COURT OF APPEALS NO. 47477-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION TWO

DARREL HARRIS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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

The Honorable Vicki Hogan, Judge

CORRECTED BRIEF OF APPELLANT

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2. The court erred in excluding testimony from a private investigator which would have corroborated appellant's testimony that there was no door or doorframe on appellant's bedroom, contrary to what the complaining witness testified.

3. The court violated appellant's Sixth Amendment right to be present in court when the court ordered appellant to remain "emotionless" in trial.

4. The prosecutor deprived the appellant of a fair trial when she told the jurors that the State would only be able to prosecute 1% of the rape cases if corroborating evidence was required.

5. The prosecutor deprived the appellant of a fair trial when she told the jurors that cases with similar evidence are prosecuted all of the time.

6. The prosecutor deprived the appellant of a fair trial when she misrepresented the law by telling the jurors they had sworn an oath not to require the State to produce corroborating evidence.

7. The prosecutor deprived the appellant of a fair trial when she suggested to the jury that the State would be unable to protect children from sexual abuse if the jury was unwilling to accept the child's word without corroborating evidence.

8. The prosecutor misrepresented the jury's function by telling the jury to disregard the lack of corroborating evidence and just focus on whether they believe the girl.

9. The prosecutor deprived appellant of a fair trial when she expressed her personal opinion as to the appellant's guilt.

10. Appellant's right to effective assistance of counsel was violated when defense counsel failed to object to the repeated instances of prosecutorial misconduct in closing.

11. Cumulative error deprived appellant of his right to a fair trial.

Issues Pertaining to the Assignments of Error

1. KM, a 25-year-old woman, claimed she was sexually assaulted by her uncle on the morning of November 6, 2013. KM claimed that in the following hours and days she was in shock, terrified for her life, and nearly hysterical. Her uncle's house had outside security cameras. It recorded interactions between KM and appellant from that morning and later in the afternoon, and shows KM behaving normally. The defense

sought to introduce footage that showed KM calling her uncle over to give him a hug before he left for work. Did the court violate appellant's Sixth Amendment right to present evidence and confront witnesses when it ruled the footage was not relevant?

2. JJ, KM's five-year-old daughter, claimed that appellant carried her into his room, shut the door, and molested her. Appellant testified that there was no door or doorframe on his bedroom. The defense had previously hired a private investigator to examine the rooms, and corroborate the lack of doors and doorframes. The court excluded the investigator's testimony, ruling that it was cumulative to appellant's own testimony. As anticipated, appellant's testimony was vigorously attacked by the State. Did the court violate appellant's right to present a defense when it excluded this defense witness?

3. The judge told appellant that he must remain "emotionless" in court and that he must not emote while at counsel table. Requiring appellant to remain stone-faced and indifferent to the accusations made against him would have made appellant appear callous and uncaring to the jury. Did the judge violate appellant's Sixth Amendment right to be fully present at trial, when the court ordered him to alter his demeanor before the jury?

4. The prosecutor engaged in flagrant and ill-intentioned misconduct throughout closing argument. The prosecutor repeatedly warned that children could not be protected if the jury was unwilling to accept the word of a child without corroboration. The prosecutor told the jury that cases similar to this are prosecuted all of the time, and that if the law required corroboration, the State could only prosecute 1% of its rape cases. The prosecutor expressed her personal opinion on the evidence and told the jury that they had sworn an oath to follow the law, and the law did not require corroboration of a girl's testimony. Did this flagrant and ill-intentioned misconduct deprive appellant of a fair trial?

5. In the alternative, did defense counsel's failure to object to any of this rampant misconduct constitute ineffective assistance of counsel?

6. Did cumulative error deprive appellant of a fair trial?

II. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The Pierce County Prosecutor charged Darrel Harris with one count of child rape in the first degree and one count of child molestation in the first degree, both alleged to have been committed against JJ. CP 1-2. The prosecutor also charged Mr. Harris with one count of indecent liberties, alleged to have been committed against KM, the child's mother. *Id.*

CP 3-4. Mr. Harris entered pleas of not guilty. By amended information, the State added an aggravating factor of domestic violence. CP 142-143.

As JJ was six years old at the time of trial, and five years old at the time of the alleged assault, a child hearsay hearing was held. The court determined that JJ was competent to testify and that her statements to other people were all admissible. CP 50-52.

A jury trial commenced on February 9, 2015 before the Honorable Vicki Hogan. The Trial concluded on February 25, 2015, when the jury found Mr. Harris guilty on all three counts. CP 113-15. A sentencing hearing was held on April 17, 2015. The court imposed a standard range sentence, and appellant filed this timely appeal. CP 144-159.

