focused on the aggressor instruction and argued that Ly could not claim self-defense because he had started the fight:

[Prosecutor]: This is commonly called a first impression instruction, and what it says is that no person ma[y] by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense. What does that mean? That simply means when you take up the knife like the defendant did, and you start attacking somebody with it, and Mr. Fortun-Cebada fights back and tries to fend him off, can you then say, well, no, I'm acting in self-defense now because he's fighting back. But the law says, no, you can't do that. You can't create the situation, and then try to rely on it and fall back on it.

4RP 11-12.

Defense counsel used closing argument to explain why Ly's use of force was reasonable, but did not mention or explain how the aggressor instruction applied. 4RP 23-41.

C. ARGUMENT

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY REQUESTING AN AGGRESSOR INSTRUCTION.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Wash. Const. art. 1, § 22. An appellate court reviews claims for ineffective assistance of counsel de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). The appellate test for ineffective assistance of counsel is “whether, after examining the whole record, the court can conclude that appellant received effective representation and a fair trial.” State v. Ciskie, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). Washington has adopted the two-part Strickland² test to determine whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001).

First, the “defendant must show that counsel's performance was deficient.” Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish deficient performance, a defendant must “demonstrate that the

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representation fell below an objective standard of reasonableness under professional norms” State v. Townsend, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001). Second, the “defendant must show that the deficient performance prejudiced the defense.” Strickland, 466 U.S. at 687. This requires the defendant to prove that, but for counsel's deficient performance, there is a “reasonable probability” the outcome would have been different. Strickland, 466 U.S. at 694.

Here, defense counsel’s representation was deficient because counsel proposed an instruction that effectively deprived Ly from advancing his claim of self-defense. The court issued the aggressor instruction at defense counsel’s request. CP 54. The State did not propose an aggressor instruction. Supp. CP __ (Sub. No. 49, State’s Instructions to the Jury). The instruction reads:

No person may, by any 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.

CP 26.

Proposing an aggressor instruction is inconsistent with a theory of self-defense because the instruction removes the State's burden of disproving a defendant's claim. "While an aggressor instruction should be given where called for by the evidence, an aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction." State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999).

"Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction." Riley, 137 Wn.2d at 910 n.2 (quoting State v. Arthur, 42 Wn. App. 129, 125 n.1, 708, P.2d 1230 (1985)).

Here, the aggressor instruction was not a necessary component to the defense case, but instead advanced the *State's* case. During closing arguments, the prosecutor focused on the aggressor instruction and argued that the instruction barred Ly from claiming self-defense because he started the fight. 4RP 11-12.

Absent defense counsel's request for an instruction, there is no indication in the record that the State would have requested an

aggressor instruction. But even if the State had proposed an aggressor instruction, the trial court would have denied the request because the evidence did not support giving the instruction.

To support an aggressor instruction, there must be evidence that the defendant engaged in an intentional act reasonably likely to provoke a belligerent response, which precipitated the incident. And, notably, this act must be an act separate from the assaultive conduct. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

Several decisions from this Court demonstrate circumstances where an aggressor instruction is inappropriate. In State v. Brower, the defendant's companion argued with the victim over a drug deal. The defendant, who testified that the victim was acting aggressively toward him, drew a gun and pointed it at the victim, for which he was charged with assault. Brower, 43 Wn. App. 896-97. The trial court gave the jury an aggressor instruction. The jury rejected Brower's self-defense claim and convicted him. Brower, 43 Wn. App. at 897, 901.

This Court reversed, stating:

Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident with [the victim]. . . . If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. The inclusion of the instruction effectively deprived him of his theory of self-defense

Brower, 43 Wn. App. at 902 (citation omitted).

Similarly, in State v. Wasson, there was an absence of any intentional, provoking act that precipitated the assaultive conduct. Wasson had been fighting with his cousin when a man named Reed approached and told them to quiet down. Wasson, 54 Wn. App. at 157. A fight then broke out between Wasson's cousin and Reed; the fight ended with Reed knocking Wasson's cousin to the ground. Wasson, 54 Wn. App. at 157. Reed then took several rapid steps toward Wasson, whereupon Wasson shot him in the chest. Wasson, 54 Wn. App. at 157. Wasson was convicted of second degree assault. Wasson, 54 Wn. App. at 157.

