

NO. 64877-2-I

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

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STATE OF WASHINGTON.

Respondent,

v.

OTIS PATRICK

Appellant.

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

The Honorable Larry McKeeman, Judge

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BRIEF OF APPELLANT

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ERIC NIELSEN  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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ERIC NIELSEN  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

Appellant was denied effective assistance of counsel because of counsel's failure to request a limiting instruction.

Issue Pertaining to Assignment of Error

The court admitted a number of emails appellant sent to the complaining witness over appellant's objection the emails were irrelevant and prejudicial because they allowed the jury to infer appellant committed multiple acts of violation of a no-contact order, for which appellant had previously pled guilty. The court admitted the emails, however, for the sole purpose of impeaching appellant's testimony. Counsel inexplicably failed to request an instruction limiting the jury's consideration of the emails for impeachment only. Was appellant denied ineffective assistance of counsel by counsel's failure to request a limiting instruction that the emails were to be considered for impeachment purposes only thereby prejudicing appellant and denying him the right to a fair trial?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

Otis Patrick was charged by amended information with two counts of second degree assault (Counts I & II), one count of tampering with witness (Count III) and four counts of misdemeanor violation of a no-contact order

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<sup>1</sup> RP refers to the verbatim report of proceedings for January 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and February 3, 2010, which are sequentially numbered.

(Counts IV through VII). CP 61-63. Anne Ross was named victim in all the charges. Id.

Patrick pled guilty to the four misdemeanor no-contact order violations. RP 1-7. A jury found Patrick guilty of one of the assault charges (Count I) not guilty on the other assault charge (Count II) and guilty of the tampering with a witness charge (Count III). CP 52, 53, and 54. Patrick was sentenced to 10 months on the assault conviction, 8 months on the tampering with a witness conviction and 365 days for the misdemeanor no-contact order convictions, with 60 days of that sentence deferred. CP 72, 73. All the sentences were ordered to run concurrent with each other. Id.

## 2. Substantive Facts

Otis Patrick and Ann Ross met in 2004 while working for the same company. RP 27,126. Although Patrick was married he and Ross began a relationship. RP 127. Ross said she wanted a permanent relationship but Patrick would not leave his wife. RP 55, 56.

Ross testified that on Monday, November 10, 2008, she asked Patrick if he would help fix the water heater in her apartment. RP 29, 138. According to Ross, Patrick worked on the water heater but was unable to fix it so he told Ross he would find a service company for her. RP 31. Patrick went to Ross's computer to search for a company while Ross made breakfast. Id.

Ross opined Patrick must have looked in her email account while he was on the computer and saw an email from a male friend because he came into the kitchen and started yelling at her. RP 32. He told Ross, "I knew you were hanging out with him" referring to her friend Cedric Padilla. Id. Ross told Patrick she was not comfortable talking to him about her friends. Id.

Ross said Patrick then picked her up, walked her down the hall into the bedroom, threw her on the bed, held her down and punched her in the face and ribs. RP 33-34. Ross and Patrick struggled for 15-20 minutes when Ross told Patrick she needed to go to the hospital. RP 35.

Patrick told Ross he would take her to the hospital. He had Ross's cell phone. RP 35. Ross, however, started walking. Patrick got into his car and followed her and asked her not to go to police. RP 36-37. Patrick then used Ross's phone and called Padilla. After the phone call he set the phone and Ross's key on the side of the road and drove off. RP 37.

Ross returned to her car and drove to the police station. RP 37. Ross told police Patrick came over to her home to fix the heater, found an email on her computer then he grabbed her around the waist and took her into the bedroom and punched, slapped and choked her. RP 84-86. The officer noticed Ross's lip was swollen and she told him her side hurt. RP

83. 86. An aid car arrived but Ross drove to the hospital herself because she did not have the money to pay for an ambulance. RP 87.

Ross was treated at the hospital for bruises on her lip, face, neck, arm, thigh and back. RP 113. She had a one confirmed rib fracture and three other possible rib fractures. RP 113.

When Ross was released from the hospital she went home and later Patrick arrived. RP 42-43. Patrick begged Ross not to go to police. Ross did not call police because she was embarrassed and did not want to get Patrick in trouble. RP 43.

A few days later, on November 17<sup>th</sup>, Ross received an email from Patrick. RP 44, 163. The email read:

Ann, I got a call from Snohomish county deputy, will not contact you. Please understand how this will affect my life. We can go on and live our lives, Ann, but please think about it. I'm trying to live a good life Ann. I am so sorry for everything. Will you please think about it. I will not contact you any more. Please give me a chance to go on without this hanging over me. Please, I am begging you. I will not be in contact with you for any reason. I promise.