2. TRIAL TESTIMONY

a. KM moves into Darrel Harris' house

In the late summer of 2013, Darrel Harris was 48 years old. RP 693.[1] He worked as a property manager and real estate agent and owned a three bedroom house in Puyallup. RP 660, 674. His niece, KM, was 25 years old. She had a five-year-old daughter named JJ. RP 397-98.

[1] The report of proceedings are sequentially numbered with two exceptions. The opening was separately transcribed and is referred to herein as "ORP." Additionally, February 24, 2015 is separately paginated. That transcript, which includes the closing argument, is referred to herein as "CRP."

In September of 2013, KM contacted Mr. Harris and asked him if she could move in for a short while with JJ. She had recently broken up with her boyfriend, and she was trying to get out of a bad situation where she was living. RP 662. Mr. Harris had allowed her to stay with him twice before. *Id.* Feeling bad for her, he agreed to help them out. KM and JJ moved in on September 23, 2013. RP 661.

Although there was no date set for KM to move out, it was understood that the arrangement was temporary until she could get back on her feet. RP 662-63. Mr. Harris set some ground rules, such as: 1) KM must actively seek paid employment, and 2) KM covers JJ's food through KM's food stamps and cash allotment. RP 663. KM moved into the second bedroom and JJ moved into the third.

Mr. Harris grew frustrated with KM over the next six weeks. Although he thought her intentions were good, she was inconsiderate. She did not wash dishes, and Mr. Harris ended up buying disposable plates and cups. RP 677. When Mr. Harris occasionally told KM he was unhappy with the situation, KM would change her ways for a few days, before reverting to her old habits. RP 677-78.

Mr. Harris' frustration continued to build over time. KM constantly asked for money and rides, and meanwhile did nothing around the house. RP 680-81. In late October Mr. Harris wrote KM a note telling her

the situation was unacceptable and that things needed to change. *Id*; Ex. 8. He wanted her to stop asking him for things. RP 681.The note stated, "You are not my companion. You are a roommate. Act like a roommate. Stop borrowing my clothes. Stop asking for rides. Stop acting like a family." Ex. 8; RP 680. Although KM seemed hurt by the note, her behavior and their relationship improved for awhile. RP 681.

On Wednesday, November 6, 2013, Mr. Harris went to work late so he could drive KM to a doctor's appointment. RP 683. The appointment was at 11:00 am, and all three of them left the house a little after 10:00 am. RP 683-84. Following the doctor visit, they stopped for lunch at a restaurant, returning home with leftovers around 3:00 pm. RP 684. Although KM had another doctor's appointment scheduled for the following day, Mr. Harris told her he had already missed too much work and would not be able to drive her. RP 685.

At about 3:15 pm, Mr. Harris was preparing to leave for work and walking towards his car when KM called him back. She was seated outside. KM gestured with her arms for Mr. Harris to pull her up, which he did. She gave him a big hug. RP 385. Mr. Harris then continued on to work. (As discussed below, these interactions were captured on video from an outside security camera, which the judge refused to allow into evidence.)

When Mr. Harris got home that evening, KM and JJ were gone. He received a call from KM telling him that she and JJ were staying at her aunt's that night because her aunt would be able to get her to the doctor's office the next day. KM and JJ did not come back to the house on Thursday. RP 686-87. KM did arrive back at the house Friday afternoon with a friend to pick up her food stamps. Mr. Harris reminded her that it was her turn to pick up groceries once the food stamps arrived. KM said that she would be back shortly and they would go grocery shopping that evening. RP 689. She did not come back, leaving Mr. Harris even more frustrated. The next morning he had to go out to the store to buy groceries to make breakfast. This was the final straw. Mr. Harris called KM on the phone and told her to come pick up her stuff, because she was no longer welcome at the house. RP 689-90. KM later acknowledged that she received that call. That was the last contact Mr. Harris had with either JJ or KM. RP 692.

Mr. Harris explained that at no time did he inappropriately touch either KM or JJ. RP 693.

b. KM gives a different account of what occurred on November 6th.

Deputy Richards of the Pierce County Sheriff's Office was working the late swing shift on November 9, 2013. RP 247. Dispatch had taken

a call from KM, and Deputy Richards was returning that call around 5:45 pm. She told him that her uncle had touched her inappropriately. RP 248. Richards spent approximately twenty to thirty minutes talking to KM, but because she was crying hysterically, it was difficult to make out everything she was saying. Richards suggested she try writing it down, and that he would come by to see her. RP 248-50.

