

64438-6

64438-6

NO. 64438-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY DELPRIORE,

Appellant.

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

BRIEF OF APPELLANT

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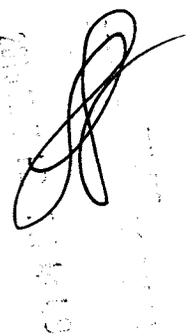


TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENT SOF ERROR..... 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

 1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DELPRIORE COMMITTED ROBBERY IN THE SECOND DEGREE..... 6

 a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. 6

 b. The State produced insufficient evidence to prove that Mr. Delpriore was an accomplice to the robbery committed by Joshua Mosley..... 7

 c. Reversal and dismissal is the appropriate remedy. 11

 2. BY DENYING HIS MOTIONS TO SUBSTITUTE COUNSEL, THE TRIAL COURT VIOLATED MR. DELPRIORE’S RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22..... 12

 a. A court violates a defendant’s constitutional right to counsel if it forces him to proceed with an attorney with whom he has an irreconcilable conflict. 12

 b. The trial court violated Mr. Delpriore’s constitutional right to counsel by denying his substitution motions. 14

 c. Reversal is required..... 17

E. CONCLUSION..... 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>City of Seattle v. Slack</u> , 113 Wn.2d 850, 784 P.2d 494 (1989).....	6
<u>In re Personal Restraint of Stenson</u> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	12, 13, 14
<u>In re Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979)	8, 9
<u>State v. Carothers</u> , 84 Wn.2d 256, 525 P.2d 731 (1974)	9
<u>State v. Cronin</u> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	10
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	7
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	11
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2001).....	8
<u>State v. Rotunno</u> , 95 Wn.2d 931, 631 P.2d 951 (1981).....	9

Washington Court of Appeals Decisions

<u>State v. Lozier</u> , 32 Wn. App. 376, 647 P.2d 535 (1982).....	9
<u>State v. Luna</u> , 71 Wn. App. 755, 862 P.2d 620 (1993).....	8
<u>State v. Spruell</u> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	11

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	6
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)6	
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970).....	7

<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	11
<u>Riggins v. Nevada</u> , 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1993)	13

Decisions of Other Jurisdictions

<u>Brown v. Craven</u> , 424 F.2d 1166 (9 th Cir. 1970)	12, 13
<u>Daniels v. Woodford</u> , 428 F.3d 1181 (9 th Cir. 2005)	15
<u>United States v. Adelzo-Gonzalez</u> , 268 F.3d 772 (9 th Cir. 2002) ...	15
<u>United States v. Moore</u> , 159 F.3d 1154 (9 th Cir. 1998)	passim
<u>United States v. Musa</u> , 220 F.3d 1096 (9 th Cir. 2000), <u>cert. denied</u> , 531 U.S. 999 (2000)	12
<u>United States v. Nguyen</u> , 262 F.3d 998 (9 th Cir. 2002)	passim

Constitutional Provisions

Const. art. I, § 22	1, 12
Const. art. I, § 3	6
U.S. Const. amend. VI	1, 12
U.S. Const. amend. XIV	6

Statutes

RCW 9A.08.020	8
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A. ASSIGNMENTS OF ERROR

1. The State failed to prove beyond a reasonable doubt that Mr. Delpriore committed second-degree robbery.

2. The trial court violated Mr. Delpriore's right to counsel under the Sixth Amendment and article I, section 22 by denying his motions for substitution of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant is liable as an accomplice to another's crime only if he knows that he is encouraging or aiding in the commission of the particular crime charged, not just any crime. In this case, appellant Anthony Delpriore punched Kyle Cummings. Kyle Cummings got up and ran away. A third person, Joshua Mosley, chased Mr. Cummings, knocked him down, threatened his life, and stole his cell phone and other possessions. Mr. Mosley testified that there was no plan to rob Mr. Cummings and that he acted alone in doing so. The prosecutor argued Mr. Delpriore was guilty as an accomplice because his punch "started the chain of events." Did the State fail to prove that Mr. Delpriore was guilty as an accomplice to the robbery committed by Mr. Mosley?