RP 44; Ex 23.

On November 29<sup>th</sup> Ross received another email from Patrick. It read:

Annie, my friend's brother was involved in a motorcycle accident this morning so she is flying back to Michigan. Her flight leaves at 2:45 on Monday, and I'm driving her to the airport. I will not be

attending court and have advised Kelly not to attend either. He's informed me that either neither he or I attend, is a 50/50 chance that they will impose a year-long no-contact order based upon the statement you wrote. If that is what you want I will not appeal it. If they impose a year-long order, I will just mail the payment to Capital One for \$201, which includes the Yahoo web site billing. The only other thing to des with is the suitcase, and I can just make sure you get that before you go on your trip. My friend sent me this quote. "Love is many things, but on thing love is not is unsure." I think that quite provides both of us with perspective of the past four years, and it answers the most important question I had. She has helped me understand that asking you to relive the truth is selfish and unfair to you , and you deserve to move on without meeting my needs. Women are infinitely wiser than men. She's a black woman as dark as my daughter Kendra, but she lives in Kirkland and her name is Denise. So I guess that makes her somewhat white. Black women from Michigan are much different than the sisters in Washington. I know I am walking a thin line by emailing you, but don't mean any harm. This while thing is winding down. I am not optimistic about the no-contract order being lifted. but I also know that it is the best thing for me. I gives me the boundaries I need to exhale. I am pleading with you not to call the police. I just wanted to let you know bout Monday. I'm sure the courts will contact you first to let you know what happened. I know your life will be filled with great people ad great love. You have a unique spirit, which will always lead to goodness. Please don't call the police.

RP 45-46, Ex. 21.

Ross said she did not appear at the court hearing on the requested no-contact order against Patrick referenced in the November 29<sup>th</sup> email because she could not afford to take more time off from work. RP 67-68. Patrick explained in his November 29<sup>th</sup> email he asked Ross not to contact

police because he was sending the email and there was a no contact order prohibiting him from contacting Ross. RP 173.

Over Patrick's relevancy objection, the court admitted a November 10<sup>th</sup> email Patrick sent to Padilla. Ex. 22: RP 73-74. In the email Patrick apologizes for calling Padilla on the phone and explained he did so in the heat of an argument. RP 78-79.

Patrick, who at one time played professional baseball, owns a baseball company and is a writer. RP 125. Patrick testified that during the course of their relationship he borrowed money from Ross so he could do a tour to promote his book, pay for his last quarter in college and to get an apartment after he and his wife split up in November 2008. RP 131-133. Patrick made monthly payments on the debt but the debt was always a source of contention between them. RP 133. Ross admitted she wanted Patrick to pay off the loan but he did not. RP 56-57.

On Sunday, November 9, 2008, Patrick received a call from Ross asking him to come over to her home. When he arrived at about 6:00 p.m., Patrick found Ross on the floor crying over bills. She was also upset because she had to buy a new water heater. RP 134-136.

Patrick left Ross's home at about 1:00 a.m. the following morning but returned at 7:30 a.m. at Ross's request. RP 138-139. When he arrived

Ross was asleep on the couch. Patrick attempted to repair the water heater but was unsuccessful. RP 139. He left to pick up some baseball uniforms and when he returned Ross was in the bedroom getting ready for work. RP 141.

Patrick again tried to fix the water heater. He noticed the pilot light was out and when he tried to ignite it he singed his hair and eyebrows. RP 143. Patrick told Ross he could not fix the water heater and she asked if he would buy her a new one deducting the cost from the money he owned her. RP 143. When he told her he did not have the money to buy a new water heater Ross became upset and started yelling at him. RP 144-145.

Patrick went to Ross's computer to find a company that could fix the water heater. RP 144, 146. While he was doing so, Ross received an email indicating Ross had been at a casino the previous Friday night. Patrick asked Ross if she had been at a casino a few nights earlier and she said she had not so Patrick asked her why she was lying to him. RP 147.