On appeal, Wasson claimed that there was insufficient evidence to support the aggressor instruction because there was no showing that he was an aggressor toward Reed. Wasson, 54 Wn. App. at 158. The Court of Appeals concluded that it was

reversible error for the trial court to issue an aggressor instruction where there was no provoking act prior to the assault: “there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault.” Wasson, 54 Wn. App. at 159. The court held that giving the aggressor instruction “effectively deprived Mr. Wasson of his ability to claim self-defense.” Wasson, 54 Wn. App. at 160; see also State v. Birnel, 89 Wn. App. 459, 473-74, 949 P.2d 433 (1998) (reversing where instruction not supported by evidence and “effectively deprived [defendant] of his ability to claim self-defense.”).

Similarly, in State v. Kidd, this court concluded it was error for a trial court to issue an aggressor instruction where the defendant shot two passengers on a bus. State v. Kidd, 57 Wn. App. 95, 101, 786 P.2d 847 (1990). The defendant believed that the two victims were drug dealers and became suspicious when they changed seats in a manner that corresponded to his own seat changes. Kidd, 57 Wn. App. at 98. When one of the men put a hand in his coat, Kidd shot him. Kidd, 57 Wn. App. at 98. Kidd shot the other man when he jumped after the first victim was shot. Kidd, 57 Wn. App. at 98. The evidence did not support giving the

aggressor instruction because the “provoking act” referred to in the instruction cannot be the actual assault. Kidd, 57 Wn. App. at 100 (citing Wasson, 54 Wn. App. at 159, 772 P.2d 1039).

Here, Fortun-Cebada testified that Ly approached him and made a comment about the soda he was holding, then pulled a knife, and assaulted him.

Q. So after he accused you of having his soda, what did you do?

A. (Inaudible.) soda and walking.

.....

Q. So he is holding in his right arm a knife; is that correct?

A. Uh-huh. And I fell down, and that’s when he stick me (Inaudible.) my neck, my (Inaudible.)

Q. Just to be clear you saw the knife coming towards your neck and you raised your arm; is that correct?

A. Yeah. Right. Yeah.

Q. When you raised your arm, did he cut your arm?

A. Right.

2RP 90.

Ly’s comments to Fortun-Cebada about the soda do not rise to the level of a “provoking act” for purposes of the aggressor instruction because “words alone do not constitute sufficient

provocation.” Riley, 137 Wn.2d at 911. And similar to the facts of Brower, Wasson, and Kidd, the provoking act and the assault encompass the same conduct. Therefore, the trial court would have been required to deny any request from the State for an aggressor instruction.

Further, the trial court would have likely denied a request from the State for an aggressor instruction for lack of evidence regarding who started the fight. See Birnel, 89 Wn. App. at 473 (instruction must be supported by credible evidence from which jurors could determine that defendant provoked need for self-defense). At sentencing, Judge Mertel handed down a sentence at the low end of the standard range because it was not clear who had actually instigated the conflict: “I’m going to sentence you to the bottom of the standard range, because I too in listening to this testimony was not convinced exactly what started this assault but I – it was clear that you did assault this man at some point in time.” 5RP 7-8.

In the absence of the aggressor instruction, there is a reasonable probability the State would not have disproved Ly’s self-defense claim. There was a considerable amount of trial testimony discussing the fact that Ly, a small man with one arm in a cast, was

not a physical match to Fortun-Cebada. 3RP 34; 4RP 33. Also, a witness testified there was another man present with Fortun-Cebada at the fight. 3RP 10. Absent an aggressor instruction, jurors may have concluded that it was unlikely Ly would have instigated a fight given the odds. But with the instruction, and the prosecutor's closing argument, jurors were misled into believing that because Ly used force against Fortun-Cebada, he could not claim self-defense.