2. An accused's constitutional right to counsel is violated when he is forced to proceed with an attorney with whom he has an

irreconcilable conflict, i.e., where there is a serious breakdown in communication. Mr. Delpriore moved to substitute counsel multiple times, stating that his attorney lied to him, failed to interview him, and did not visit him, and further explaining: "I do not trust him. There is no communication between us." Did the trial court violate Mr. Delpriore's constitutional right to counsel by denying his motions for substitution?

C. STATEMENT OF THE CASE

On March 25, 2009, appellant Anthony Delpriore and his friend Joshua Mosley were walking through their Fremont neighborhood when they encountered another man, Kyle Cummings, walking the opposite direction. 9/23/09 RP 12-17. Mr. Delpriore was agitated because his girlfriend had recently been assaulted at knifepoint. 9/24/09 RP 63. He took out his anger by punching Mr. Cummings, an act he admitted was "stupid." 9/24/09 RP 63. Mr. Delpriore did not say anything during the encounter. 9/23/09 RP 36.

After Mr. Delpriore assaulted Mr. Cummings, Mr. Cummings ran away. 9/23/09 RP 21; 9/24/09 RP 52. Mr. Delpriore went home, but Mr. Mosley chased Mr. Cummings. 9/23/09 RP 23, 36; 9/24/09 RP 52, 66. Mr. Mosley tackled Mr. Cummings and told him

to give him everything he had or he would kill him. 9/23/09 RP 24. Mr. Cummings gave Mr. Mosley his cell phone, lighter, and wallet, which contained \$100. 9/23/09 RP 24-25.

Mr. Cummings went home and called 911, describing the person who punched him and the person who robbed him. 9/23/09 RP 70. Police officers arrested Mr. Delpriore and Mr. Mosley, and searched both. They did not find anything when searching Mr. Delpriore. 9/24/09 RP 28. They found Mr. Cummings's cell phone when searching Mr. Mosley. 9/24/09 RP 24.

The State charged both Mr. Mosley and Mr. Delpriore with second-degree robbery. CP 1. Mr. Mosley pled guilty, but Mr. Delpriore proceeded to trial. 9/24/09 RP 50.

On May 20, 2009, Mr. Delpriore moved to substitute counsel. He explained:

Yeah, I feel there's a conflict of interest going on between me and my attorney. He seems adequate (sic) on me taking continuances and taking plea bargains, when that is not what I want to do. And I feel that my case is being neglected. ... I've called multiple times, asking him to come visit me, and he's come once; that's it.

I've been asking, you know, to go over charges. I left messages, you know, containing (sic) to a videotape that could prove my innocence. And now that tape has probably been destroyed by the store that I was at, so therefore, there goes any evidence that can,

you know, help me in my case. I feel that he's not the right attorney for me.

5/20/09 RP 3-4. The court responded, "Well, that's not really the basis for discharging counsel, so your motion is denied." 5/20/09 RP 4.

On July 15, Mr. Delpriore again moved to substitute counsel, because he was upset about the number of continuances that had been granted and by the fact that his attorney did not move to dismiss. 7/15/09 RP 4-5. The trial court noted that there was no basis for dismissing the case and therefore denied the motion to substitute counsel. 7/15/09 RP 6.

On August 27, Mr. Delpriore again moved to substitute counsel in a letter to the court. CP 15-16. Mr. Delpriore wrote that he did not trust his attorney and that there was "no communication" between him and his lawyer. CP 15. He said, "[My attorney] lies to me, avoids me, and hangs up on me." CP 16. Mr. Delpriore further noted that his lawyer had never interviewed him and "does not work with me in my defense." CP 15. The court did not hold a hearing on this motion.

