67909-1

67909-1

No. 67909-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

PAUL DOUGLAS LOISELLE,

Appellant/Cross-Respondent.

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

The Honorable Sharon S. Armstrong

BRIEF OF APPELLANT

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1. The State failed to prove beyond a reasonable doubt the box cutter used by Mr. Loiselle qualified as a "deadly weapon."

2. The prosecutor impermissibly shifted the burden of proof and relieved The State's burden of proof, thus violating Mr. Loiselle's right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State is required to prove the existence of a sentence enhancement beyond a reasonable doubt. Mr. Loiselle was charged with the use of a deadly weapon, which required the State to prove that in the manner it was used, the box cutter used by Mr. Loiselle during the assault was likely to cause death. The State proved the victim suffered a serious laceration but the State failed to prove that the box cutter, in the manner it was used by Mr. Loiselle, likely would have caused death. Is Mr. Loiselle entitled to reversal of the deadly weapon special verdict?

2. A prosecutor violates a defendant's right to a fair trial when he misstates the law thus impermissibly shifting the

burden of proof to the defendant and relieving the State of its own burden of proof. During closing argument, the prosecutor invoked the civil standard of proof doctrine of *res ipsa loquitur*, thus inferring the defendant had a burden of proof and also inferring the State merely had to meet this civil standard, not the constitutionally mandated burden of proof beyond a reasonable doubt. Did the prosecutor's argument constitute misconduct which had a likelihood of affecting the jury verdict, thus requiring reversal of Mr. Loiselle's convictions?

C. STATEMENT OF THE CASE

On December 14, 2011, Paul Loiselle, his girlfriend, and several friends enjoyed a night out celebrating Mr. Loiselle's 42nd birthday. 8/2/2011RP 90-91. Following dinner, at approximately 10 pm, the party moved to Yen Wor, a tavern in which Mr. Loiselle had been the karaoke host. 8/2/2011RP 91, 114.

Coincidentally, Rory Tripp and several of his friends were celebrating his 28th birthday at a nearby tavern, the Crosswalk. 7/28/2011RP 108-09. At approximately 1 am, Mr. Tripp and his friends moved to Yen Wor. 8/1/2011RP 109. Mr. Tripp and five

of the other men were fairly intoxicated when they arrived at Yen Wor. 7/28/2011RP 110, 8/1/2011RP 101. Near closing time, the bartender announced last call, which Mr. Loiselle reiterated when the patrons did not appear to be leaving. 8/2/2011RP 116. Mr. Tripp's friend, Corey Flynn, took offense to Mr. Loiselle's announcement and, as he left, Mr. Flynn insulted Mr. Loiselle with a derogatory remark. 7/28/2011RP 104.

As Mr. Tripp, Mr. Flynn, and the others were leaving the tavern, Mr. Loiselle grabbed a pool cue and followed them outside. 7/28/2011RP 108, 8/2/2011 RP 145. Perry Southerland, a regular patron at Yen Wor, and Rex Waters, the karaoke host that night, followed Mr. Loiselle outside. 8/1/2011 167. Mr. Waters immediately took the pool cue away from Mr. Loiselle, and handed it to Mr. Southerland, who took the cue back inside Yen Wor. 8/1/2011RP 167-69. Mr. Southerland returned outside where he claimed he saw a box cutter, which contained a razor blade in it, in Mr. Loiselle's left hand. 8/1/2011RP 170.

Angry words were exchanged between Mr. Loiselle and the other men. 7/28/2011RP 167. Mr. Loiselle lunged at Randall Nickell, one of Mr. Tripp's friends, with his left hand

and struck him in the throat. 7/28/2011RP 169. This punch knocked Mr. Nickell to the ground, and when he stood up to return the punch, Mr. Flynn told Mr. Nickell he had been cut. 7/28/2011RP 171. Mr. Loiselle then lunged at Mr. Tripp with his left hand, cutting him as well. 7/28/2011RP 118, 8/2/2011RP 18-19. Mr. Waters herded Mr. Loiselle and the other regulars from Yen Wor back inside the tavern. 8/2/2011RP 74.