Ross responded by calling Patrick a "jerk" for not stepping up when she was pregnant. RP 148. Ross opened her robe, jumped on Patrick's lap, put her hands in her vagina and then rubbed her hands on Patrick's face. RP 149. She screamed at Patrick and told him "this is where our baby was." Id. Patrick pushed Ross to the floor but she got up

and tried to slap him. Id. Ross then went into the kitchen, retrieved a knife, and for about 3 minutes the two of them moved around the dining room table as Patrick tried to avoid her. RP 151-155. Ross eventually ran at Patrick. RP 156. Patrick tackled her and the knife fell out of Ross's hand. They both fell to the floor and wrestled. RP 157.

At some point Ross asked Patrick to take her to the hospital and he agreed. RP 158. Ross, who was on the floor on her stomach, pulled her butt cheeks apart and told Patrick "I'm going to shit." RP 158-159. Patrick told Ross he was going to call police and then left. RP 159.

Ross denied she ever had a knife during the altercation. RP 47. She denied putting her hands in her vagina and then on Patrick's face. RP 47.

Following Patrick's testimony, the State moved to admit four other emails Patrick sent to Ross after the November 10<sup>th</sup> incident. RP 175-178 (Ex. 26, 27, 28 and 29). The State argued the emails were admissible to impeach Patrick's testimony that he told Ross he never intended to leave his wife and that the November 10<sup>th</sup> argument was over Ross cheating on him and not over money or other issues. Id. Patrick argued the emails were irrelevant and prejudicial because Patrick admitted there was a no-contact order prohibiting him from contacting Ross and the emails would show Patrick repeatedly violated that order. RP 175-178.

The court admitted Exhibits 26, 27, and 28, but excluded Exhibit 29. RP 180.<sup>2</sup> Although the court found the emails were potential prejudicial because they showed Patrick contacted Ross in violation of the no-contact order, the court found the prejudice was mitigated by the State's promise not argue the emails showed violations or the order. Id.

In a November 28<sup>th</sup> email (Ex. 26) Patrick addresses repayment of the money he owed Ross and he apologizes for how he has treated her. In the December 2<sup>nd</sup> email (Ex. 27) Patrick admitted he lied to Ross keep her in the relationship. In the December 13<sup>th</sup> email (Ex. 28) Patrick again addresses money and he explains why he could not ask Ross share his life with him.

### C. ARGUMENT

#### TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO REQUEST A LIMITING INSTRUCTION DIRECTING JURORS TO USE THE EMAILS SOLELY FOR IMPEACHMENT AND NOT FOR ANY OTHER PURPOSES.

Washington Const. art. I, § 22 and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant

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<sup>2</sup> The emails (Ex. 's 26, 27 and 28) are attached hereto as an appendix.

must meet a two-pronged test: he must show (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced him. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In evaluating whether the deficient performance prong is met, the quality of counsel's representation is determined by reference to an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A defendant must show the absence of legitimate strategic or tactical reasons supporting defense counsel's challenged conduct. In re Pers. Restraint of Hutchinson, 147 Wash.2d 197, 206, 53 P.3d 17 (2002).

Counsel's errors result in prejudice when there is a reasonable probability the outcome of the trial would have differed absent the errors. Thomas, 109 Wash.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

A failure to request a limiting instruction can be a tactical decision not to emphasize damaging evidence. See State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wash.2d 1024, 854 P.2d 1084 (1993); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Here, counsel's performance was objectively unreasonable because there

was no legitimate trial tactic or strategy for failing to purpose an instruction limiting the jury's consideration of the emails solely for impeachment.

The emails were admitted for the sole purpose of impeaching Patrick's testimony. An instruction limiting the emails for impeachment purposes only was legally warranted. "Where [impeachment] evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary." State v. Johnson, 40 Wn. App. at 377, citing State v. Pitts, 62 Wn.2d 294, 297, 382 P.2d 508 (1963) (emphasis added); State v. Flieman, 35 Wn.2d 243, 245, 212 P.2d 794 (1949) (absence of a limiting instruction may be prejudicial error). Had Patrick's counsel properly requested a cautionary instruction, ER 105 would have obligated the court to issue one.<sup>3</sup> State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002). review denied, 148 Wn. 2d 1023 (2003). Additionally, the court recognized the emails were prejudicial but found the prejudice mitigated by the State's promise not to use them to argue by sending the emails Patrick violated the no-contact order. Given the court's concern about the potential prejudice, it is likely

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<sup>3</sup> ER 105 provides "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

the court would have granted a request for a limiting instruction to further mitigate the prejudice.