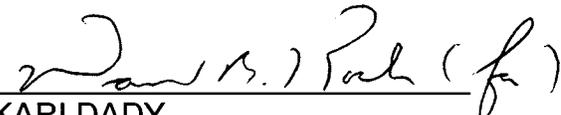
D. CONCLUSION

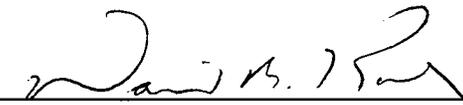
Defense counsel rendered ineffective assistance of counsel in a manner that deprived Ly of his constitutional right to present a defense. This court should remand Ly's case for a new trial.

DATED this 26th day of August 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH


KARI DADY
WSBA No. 38449


DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

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Respondent,)	
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v.)	COA NO. 62992-1-1
)	
THANH NGOC LY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 26TH DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THANH NGOC LY
 DOC NO. 862389
 AIRWAY HEIGHTS CORRECTIONS CENTER
 P.O. BOX 1899
 AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF AUGUST, 2009.

x *Patrick Mayovsky*

[COPY]

NO. 62992-1-I

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Angry about the situation, Ly left his soda near the clerk's window at the gas station and walked around the corner of the building. 3RP 35-36. Ly returned to pick up his soda a few

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Ly testified that he gestured for Fortun-Cebada to give the soda to him, and Fortun-Cebada responded by hitting him in the face. 3RP 37. Fortun-Cebada lunged at him and Ly believed that he was trying to steal his money. 3RP 38. Ly said that he tried to get away from the fight, but Fortun-Cebada followed him. 3RP 39-40. Ly pulled out a knife in order to scare Fortun-Cebada away. 3RP 40. Fortun-Cebada then took off the backpack that he had been wearing and used it to strike Ly. 3RP 40.

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Here, defense counsel’s representation was deficient because counsel proposed an instruction that effectively deprived Ly from advancing his claim of self-defense. The court issued the aggressor instruction at defense counsel’s request. CP 54. The State did not propose an aggressor instruction. Supp. CP __ (Sub. No. 49, State’s Instructions to the Jury). The instruction reads:

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Absent defense counsel's request for an instruction, there is no indication in the record that the State would have requested an

aggressor instruction. But even if the State had proposed an aggressor instruction, the trial court would have denied the request because the evidence did not support giving the instruction.

To support an aggressor instruction, there must be evidence that the defendant engaged in an intentional act reasonably likely to provoke a belligerent response, which precipitated the incident. And, notably, this act must be an act separate from the assaultive conduct. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

Several decisions from this Court demonstrate circumstances where an aggressor instruction is inappropriate. In State v. Brower, the defendant's companion argued with the victim over a drug deal. The defendant, who testified that the victim was acting aggressively toward him, drew a gun and pointed it at the victim, for which he was charged with assault. Brower, 43 Wn. App. 896-97. The trial court gave the jury an aggressor instruction. The jury rejected Brower's self-defense claim and convicted him. Brower, 43 Wn. App. at 897, 901.

This Court reversed, stating:

Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident with [the victim]. . . . If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper. The inclusion of the instruction effectively deprived him of his theory of self-defense

Brower, 43 Wn. App. at 902 (citation omitted).

Similarly, in State v. Wasson, there was an absence of any intentional, provoking act that precipitated the assaultive conduct. Wasson had been fighting with his cousin when a man named Reed approached and told them to quiet down. Wasson, 54 Wn. App. at 157. A fight then broke out between Wasson's cousin and Reed; the fight ended with Reed knocking Wasson's cousin to the ground. Wasson, 54 Wn. App. at 157. Reed then took several rapid steps toward Wasson, whereupon Wasson shot him in the chest. Wasson, 54 Wn. App. at 157. Wasson was convicted of second degree assault. Wasson, 54 Wn. App. at 157.

On appeal, Wasson claimed that there was insufficient evidence to support the aggressor instruction because there was no showing that he was an aggressor toward Reed. Wasson, 54 Wn. App. at 158. The Court of Appeals concluded that it was

reversible error for the trial court to issue an aggressor instruction where there was no provoking act prior to the assault: “there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault.” Wasson, 54 Wn. App. at 159. The court held that giving the aggressor instruction “effectively deprived Mr. Wasson of his ability to claim self-defense.” Wasson, 54 Wn. App. at 160; see also State v. Birnel, 89 Wn. App. 459, 473-74, 949 P.2d 433 (1998) (reversing where instruction not supported by evidence and “effectively deprived [defendant] of his ability to claim self-defense.”).