Mr. Nickell was taken to Harborview Hospital with a wound to his neck. 7/28/2011RP 174. Because of concerns the injury could have caused serious damage, a doctor specializing in neck injuries was contacted to evaluate the wound. 8/1/2011RP 24-25. Mr. Nickell was diagnosed with a penetrating stab wound to the left side of his neck which required 40 stitches to close. 7/28/2011RP 175, 8/1/2011RP 27. Mr. Nickell made a full recovery from the injury. 8/1/2011RP 64.

Mr. Tripp also suffered a far less serious injury to his neck. 7/28/2011RP 123. Mr. Tripp was also treated at Harborview, but his injury only required cleaning. 7/28/2011RP 127.

Mr. Loiselle was charged with two counts of second degree assault, one count involving Mr. Tripp, one count involving Mr. Nickell, with each count containing a sentencing enhancement for being armed with a deadly weapon. CP 6-7.

During closing argument, the prosecutor injected the civil burden of proof into Mr. Loiselle's trial:

> All right. I've been debating over and over and over with Ms. Breslin (phonetic) there and with colleagues, and there is a concept that is usually expressed in Latin, a legal doctrine or a concept, and I'm not going to use the Latin, but the concept is that the thing speaks for itself. The thin [sic] speaks for itself. All right. I'll tell you. It's *res ipsa loquitur*. It's an old legal doctrine that the thin [sic] speaks for itself. In malpractice cases, if somebody is opened up after surgery and they find a sponge inside that person, obviously, the doctor has committed malpractice, somebody screwed up. The thing speaks for itself. *Res ipsa loquitur*. That's this case.
>
> The injuries in this case speak for themselves. They're speaking to you. The evidence in this case is overwhelming. The defendant escalated the situation far beyond necessity and he used an instrument to cut intentionally the throat of Randy, and he intentionally used an instrument, a blade, to cut Rory. He's the only one that can do it. *Res ipsa loquitur*. It speaks for itself and it's speaking to you in a straight line and this and all other evidence leads to the defendant who put himself in that chair by continuing to escalate, and today that straight line leads to his conviction. He is guilty of

> the crimes of assault in the second degree in Count I and Count II. Thank you.

8/3/2011RP 44-45 (italics added).

The prosecutor revisited this doctrine again in his rebuttal argument:

> There's absolutely no indication whatsoever there was anything sharp on that tree or that somehow or another these injuries came from this tree and the key thing, ladies and gentlemen, the key thing, is that there's absolutely – there's absolutely no other explanation for how Rory received his injury which if you take a look at State's Exhibit 4 – just a second – take a look at State's Exhibit 4, that shows you right there that with his left hand, it's almost like a perfect like slash like that, almost straight in line, the shirt up that way, cut, cut, cut, all the way through. *Res ipsa.* Take a look at 28. Do you see anything sharp on that tree? The evidence is overwhelming, ladies and gentlemen.

8/3/2011RP 63 (emphasis added). Mr. Loiselle did not object to either argument.

The jury subsequently convicted Mr. Loiselle as charged. CP 79-82.[1]

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[1] At sentencing, Mr. Loiselle moved the trial court to strike the enhancements based upon a defective special verdict instruction under the Supreme Court's decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled, State v. Nunez,* 174 Wn.2d 707, ___ P.3d ___ (2012). CP 139-43. At sentencing, over the State's objection, the court struck the enhancements. CP 165. The State appealed that decision.

