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MAY 11 2011

King County Prosecutor  
Appellate Unit

NO. 65938-3-I

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

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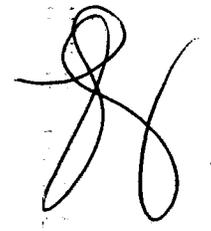
STATE OF WASHINGTON,

Respondent,

v.

NINA R. SCOTT,

Appellant.

2011  
MAY 11 10:30 AM  


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

The Honorable Cheryl B. Carey, Judge

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BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived the appellant, Nina Scott, of her due process right to a fair trial by impartial jury.

2. Scott received ineffective assistance of counsel at trial.

Issues Pertaining to Assignments of Error

1. Did the prosecutor commit flagrant misconduct, requiring reversal, by expressing a personal opinion that Scott was guilty because the check at issue was obviously forged?

2. Was defense counsel ineffective in failing to object to the prosecutor's misconduct, where no legitimate trial tactic could justify lack of objection?

B. STATEMENT OF THE CASE

Bank Manager Jason Shen was working near the close of business on a Friday night when an employee showed him a check for \$3,284 that Nina Scott presented for cashing. 4RP 162-65; 5RP 18-22; 6RP 75.<sup>1</sup> As soon as he saw the check, he realized it had been altered and could not

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<sup>1</sup> The check, admitted as Exhibit 8, has been designated for this Court's review.

The eight-volume verbatim report of proceedings is cited as follows: 1RP – 8/4/10; 2RP – 8/5/10; 3RP – 8/9/10; 4RP – 8/10/10; 5RP – 8/11/10; 6RP – 8/12/10; 7RP – 8/13/10; 8RP – 8/27/10.

believe someone would try to cash it. 4RP 165-66, 179. It looked like someone erased something from the payee line and wrote "Nina Scott" atop the erasure. There was also more than one type of handwriting on the check. 4RP 166-68. The memo blank section in the lower left corner of the check contained a reference to a student loan. 4RP 168-69.

Following bank policy, Shen reviewed images of other checks drawn on the same account and determined the writing on the check was different than that of the previously drawn checks. He then called one of the account holders, who said the check was not intended for Nina Scott. 4RP 168-70; 5RP 29. Suspecting check fraud, Shen then called the police. 4RP 170-71. Meanwhile, Scott remained seated in an office cubicle. 4RP 172-73.

Three officers responded to the bank at about its closing time of 6 p.m. 4RP 9-11, 19-20, 28-30, 108-10, 164. They observed the check, learned Scott presented it, and went to speak with her as she remained seated in the cubicle. 4RP 11-14, 52-54, 58, 97-100, 117, 171-74. Officer Kerkhoff described the instrument as "the most horrific altered check that I have ever seen. It was that obvious." 4RP 14. Kerkhoff recalled laughing in the bank when he saw the check. 4RP 59.

Scott was shocked when she learned she was being arrested for taking a substantial step to cash the check. She did not believe she did anything wrong. 4RP 21-22, 53-54, 63. She told Officer Kerkhoff that if the check was bad, she would just leave without receiving any money. 4RP 16-18, 24. Kerkhoff told her it was too late for that. 4RP 55.

Scott told Kerkhoff she had received the check from "Rob" and that he was outside. 4RP 24-25. She did not know his last name, address, or telephone number. 4RP 24-25, 54-55. She also did not know either of the account holders, whose names were displayed on the check. 4RP 24-25. Kerkhoff did not look for Rob, concluding it would not be worth his while because any accomplice waiting outside would have left when seeing the police come, and because there was already probable cause to arrest Scott for forgery. 4RP 25-26, 55-56. Kerkhoff tried without success to contact the account holders. 4RP 31-32.