Without a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. State v. Myers, 133 Wn. 2d 26, 36, 941 P.2d 1102 (1997). There was no legitimate tactic or strategic reason for counsel not to seek a limiting instruction. Counsel was concerned the jury would use evidence of the emails to logically conclude that each was sent in violation of the no-contact order and speculate that Patrick committed more crimes than he was charged with. A limiting instruction directing the jury to use the email evidence for impeachment and no other purpose would not have drawn any adverse attention to the emails. Counsel's failure to request a limiting instruction cannot be considered tactical and fell below an objective standard of reasonableness.

Counsel's deficient performance undermines confidence in the jury's guilty verdict. Patrick's defense to the assault charge was self-defense. His defense to the tampering charge was that he sent the November 29<sup>th</sup> email to let Ross know he would not fight a no-contact order if she wanted one. RP 164. Without a proper limiting instruction it is probable the jury used the email evidence for another purpose other than impeachment: to infer Patrick was a serial law breaker by repeatedly

contacting Ross in violation of the court's order. Thus, if any member of the jury had a reasonable doubt about the evidence against Patrick, that doubt was likely resolved in favor of the State because of that inference. Thus, defense counsel's failure to request a limiting instruction was prejudicial and this Court should reverse Patrick's conviction and remand for a new trial.

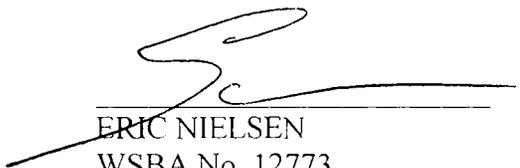
D. CONCLUSION

For the above reasons, Patrick's convictions should be reversed.

DATED this 23 day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC NIELSEN

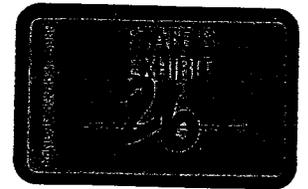
WSBA No. 12773

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

08-24605



**Bilyeu, David**

**From:** Dashawn Patrick [dashawnpatrick@hotmail.com]  
**Sent:** Friday, November 28, 2008 2:18 PM  
**To:** 'Ann Ross'  
**Subject:** Credit Card website charge and Capitol One

Ann,

I hope you had a nice Thanksgiving with your family.

- Your credit card may have been charged \$12.99 for my STING website. Why don't you check your statement for a \$12.99 charge to Yahoo Small Business. I hope it's not there, if so I will pay for it, as well as an additional \$12.99 in case it billed for December. I will call Yahoo to see what happened because I was certain this was handled.
- The Capitol One payment is \$175.00. I was going to mail it out Monday, but due to the holidays I think it may be late. Why don't I give you \$201.00, which includes \$26.00 for the website billing, and you make the Capitol One payment this month.

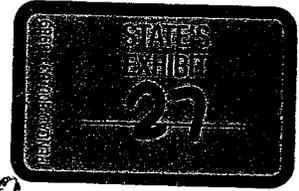
There are so many questions that only you can answer. After all we'd been through, the truth was the appropriate way to end our relationship. I know you did not feel safe enough to tell me, but you are safe now baby. No screaming, no shouting, just an open, honest conversation. I hope you give that to me, and whatever you have to say, no matter what it is, I can handle it. Nothing you tell me lessens what you have endured for four years. Regardless of how we ended, you never deserved to be treated that way. "I apologize" does not begin to capture how sorry I am. I appreciate that you have allowed me to talk to you over the past two weeks. Monday will remove the no contact order, but you will see you don't need it to move on, you have your life back. Yes, I think about who is parked in my spot, but I don't drive by. I think about who is at your house late at night, but I know we are over, so I don't call. I wonder who will be helping you put up your Christmas tree, who you will be baking sugar cookies for and who you will watch Christmas cartoons with, but those are moments I've accepted as reality. You are not responsible for my feelings, nor are you responsible for my healing, I will deal with them on my own. The only thing we are all responsible for when ending relationships is truth, because that allows us to close chapters in our lives and move on. After four years, it is the right thing to do. My heart will recover from whatever you tell me.

No police needed boo. Thank you so much for letting me get my feelings out, they are eating me up inside. Over the next few days, please think about what I've asked. I know it will be hard because you think I cannot handle it, but I can. It is not a want, it is a need, and my soul cannot heal without it. I'll contact you sometime after Monday to set up returning the carryon suitcase, the \$201.00 and I still have the Christmas stockings for Gracie and Meesha. If you don't want the stockings, I will take them back.

Have a nice weekend.