D. ARGUMENT

1. THE STATE FAILED TO ESTABLISH THE BOX CUTTER USED BY MR. LOISELLE QUALIFIED AS A "DEADLY WEAPON"

a. The State bears the burden of proving the existence of the sentence enhancement beyond a reasonable doubt. In a criminal prosecution, the State is required to prove a sentencing enhancement beyond a reasonable doubt. U.S. Const. amend. XIV; *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, 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, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

For deadly weapon sentence enhancements, there must be sufficient evidence that the defendant was armed with an *actual* deadly weapon. *State v. Tongate,* 93 Wn.2d 751, 754–55, 613 P.2d 121 (1980). Whether a weapon is deadly is a question of fact that the State must prove beyond a reasonable doubt. *Tongate,* 93 Wn.2d 754–55.

Mr. Loiselle contends there was insufficient evidence to support the jury's finding in the special verdicts that he was armed with a deadly weapon.

b. The State failed to prove the box cutter was a deadly weapon. As noted, for a deadly weapon jury verdict to stand, there must be sufficient evidence that the defendant was armed with an *actual* deadly weapon. *Tongate,* 93 Wn.2d at 754–55. Under RCW 9.94A.533(4), if the jury finds that the defendant was armed with a deadly weapon during the commission of a felony as defined by the statute, the court must impose a consecutive term for the deadly weapon enhancement.

> The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon . . . (a) Two years for any felony defined under any law as

> a class A felony or with a statutory maximum sentence of at least twenty years . . .; (b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years. . . ..

RCW 9.94A.533(4). Second degree assault is a class B felony. RCW 9A.36.021(2)(a).

The deadly weapon finding must be made by the jury in a special verdict. RCW 9.94A.825 ("[I]f a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime").

A "deadly weapon" is defined as:

> an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825.

RCW 9A.04.110(6) creates two categories of deadly weapons: deadly weapons *per se*, namely "any explosive or loaded or unloaded firearm" and deadly weapons in fact, namely "any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." *State v. Taylor,* 97 Wn.App. 123, 126, 982 P.2d 687 (1999). "Circumstances include 'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" *In re Martinez,* 171 Wn.2d 354, 365, 256 P.3d 277 (2011).

Thus, unless a dangerous weapon falls within the narrow category for deadly weapons *per se*, its status rests on the manner in which it is used. RCW 9.94A.825; *Martinez,* 171 Wn.2d at 366. The *Martinez* Court specifically disapproved of an approach that relied on whether the weapon was *potentially* capable of causing great bodily harm. *Martinez,* 171 Wn.2d at 368 n. 6.

For instance, in *State v. Skenandore*, a make-shift spear was found not to be a deadly weapon under the circumstances it was used, where a prison inmate used it to stab a corrections officer through a six-by-eighteen inch opening in a cell door. 99 Wn.App. 494, 500–01, 994 P.2d 291 (2000). The spear was made out of rolled paper affixed to a golf pencil. *Id.* at 496. The spear struck the officer in the chest as he was bent over, handing a sack breakfast to the inmate through an opening in the cell door. *Id.* at 496–97. The spear did not break the skin. *Id.* at 497. The inmate was charged with second degree assault; at trial, the prosecutor argued that a sharpened pencil in the eye could cause substantial bodily injury. *Id* at 497–98. The record did not reveal any evidence that the inmate was aiming for the officer's face, or that the inmate actually stabbed the officer anywhere in the face. *Id.* at 498 n.3.

Division Two of this Court found insufficient evidence that the spear was a deadly weapon because the officer's face was not near the opening through which he was passing the inmate the sack breakfast; all blows landed on the officer's torso, well below his face; and the cell door separating the officer and

the inmate restricted the spear's movement. *Skenandore* 99 Wn.App. at 500. The Court acknowledged the spear may have had potential to cause substantial bodily harm, but the surrounding circumstances inhibited the spear's potential to cause such harm in that case. *Id.*

Here, the weapon was identified to be a box cutter, which did not fall under the category of a *per se* deadly weapon as defined in RCW 9.94A.825. The box cutter arguably used by Mr. Loiselle was never found, so the State never proved it was either a "knife having a blade longer than three inches," or a "razor with an unguarded blade." RCW 9.94A.825. As a consequence, the State had to prove the box cutter had the "capacity to inflict death from the manner in which it [was] used, [was] likely to produce or may easily and readily produce death." *Id.*