Kerkhoff transported Scott to the local jail, where she spent the night. 4RP 28, 155-56; 6RP 86. Detective Onishi interviewed her the next afternoon. 4RP 153-58; 5RP 47-48. Scott told Onishi she received the check from "Matt," a slender Native American man in his 20s with long, curly hair. 5RP 36. Scott received a phone call from Matt, met him at a fast food restaurant, and then followed him to the bank. 5RP 37-38,

89-91. When they arrived in the bank parking lot, Matt wrote Scott's name on a check, handed it to her, and told her to go inside and cash it. 5RP 38, 43-44, 92-93, 120-21.

Scott told Onishi where Matt parked his teal-colored, early 90s, Acura when she met with him there. 5RP 39-41, 43, 70. Scott also gave Matt's phone number to Onishi. But the detective made no attempt to find Matt. 5RP 48-49, 82-83, 94-95. Onishi explained he had a heavy workload, including many cases that were more serious than the "de minimis" felony of forgery that Scott was suspected of committing. 5RP 48-50.

Calling it "one of the, probably the worst, check forgeries" he had seen, Onishi explained he chose not to devote additional scarce resources in an attempt to find someone who would probably not be charged with a crime. 5RP 49-51. He said the issue was not who stole the check but rather who presented it, which was not disputed. 5RP 54. Onishi said he assumed Scott knew the check was bad and acted with intent to defraud because of the obviously altered nature of the instrument. 5RP 96, 113. Scott did tell him, however, that she never looked at the check before trying to cash it. 5RP 118.

Scott told Onishi she had no idea she had done anything wrong. She gave the check and her identification to the teller, sat down, and waited for a bank manager to approve her check. 5RP 93. Scott said while she sat waiting, Matt called her and asked what was taking so long. He also asked why she did not leave the bank. 5RP 93-94. Her impression was that there was no reason to leave without her money because she was doing nothing wrong. 5RP 94.

Onishi spent about 45 minutes talking with Scott. She was "very articulate, . . . very aware of her surroundings, and very good conversation. . . . I didn't get the impression that she was stupid at all." 5RP 115.

The state charged Scott with forgery. CP 1-4. The defense theory was that Scott did not know the check was forged and, correspondingly did not act with intent to defraud. 6RP 161-62.

Scott testified she was shopping when Matt called her. She had met Matt a couple months earlier through a mutual friend. She did not know his last name, but also did not the last names of most of her friends. 5RP 143-44. Scott made it clear she lived with her fiancé and was therefore not romantically interested, a fact Matt respected. As a result, Scott thought he was a decent and trustworthy person. 5RP 147; 6RP 18.

A few days before the phone call, Scott had told Matt she needed money to pay for traffic tickets, car repairs, and going to school to learn about auto mechanics. 6RP 5-15. Matt offered to loan her money he was going to receive for selling a mobile home. 6RP 15-17, 76-77. She said she could afford to repay him \$300 per month. 6RP 18-19.

During the phone call, Matt said he was able to lend her money and asked her to meet him at a fast food restaurant. 6RP 4-5. When she arrived, Matt told her they would have to go to a bank. She drove her car to the bank, parked it, and walked over to Matt's car. 6RP 21-22. Matt had no identification on him so he could not go inside to cash the check. 6RP 90. He asked Scott how to spell her name, misspelled it, and then fixed the spelling. 6RP 22-23, 70-72, 91-92. She did not see any white-out, erasers, a checkbook, or other checks. 6RP 71-72.

Scott grabbed the check, walked into the bank, and was quickly greeted by a bank employee who asked how she could help. 6RP 23-24, 78-81. Scott said she wanted to cash a check and handed the check and her forms of identification to the employee. 6RP 80-81. To that point, she had only briefly glanced at the check. 6RP 23-27, 83. The employee said that because of the amount of the check, she would have to get approval from a manager. 6RP 27. Scott took a seat near a desk. 6RP 28-29.

Matt called her as she sat waiting. With urgency in his voice, Matt suggested she leave. This made no sense to Scott; she was not going to leave without her identification and she had come into the bank to cash the check and it had not yet been cashed. 6RP 32-33.