At trial, Mr. Cummings, Mr. Delpriore, and Mr. Mosley testified about the events of March 25 as described above. Both

Mr. Delpriore and Mr. Mosley testified that they never discussed committing a robbery and that Mr. Mosley acted alone “on impulse” in chasing Mr. Cummings down and robbing him. 9/24/09 RP 52-58, 64, 69. Mr. Delpriore again admitted to punching Mr. Cummings, but insisted he had nothing to do with the subsequent robbery. 9/24/09 RP 64, 69. Mr. Cummings confirmed that only Mr. Mosley chased him, threatened him, and took his belongings. 9/23/09 RP 23-25, 36-40.

During closing argument, the prosecutor stated:

The State is certainly not alleging that Mr. Delpriore is the person who chased down Kyle Cummings, threw him on the ground, threatened his life, took his cell phone, his lighter, and his wallet. What the State is saying is that this robbery would not have succeeded but for Mr. Delpriore’s participation in it; that it was Mr. Delpriore who started this robbery, who started this chain of events that began on Fremont and 44th and ended with Kyle Cummings on the ground in a chokehold by Mr. Mosley.

9/24/09 RP 110-11.

During deliberations, the jury posed the following question to the court: “If an action starts a chain of events that leads to a crime, is the person who started the action considered an accomplice?” CP 59; 9/24/09 RP 139. The court responded, “Please re-read Jury Instruction 9” (the accomplice liability instruction). CP 60.

Although the jury was instructed it could find Mr. Delpriore guilty of fourth-degree assault instead of second-degree robbery, it convicted Mr. Delpriore of robbery in the second degree as charged. CP 58. He timely appeals. CP 73-82.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. DELPRIORE COMMITTED ROBBERY IN THE SECOND DEGREE.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State produced insufficient evidence to prove that Mr. Delpriore was an accomplice to the robbery committed by Joshua Mosley. The State charged Mr. Delpriore and Joshua Mosley with one count of second-degree robbery, alleging that they “did unlawfully and with intent to commit theft, take personal property of another, to-wit: money and cell phone, from the person and in the presence of Kyle Cummings, against his will, by the use or threatened use of immediate force, violence and fear of injury to such person or his property.” CP 1. But the State did not contend that Mr. Delpriore himself robbed Mr. Cummings. Rather, the prosecution’s theory was that Mr. Mosley ran after Mr. Cummings, threatened his life, and took his wallet and cell phone, while Mr. Delpriore served as Mr. Mosley’s accomplice. CP 2; 9/24/09 RP 110 (“The State is certainly not alleging that Mr. Delpriore is the person who chased down Kyle Cummings, threw him on the ground, threatened his life, took his cell phone, his lighter, and his wallet”).

The State presented insufficient evidence to prove that Mr. Delpriore was an accomplice to Mr. Mosley's robbery of Mr. Cummings. A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he
 - (i) solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) aids or agrees to aid such other person in planning or committing it

RCW 9A.08.020(3). To prove a defendant is liable as an accomplice, the State must show he had knowledge that he was promoting or encouraging the commission of the particular crime charged, not just any crime. State v. Roberts, 142 Wn.2d 471, 510, 14 P.3d 713 (2001).

Presence, knowledge of the crime, and personal acquaintance with active participants is not sufficient to support a finding of accomplice liability. In re Wilson, 91 Wn.2d 487, 490, 588 P.2d 1161 (1979). Even physical presence combined with assent is not enough. Id. at 491; State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). “[O]ne’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in

the commission of the crime, will not subject an accused to accomplice liability.” State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). “Even though a bystander’s presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt.” Wilson, 91 Wn.2d at 492.