While the treating physician testified at length to the *potential* for an injury to that portion of Mr. Nickell's neck to be deadly, that is not the standard under RCW 9.94A.825. The weapon used must be likely to cause death, not merely the potential to cause death. In addition, the actual injuries suffered by Mr. Nickell were non-life threatening. Mr. Nickell

suffered a superficial deep wound to his neck. 8/1/2011RP 47-48. Had it been deep enough in specific portions of a person's neck, it had the potential to cause death given the right circumstances. But as noted, the *potential* for causing death is not the standard, yet that is all the State proved here. Following *Martinez* and *Skenandore,* the evidence failed to prove that the sharp object was a deadly weapon as that term is defined.

This Court's decision in *State v. Shilling* does not compel a different conclusion. 77 Wn.App. 166, 889 P.2d 948 (1995). In *Shilling,* the defendant admitted in his testimony that the bar glass "could possibly cause substantial bodily harm or death." *Shilling,* 77 Wn.App. at 166. Here, the issue of whether the box-cutter could have caused death was not conceded as in *Shilling,* but controverted by Mr. Loiselle. Further, to the extent the decision in *Shilling* relies upon the potential for injury, it has been overruled by the Supreme Court in *Martinez.*

c. In light of the State's failure to prove Mr. Loiselle used a deadly weapon, this Court must strike the enhancement and remand for resentencing. Where there is insufficient evidence in the record to support the deadly weapon enhancements, the remedy is to remand to the sentencing court with directions to dismiss the enhancements. *State v. Williams-Walker,* 167 Wn.2d 889, 902, 225 P.3d 913 (2010). Here, the deadly weapon special verdict was not supported by sufficient evidence, thus this must Court affirm the trial court's decision striking the enhancements.

2. MR. LOISELLE'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT

a. Mr. Loiselle had a constitutionally protected right to a fair trial free from prosecutorial misconduct. The United States Supreme Court has stated that a prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an

obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence," appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Monday,* 171 Wn.2d at 676.

Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. "The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Therefore, the ultimate inquiry is not whether the error was harmless or not harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *Davenport,* 100 Wn.2d at 762.

Comments made by a deputy prosecutor constitute misconduct and require reversal where they were improper and substantially likely to affect the verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To prevail on a claim of prosecutorial misconduct, the defendant must show that "there is a a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *State v. Thorgerson,* 172 Wn.2d 438, 443, 258 P.3d 43 (2011), *quoting State v. Magers,* 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

Where defense counsel fails to object to prosecutorial misconduct at trial, the issue may be raised on appeal where the prosecutor's misconduct was "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" and was not curable by a jury instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (internal quotation marks omitted), *quoting State v. Gregory,* 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

b. The prosecutor's use during closing argument of the civil standard of proof constituted misconduct. The prosecutor's reference to the civil tort concept of *res ipsa loquitur* effectively relieved the State of its burden of proof and impermissibly shifted the burden of proof to the defense, thus violating Mr. Loiselle's right to due process and a fair trial.

Res ipsa loquitur means "'the thing speaks for itself.'" *Curtis v. Lein,* 169 Wn.2d 884, 889, 239 P.3d 1078 (2010), *quoting* W. Page Keeton Et Al., *Prosser And Keeton On The Law of Torts* § 39, at 243 (5th ed.1984).

> [T]he doctrine of *res ipsa loquitur* provides an inference of negligence from the occurrence itself which establishes a prima facie case sufficient to present a question for the jury.
> . . .
> [The doctrine of *res ipsa loquitur*] casts upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence. *Id.*

Metro. Mortgage & Sec. Co., Inc. v. Washington Water Power, 37 Wn.App. 241, 243, 679 P.2d 943 (1984).