Two officers, then a third, soon walked up to her and began asking questions. 6RP 35-36. They continued to ask questions, about the check and about other things, for about 15 minutes inside the bank. 6RP 35-39. The officers also bantered back and forth amongst themselves in an unprofessional and inappropriate manner. 6RP 38-39. They suggested she did a poor job of altering the check, rudely responded to her answers to their questions, and laughed amongst themselves. 6RP 39-40, 43-45. The officers offended her by assuming she was lying with every answer. 6RP 54-55.

At one point, Kerkhoff asked her about the purpose of the check. Scott told him it was a loan, and Kerkhoff said something like people don't just loan other people money. 6RP 41. She responded either that she had lent money to Rob or received a loan from Rob only a short time earlier. 6RP 41-42. Scott testified it was in that context the name "Rob" came up. 6RP 41.

Scott never told her full version of events to the officers because they had already made up their minds and were not interested in what she had to say. 6RP 54-57, 102. Kerkhoff eventually read her her rights inside the bank while another officer handcuffed her. 6RP 49-51. She was put into Kerkhoff's car and taken to jail. 6RP 56, 59.

On the way she said she could not believe she was going to jail because someone else gave her a bad check. 6RP 56-57. Kerkhoff told her he knew the scam and asked her how much money she was going to get for passing the check. 6RP 57. Scott told Kerkhoff the check was a loan, but attempted to offer no additional explanation after that. 6RP 57.

Scott testified she liked Detective Onishi and found him to be the first logical person with whom she had spoken. 6RP 61. He interviewed her, then summarized her account of events in a written statement. 6RP 61-62. Onishi allowed her to review the statement, which she characterized as "fair," and signed it. 6RP 62-66. Onishi released her from jail after their interview ended. 6RP 64-65.

The jury found Scott guilty of forgery as charged. CP 37. Scott filed a motion for new trial under CrR 7.5(a)(8),<sup>2</sup> asserting trial counsel

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<sup>2</sup> "The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected . . .

was ineffective for failing to investigate Scott's mental health diagnosis and condition shortly before the offense. CP 69-72; 8RP 2-7. Counsel learned Scott had been diagnosed with bipolar disorder at age 13 and prescribed lithium. About six weeks before trying to pass the check in this case, Scott was involuntarily committed for two weeks, released, and admitted again for a week. Counsel had no records to verify these claims. 8RP at 3-4. Stating bipolar disorder produces drastic mood swings, counsel pointed to Scott's changed behavior during her testimony from one day to the next. 8RP at 5-6.

Counsel said she was ineffective for failing to consult with a mental health expert to determine whether her combination of medications, commitments, and bipolar disorder could have caused her to be so inattentive that she did not even notice the condition of the check. 8RP 7. Counsel asked for a new trial or, alternatively, for a 60-day continuance to give her time to consult an expert. 8RP 7.

The trial court found that but for her chronic tardiness, Scott appeared competent to stand trial, appeared to be assisting in her own defense, testified appropriately to the questions asked, behaved properly,

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(8) That substantial justice has not been done."

and generally appeared to understand the court process. 8RP 10-12. The court denied the motion. 8RP 15.

The court imposed a standard range sentence and converted all but the one day served to 120 hours of community restitution. CP 73-78; 8RP 22-24.

C. ARGUMENT

PROSECUTORIAL MISCONDUCT VIOLATED SCOTT'S  
RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

During closing argument, the prosecutor expressed her opinion that the check Scott tried to pass was obviously forged, telling jurors, "So look at that check. *I know it's a bad check.* Is it reasonable that the defendant never really looked at the check or that the defendant thought this was a good check?" The prosecutor's comment was a prejudicial opinion on Scott's guilt. Her conviction should be reversed.

The prosecutor, as representative of the people, is presumed to act with impartiality. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Prosecutors are "quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." Fisher, 165 Wn.2d at 746.

The Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington Constitution

guarantee a criminal defendant the right to a fair and impartial trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

1. The prosecutor committed misconduct by clearly stating her opinion that the check Scott tried to pass was altered.

A prosecutor commits misconduct by making improper comments that were substantially likely to affect the outcome of the trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). "It is established that the constitutionally guaranteed fair trial requires a trial in which the attorney representing the state does not throw the prestige of his public office and the expression of his own opinion of guilt into the scales against the accused." State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558 (1969), reversed on other grounds, 403 U.S. 947 (1971).

"It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." United States v. Young, 470 U.S. 1, 8, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985) (quoting American Bar Association Standards for Criminal Justice 3-5.8(b)(2d ed. 1980)); see also Reed, 102 Wn.2d at 145-46 (misconduct for prosecutor to express

personal opinion regarding credibility of witness or guilt of defendant). Prejudicial error occurs when it is clear and unmistakable that counsel is expressing a personal opinion rather than arguing an inference from the evidence. State v. McKenzie, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

The Supreme Court in McKenzie cited the prosecutor's comment in State v. Case<sup>3</sup> as an example of what constitutes a "clear and unmistakable" expression of personal opinion requiring reversal. McKenzie, 157 Wn.2d at 54. In Case, the prosecutor argued, "I doubt that you haven't already made up your mind. Now, you must have, as human beings. But if you haven't, don't hold it against me. I mean, *that is my opinion* about what this evidence shows and how clearly this evidence indicates that this girl has been violated." McKenzie, 157 Wn.2d at 54 (emphasis in original) (quoting Case, 49 Wn.2d at 68). The prosecutor's prejudicial argument was "a personal appeal to the jury and explicitly acknowledged that he was offering his own opinion." McKenzie, 157 Wn.2d at 54.

In Scott's case, the prosecutor's remark was also clearly a personal opinion: "So look at that check. *I know* it's a bad check. Is it reasonable that the defendant never really looked at the check or that the defendant

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<sup>3</sup> 49 Wn.2d 66, 298 P.2d 500 (1956).

thought this was a good check?" 6RP 157. And the context of the remarks, which follow, does not change the nature of the prosecutor's personal opinion of Scott's guilt:

Now, ladies and gentlemen, I submit to you the defendant, she is no patsy. She is an educated adult. She told you that she finished high school early. She told you that she was almost 23 years old when this happened. That she's been living on her own since she was 18. She moved out then. That she's paid rent and utilities. All other normal bills that adults do. She might have used a prepaid debit card or cash to pay her bills, but it's clear she's no stranger to checks. She told you that she had checks when she was little. That she would write her sister checks, and when she was 16 she would write checks to pay her cell phone bill. She says she even dealt with checks at work. Yesterday she told you she worked at McDonald's and the thrift shop. She knew the importance of checking someone's ID . . . and actually writing in an expiration date. The defendant is an educated adult with the financial know how to pay her bills, to live on her own. So look at that check . . .

6RP 156-57.

A statement suggesting a reasonable inference from the evidence would have been something along the lines of, "Scott must have known the check was forged." But the prosecutor's *own belief* that the check was forged stood alone and was not a reasonable inference from the evidence the prosecutor argued. Nor was the prosecutor's belief relevant or comparable to what Scott may have believed – the prosecutor, trained in

the law, was presumed to know more about forgery than a layperson like Scott. The statement was improper.

Defense counsel did not object to the evidence. Even so, reversal is required if the prosecutor's remark was so flagrant and ill-intentioned it could not have been cured by a jury instruction. Fisher, 165 Wn.2d at 747. The defendant establishes prejudice if there is a substantial likelihood the misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Statements made during closing argument are presumably intended to influence the jury. Reed, 102 Wn.2d at 146. Otherwise, there would be no point in making them at all. Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal).