Here, the State did not prove that Mr. Delpriore was an accomplice to Mr. Mosley’s robbery of Mr. Cummings. The State presented evidence that Mr. Delpriore punched Mr. Cummings, but Mr. Mosley alone ran after Mr. Cummings, Mr. Mosley threatened Mr. Cummings and demanded his valuables, and Mr. Cummings’s possessions were recovered from Mr. Mosley, not Mr. Delpriore. Mr. Delpriore did not even follow Mr. Mosley when Mr. Mosley chased Mr. Cummings, let alone assist him. Contrast State v. Lozier, 32 Wn. App. 376, 378, 647 P.2d 535 (1982) (accomplice liability supported by evidence that defendant kept moving to position himself to shut off the victim’s avenue of escape); State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974) (accomplice liability supported by evidence that defendant served as lookout).

The jury convicted Mr. Delpriore based on a misunderstanding of accomplice liability. During closing argument,

the prosecutor stated, "What the State is saying is that this robbery would not have succeeded but for Mr. Delpriore's participation in it; that it was Mr. Delpriore who started this robbery, who started this chain of events that began on Fremont and 44th and ended with Kyle Cummings on the ground in a chokehold by Mr. Mosley." 9/24/09 RP 110-11. Cf. State v. Cronin, 142 Wn.2d 568, 577, 14 P.3d 752 (2000) (prosecutor improperly argued that in order for defendant to be guilty of first-degree murder as an accomplice, he merely needed to aid "in the commission of the assaultive behavior that unravels into that fatal stabbing"). Taking its cue from the prosecutor, the jury asked, "If an action starts a chain of events that leads to a crime, is the person who started the action considered an accomplice?" CP 59; 9/24/09 RP 139. The court did not say "no," instead referring the jury to the instruction. CP 60.

As the jury recognized and the prosecutor argued, the State proved that Mr. Delpriore's punch started a chain of events that ended with Mr. Mosley robbing Mr. Cummings. However, that is insufficient to prove Mr. Delpriore was an accomplice to the robbery. Mr. Delpriore was guilty of assault and he acknowledged as much. But the fact that he assaulted Mr. Cummings is

insufficient as a matter of law to convict him of robbery. The conviction should be reversed.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Delpriore committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the second-degree robbery conviction with prejudice. A conviction may be entered for fourth-degree assault, but Mr. Delpriore may not be re-tried for robbery.

2. BY DENYING HIS MOTIONS TO SUBSTITUTE COUNSEL, THE TRIAL COURT VIOLATED MR. DELPRIORE'S RIGHTS UNDER THE SIXTH AMENDMENT AND ARTICLE I, SECTION 22.

a. A court violates a defendant's constitutional right to counsel if it forces him to proceed with an attorney with whom he has an irreconcilable conflict. A trial court has the discretion to grant or deny a motion for substitution of counsel. In re Personal Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001). However, this discretion is constrained by the accused's constitutional rights. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002).

Both the federal and state constitutions guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22. The right to counsel is violated where a defendant is forced to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); Nguyen, 262 F.3d at 1003-04. An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003 (citing United States v. Musa, 220 F.3d 1096, 1102 (9th Cir. 2000), cert. denied, 531 U.S. 999 (2000)).

“A defendant’s right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1993).

A defendant is denied his Sixth Amendment right to counsel when he is “forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.”

Nguyen, 262 F.3d at 1003 (citing Craven, 424 F.2d at 1169).

Where “the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant’s] Sixth Amendment right to effective assistance of counsel.” United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998).

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court’s inquiry into the conflict, and (3) the timeliness of the motion. Stenson, 142 Wn.2d at 724 (citing Moore, 159 F.3d at 1158-59).

b. The trial court violated Mr. Delpriore's constitutional right to counsel by denying his substitution motions . An evaluation of the three factors in this case shows that the denial of the motion to substitute counsel was improper. First, the extent of the conflict between Mr. Delpriore and his attorney was substantial and irreconcilable. On May 20, Mr. Delpriore told the trial court, "I feel there's a conflict of interest going on between me and my attorney. He seems adequate (sic) on me taking continuances and taking plea bargains, when that is not what I want to do. And I feel that my case is being neglected." 5/20/09 RP 3. Cf. Moore, 159 F.3d at 1159 (defendant and attorney "disagree[d] about what to do in the case").