The doctrine of *res ipsa loquitur* recognizes that the nature of an act may allow the occurrence itself to

circumstantially establish liability on the part of the defendant, without further direct proof. *Jackson v. Criminal Justice Training Commission,* 43 Wn.App. 827, 829, 720 P.2d 457 (1986). Where *res ipsa loquitur* applies, it spares the plaintiff from proving specific acts of negligence and shifts the burden to the defendant to provide an explanation. *Curtis,* 169 Wn.2d at 894. In the civil context, courts ordinarily apply the doctrine "'sparingly in peculiar and exceptional cases, and only where the facts and the demands of justice make its application essential.'" *Curtis,* 169 Wn.2d at 889 (internal quotation marks omitted), *quoting Tinder v. Nordstrom,* 84 Wn.App. 787, 792, 929 P.2d 1209 (1997).

The concept of *res ipsa loquitur* is not helpful to the jury in a criminal case, and any attempt to invoke its legal meaning is extremely problematic. This reference to *res ipsa loquitur* is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. *State v. Camara,* 113 Wn.2d 631, 638, 781 P.2d 483 (1989), *citing In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). By suggesting otherwise, for instance

suggesting using a civil inference standard, suggests to the jury that the State's burden of proof is less than proof beyond a reasonable doubt, and subtly shifts the burden of producing evidence to rebut the inference to the defense. *See Thorgerson,* 172 Wn.2d at 453 ("A prosecutor generally cannot comment on a defendant's failure to present evidence because the defendant has no duty to present evidence"); *Gregory,* 158 Wn.2d at 859-60 (arguments that shift the burden of proof to the defense constitute misconduct). This was improper and constituted misconduct on the part of the prosecutor.

c. The prosecutor's argument warrants reversal. If the defendant did not object at trial, the defendant may raise the issue for the first time on appeal where the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson,* 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State*

v. Emery, ___ Wn.App. ___, 278 P.3d 653, 664 (2012), *quotingThorgerson,* 172 Wn.2d at 455.

"The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Slattery v. City of Seattle,* 169 Wn. 144, 148, 13 P.2d 464 (1932). Thus, the "focus [should be] less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery,* 278 P.3d at 665.

Here, the prosecutor's argument plainly constituted misconduct. Thus the issue is whether this misconduct could have been cured by an instruction. Mr. Loiselle's submits it could not. The prosecutor's argument went to the core of one of the seminal constitutional protections due a criminal defendant; the burden of proving guilt beyond a reasonable doubt. This right is so sacrosanct that a jury instruction which misstates the burden of proving guilt beyond a reasonable doubt is a structural error not susceptible to a harmless error analysis. *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S.Ct. 2078, 124

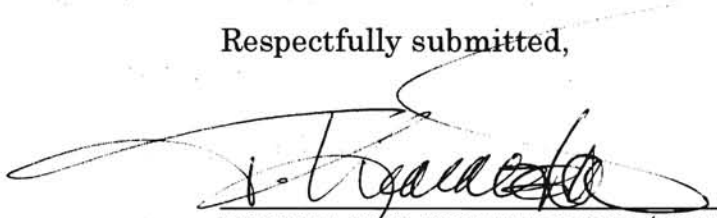
L.Ed.2d 182 (1993). The prosecutor's invocation of a lesser burden of proof went to the core of this constitutional right and, regardless of what the trial court might have said to attempt to cleanse the remark, could not be forgotten by the jury. As a result, the error could not be cured. This Court must find the prosecutor's argument to constitute reversible misconduct and reverse Mr. Loiselle's convictions.

E. CONCLUSION

For the reasons stated, Mr. Loiselle request this Court reverse his convictions and remand for a new and fair trial.

DATED this 23rd day of August 2012.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67909-1-I
v.	)	
	)	
PAUL LOISELLE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF AUGUST, 2012.

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