Similarly, in State v. Kidd, this court concluded it was error for a trial court to issue an aggressor instruction where the defendant shot two passengers on a bus. State v. Kidd, 57 Wn. App. 95, 101, 786 P.2d 847 (1990). The defendant believed that the two victims were drug dealers and became suspicious when they changed seats in a manner that corresponded to his own seat changes. Kidd, 57 Wn. App. at 98. When one of the men put a hand in his coat, Kidd shot him. Kidd, 57 Wn. App. at 98. Kidd shot the other man when he jumped after the first victim was shot. Kidd, 57 Wn. App. at 98. The evidence did not support giving the

aggressor instruction because the “provoking act” referred to in the instruction cannot be the actual assault. Kidd, 57 Wn. App. at 100 (citing Wasson, 54 Wn. App. at 159, 772 P.2d 1039).

Here, Fortun-Cebada testified that Ly approached him and made a comment about the soda he was holding, then pulled a knife, and assaulted him.

Q. So after he accused you of having his soda, what did you do?

A. (Inaudible.) soda and walking.

....

Q. So he is holding in his right arm a knife; is that correct?

A. Uh-huh. And I fell down, and that’s when he stick me (Inaudible.) my neck, my (Inaudible.)

Q. Just to be clear you saw the knife coming towards your neck and you raised your arm; is that correct?

A. Yeah. Right. Yeah.

Q. When you raised your arm, did he cut your arm?

A. Right.

2RP 90.

Ly’s comments to Fortun-Cebada about the soda do not rise to the level of a “provoking act” for purposes of the aggressor instruction because “words alone do not constitute sufficient

provocation.” Riley, 137 Wn.2d at 911. And similar to the facts of Brower, Wasson, and Kidd, the provoking act and the assault encompass the same conduct. Therefore, the trial court would have been required to deny any request from the State for an aggressor instruction.

Further, the trial court would have likely denied a request from the State for an aggressor instruction for lack of evidence regarding who started the fight. See Birnel, 89 Wn. App. at 473 (instruction must be supported by credible evidence from which jurors could determine that defendant provoked need for self-defense). At sentencing, Judge Mertel handed down a sentence at the low end of the standard range because it was not clear who had actually instigated the conflict: “I’m going to sentence you to the bottom of the standard range, because I too in listening to this testimony was not convinced exactly what started this assault but I – it was clear that you did assault this man at some point in time.” 5RP 7-8.

In the absence of the aggressor instruction, there is a reasonable probability the State would not have disproved Ly’s self-defense claim. There was a considerable amount of trial testimony discussing the fact that Ly, a small man with one arm in a cast, was

not a physical match to Fortun-Cebada. 3RP 34; 4RP 33. Also, a witness testified there was another man present with Fortun-Cebada at the fight. 3RP 10. Absent an aggressor instruction, jurors may have concluded that it was unlikely Ly would have instigated a fight given the odds. But with the instruction, and the prosecutor's closing argument, jurors were misled into believing that because Ly used force against Fortun-Cebada, he could not claim self-defense.

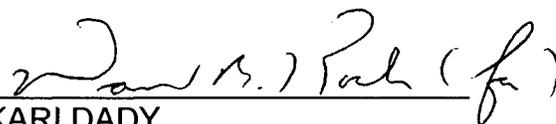
D. CONCLUSION

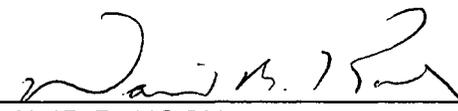
Defense counsel rendered ineffective assistance of counsel in a manner that deprived Ly of his constitutional right to present a defense. This court should remand Ly's case for a new trial.

DATED this 26th day of August 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH


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WSBA No. 23789
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62992-1-I
)	
THANH NGOC LY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 26TH DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THANH NGOC LY
 DOC NO. 862389
 AIRWAY HEIGHTS CORRECTIONS CENTER
 P.O. BOX 1899
 AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF AUGUST, 2009.

x *Patrick Mayovsky*