In his August letter to the court, Mr. Delpriore told the court that his attorney did not visit him, did not share evidence with him, and lied to him. CP 15. Cf. Nguyen, 262 F.3d at 1000 (irreconcilable conflict found even though attorney visited client 6-7 times); Stenson, 142 Wn.2d at 728, 730 (no irreconcilable conflict where attorney visited client twice a week for 8 months – approximately 34 times total). Mr. Delpriore said, "I do not trust him. There is no communication between us." CP 15. The breakdown in the attorney-client relationship between Mr. Delpriore

and his lawyer constituted an irreconcilable conflict that should have been addressed by granting the motion for substitution of counsel. See Moore, 159 F.3d at 1160.

Second, the inquiry into the conflict was inadequate. “For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant ‘privately and in depth.’” Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). “[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2002). An inquiry is adequate if it “ease[s] the defendant’s dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision.” Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing Adelzo-Gonzalez, 268 F.3d at 777).

Here, the court did not question the parties at all, let alone privately or in depth. Cf. Nguyen, 262 F.3d at 1005 (reversing where trial court “asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses”); Moore, 159 F.3d at 1160 (reversing because while “[t]he court did give both parties a chance to speak

and made limited inquiries to clarify what was said, ... the court made no inquiries to help it understand the extent of the breakdown"). On May 20, when Mr. Delpriore stated he felt there was a conflict of interest, that his attorney was continuing the case and pushing him to plead guilty against his wishes, and that his attorney was not sharing evidence with him, the trial court stated only, "Well, that's not really the basis for discharging counsel, so your motion is denied." 5/20/09 RP 4. The court did not ask any questions, let alone inquire privately or in depth. When Mr. Delpriore wrote the court a letter requesting substitution of counsel in August, there was not even a hearing on the motion. There was no inquiry despite the fact that Mr. Delpriore stated "there is no communication between us," and that his attorney "does not work with me in my defense, ...doesn't visit me" and "still has not interviewed me." CP 15. The total absence of inquiry in this case cuts in favor of reversal.

Third, Mr. Delpriore's motions were clearly timely. He made at least three motions to substitute counsel, on May 20, 2009, July 15, 2009, and August 27, 2009. Trial did not start until September 22, 2009. The motions were timely, and this factor, too, cuts in Mr. Delpriore's favor. Cf. Moore, 159 F.3d at 1159, 1161 (motions held

timely when made one month before trial and again two weeks before trial); Nguyen, 262 F.3d at 1003 (motion timely when made the day trial set to begin).

In sum, the trial court violated Mr. Delpriore's constitutional right to counsel by denying his motions to substitute counsel and forcing him to work with an attorney with whom he had a serious breakdown in communication.

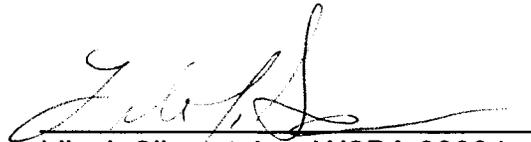
c. Reversal is required. The erroneous denial of a motion to substitute counsel is presumptively prejudicial and requires reversal. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. Because the trial court erroneously denied Mr. Delpriore's motions to substitute counsel, his conviction should be reversed and his case remanded for a new trial. Nguyen, 262 F.3d at 1005.

E. CONCLUSION

For the reasons set forth above, Mr. Delpriore respectfully requests that this Court reverse his conviction and dismiss the charge. In the alternative, the conviction should be reversed and the case remanded for a new trial.

DATED this 11th day of May, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

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

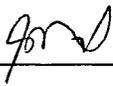
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64438-6-I
)	
ANTHONY DELPRIORE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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