Furthermore, a juror is likely to be impressed by what a prosecutor says given his position as representative of the state and the aura of special reliability he enjoys. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). In a more strongly worded opinion, the Ninth Circuit held, "A

prosecutor has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus." United States v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992); see also, United States v. Vargas, 583 F.2d 380, 387 n.7 (7th Cir. 1978) (recognizing that a prosecutor's statement carries a an implicit stamp of authenticity and credibility as it is endorsed by the government).

Scott's defense depended on whom the jury believed. She testified she did not know the check was forged and she did not examine the check. Officer Kerkhoff described her as confused, and said she did not know why the officers had reported to the bank. 4RP 15. This contrasted with the officers' testimony that it was obvious the check had been altered. While Onishi testified Scott was articulate and aware of her surroundings, he also said Scott told him she had done nothing wrong, which was the reason she did not leave the bank while Shen contacted the police.

One of the elements in the "to-convict" instruction was that Scott "knew that the instrument had been falsely made, completed, or altered." CP 50 (instruction 9, attached as appendix). Another was that she "acted with the intent to injure or defraud." Id. The prosecutor asserted the

sufficiency of evidence to prove these elements was "the real debate," "the real argument." 6RP 147. The prosecutor argued the jurors would "have to make a credibility call." 6RP 148.

The prosecutor's personal opinion that the check was altered served to tell jurors that in the trained legal opinion of the prosecutor, those elements had been proven beyond a reasonable doubt. This intentional and obvious opinion on guilt was flagrant misconduct.

Finally, misconduct committed in the face of a well established rule can constitute a flagrant and ill-intentioned violation of the proper standards for a prosecutor's trial conduct. See State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (finding the prosecutor's misconduct flagrant and ill-intentioned where improper argument came more than two years after case held argument constituted misconduct), review denied, 131 Wn.2d 1018 (1997). The prosecutor's opinion in Scott's case falls into this category because, as demonstrated above, the rule against opining on guilt is hardly new.

For these reasons, the prosecutor's unmistakable opinion that the check was forged was so flagrant and prejudicial that no objection or instruction could cure it.

2. Trial counsel was ineffective for failing to object to the prosecutor's opinion.

Article I, section 22 and the Sixth Amendment guarantee criminal defendants effective representation. 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). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (reversing where defense counsel failed to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). This makes sense

because the purpose behind both the prohibition against prosecutorial misconduct and the right to effective assistance is to protect the defendant's right to a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); Reed, 102 Wn.2d at 145.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.”).

There was no legitimate reason not to object given the prejudicial nature of the prosecutor's improper argument. Scott derived no conceivable benefit from letting the jury consider the prosecutor's opinion that the check was forged as it deliberated on her fate.

Further, if this Court rules a curative instruction could have obviated the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. No legitimate strategy justified allowing the prosecutor's prejudicial comment to fester in the juror's minds without instruction from the court that the improper comment should be disregarded and play no role in their deliberations.

There is a reasonable probability counsel's failure affected the verdict for the reasons set forth above.

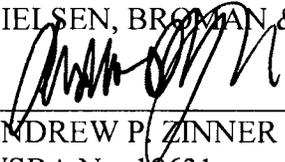
D. CONCLUSION

For the reasons stated, this Court should reverse Scott's forgery conviction and remand for a new trial.

DATED this 10 day of May, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

No. 9

To convict the defendant of the crime of forgery, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 1, 2009, the defendant possessed or offered or put off as true a written instrument which had been falsely made, completed or altered;

(2) That the defendant knew that the instrument had been falsely made, completed or altered;

(3) That the defendant acted with intent to injure or defraud; and

(4) 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

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STATE OF WASHINGTON/DSHS	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65938-3-I
	)	
NINA SCOTT,	)	
	)	
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 10<sup>TH</sup> DAY OF MAY, 2011, 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] NINA SCOTT  
3712 S. 130<sup>TH</sup> STREET  
SEATTLE, WA 98168

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF MAY, 2011.

x *Patrick Mayovsky*