D

LAN



**Bilyeu, David**

**From:** dashawn patrick [odp@andsomeriseaboveit.com]  
**Sent:** Tuesday, December 02, 2008 7:28 PM  
**To:** 'Ann Ross'  
**Subject:** Celine Dion: Do you believe in Angels?

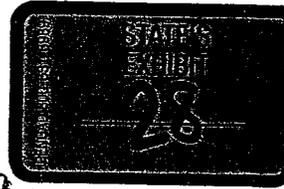
<http://www.youtube.com/watch?v=7Jr-2eyRtV4>

Ann,

The past few days I've been needing to hear the song "Oh Holy Night". I don't know why, I just needed to hear it. I was in my car all morning asking God to play it for me. I finally changed the station to kcms 105.3 and the first thing the DJ said was: "Here is OH HOLY NIGHT, BY CELINE DION!" I started crying, instantly, because God knew how much I needed that song. As soon as she began to sing, it was like God sent an Angel to sing that song just for me. That was no coincidence, and it was no coincidence that it was Celine Dion, one of the most beautiful voices on earth. I cried through the entire song because I know God loves me. After all the horrible things I've done in life, he cared enough to have Celine sing to me.

That song made me understand that it is Christmas. We all have so much to be thankful for. Ann, I love you and I will always, always, always and forever love you. You will probably be the greatest love of my lifetime, but I know it was not by accident that we were torn apart. God wants you to have an amazing life and he knew I was not the man to give you that. He needed to remove me so that he could bless you with the desires of your heart. He loves me, too, and he wanted me to understand the destruction caused by the lies and manipulation of how we began. I am/was an adulterer and God wants more for that for my life. It's not your fault, it's mine. You were not here for an affair, I was the one that lied and kept you here. He needed me to come face-to-face with the damage I have caused to His loved ones. God has such a HUGE life in store for you, I can see it, Ann. He has already blessed me with a huge life. I am the richest man on earth because of the five children he has given me. We will both move forward, but it's Christmas, Ann, and I just want you to know that I love you, maybe not in the way we once loved each other, but in a way that God wants me to love you. I know you cannot say the same about me right now, but I accept that. Please listen to this song. I don't know if anyone can listen to it without crying. Celine Dion has no idea how much she saved me today. I was falling and she lifted me. I was giving up and she told me I could endure.

Merry Christmas Ann.



Bilyeu, David

**From:** dashawn patrick [odp@andsomeriseaboveit.com]  
**Sent:** Saturday, December 13, 2008 11:33 AM  
**To:** 'Ann Ross'  
**Subject:** last email: deposit/Stupid Boy

Ann,

I have been sick for the past two days, so I haven't left the house, other than going to the play with Tyler's class. Do you need that money deposited today? I wasn't planning on getting off the couch today, but I will go to the bank if you need it.

I'm starting to realize the song Stupid Boy is true. The last two verses are haunting: **"God please let her know I'm sorry, I'm sorry, I'm sorry, I'm sorry baby. Yeah, it dawned on me, she's never coming back to me!"** I'm trying to let go but it's hard, be patient with me baby. I go to sleep thinking about how you always bought me Apple Cider during the holidays. I wake up with your voice telling Meesha and Gracie to **"Go see their daddy"**. What did you want from me boo, will you tell me? Did you want marriage? I truly didn't know. We never talked about sharing real life together. I know that sounds stupid, but I had no idea what you wanted from me. Here I was, a man with three kids living with me and two grown, and there you were a single, young lady with the world at her feet. Do you think it was easy for me to ask: **"Baby, give up all of that and come share your life with me?"** I couldn't do it, so I waited for you to tell me that was what you wanted. Can I ask you a question? Now that we are over, are you happy you did not take that plunge into my life? Are you glad you didn't become a step-mother and help me raise my kids? I always thought it was too much to ask of you. Will you please tell me now, if it was?

Can I see you, Ann? I won't ask you back! I won't ask about other men! I just want to see your face one last time, and say goodbye. I won't bother you anymore baby. If I am not able to see you, do you mind if I text you on Christmas day? Will you please text me back? It would mean so much if you wished me a Merry Christmas.

D

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64877-2-1
	)	
OTIS PATRICK,	)	
	)	
Appellant.	)	

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**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 23<sup>RD</sup> DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] OTIS PATRICK  
2611 1/2 OAKES AVENUE  
EVERETT, WA 98201

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 AUG 24 PM 4:20

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF AUGUST 2010.

x *Patrick Mayovsky*