He arrived about a half hour later. KM was still "hysterically crying." RP 251; 258. In fact, compared with other people, KM was "one of the more upset people as far as crying." RP 252. She told Richards that three or four days earlier she had woken to find her uncle, Mr. Harris, sitting on her bed, rubbing her vagina over her pajamas. RP 257. She told him to stop, which he did. Mr. Harris told her that he wanted sex with her twice a week if she was going to live there for free. RP 257. Later that morning she received a note from Mr. Harris telling her that she had better start living up to her end of the bargain if she wanted to stay in the house. RP 255; Ex. 8. KM said that she did not report it earlier because she was fearful of him. RP 252.

While Deputy Richards was speaking with KM, she advised him that her daughter had just recently told her that she also had been touched by Mr. Harris. RP 258, 278. KM had not mentioned this during the telephone call. RP 281. Because Richards did not have any experience in in-

terviewing children, he had KM ask the questions. RP 259. KM told JJ to tell Richards what she had said earlier. *Id.* In response to her mom's questions, JJ said he touched her in "the private spot" with his finger and it hurt. RP 259-60. She said him it happened one time. RP 429.

By the time that KM took the stand at trial, the story had changed. She now testified that Mr. Harris had put his hand inside her pajamas. RP 411. She described how she went outside to the porch to confront Mr. Harris after she found the note, but in her earlier written statement she described finding the note and going into Mr. Harris' room, where he was laying on the bed, to confront him. RP 463, 465. She also testified the reason she waited three days to call the police was that, "I didn't know what to do. I was in such shock." RP 422

At trial, KM stated that she first learned about JJ being touched **after** Deputy Richards had arrived at the house. KM had been asking JJ everyday since they left whether Mr. Harris had touched her, and that JJ said no. RP 427-28. Then while Deputy Richards was at the house on the 9th, KM told JJ that "something bad had happened to mommy. Did Darrel do something to you?" RP 428. At that point JJ said yes. *Id.*

Following JJ's statement, she was subjected to physical examinations and forensic interviews. At that forensic interview with Keri Arnold, JJ jumped right into talking about the abuse. The interviewer acknowl-

edged that this does not usually happen, but it "isn't completely uncommon." RP 542. JJ told the interviewer that it happened 33 times. RP 547. She told the interview that she saw Mr. Harris grab her mother and take her clothes off. RP 568. This did not cause any concerns for Ms. Arnold. *Id.* In fact, because JJ provided some details instead of just repeating the same sentence over and over again, the interviewer had little concern of coaching. RP 549. The interviewer acknowledged her employment at the Pierce County Prosecutor's Office, but assured the jury it did not in any way influence her opinions. RP 577.

The physical examination revealed no physical evidence of abuse. RP 305-06. The examination was normal, including the genital and anal exams. RP 596. The State's medical witnesses testified that lack of physical signs of abuse did not in any way rule out the possibility of abuse. RP 596. JJ's hearsay statements were introduced through KM, JJ's great aunt, and the forensic interviewer.

JJ herself took the stand. The first time she was asked questions about what Darrel had done that she did not like, she stated "I forgot." RP 340. Outside the presence of the jury JJ said she did not want to talk about it that day, and so she was excused. RP 342-45.

The next day JJ took the stand again. RP 386. Before doing so, she watched the video of her earlier forensic interview. RP 391. JJ stated that

Darrel had "touched me in the wrong places. . . girl places" RP 387. JJ said it happened during the day and night. It happened in the living room, her room, and her bedroom. RP 392-93. JJ did not remember what any of those rooms looked like. RP 395.

JJ told her aunt that Mr. Harris came into her room and shut her door while her mom slept. JJ also said that Mr. Harris picked her up, carried her into his room, and shut the door. RP 354-55, 364.

Mr. Harris responded by pointing out that neither his room nor KM's room had a door. RP 666-68. In fact neither bedroom even had a door frame in which a door could be hung. RP 669. Mr. Harris had bought the house three years ago in a state of disrepair and, had been remodeling it since. Because he had lived alone, putting up doors had never been a high priority. *Id.* He did, however, put a door JJ's room when KM and JJ were in the process of moving into the house. *Id.* Because her bed was 80 inches long, however, the door would not close. RP 668. Given the location of KM and JJ's bed, they would be able to see each other from their own bed. *Id.* Mr. Harris produced a scale drawing of the house that he had drawn (Ex. 14) along with pictures. KM disputed much of this, claiming there had been a door on Mr. Harris' room. RP 409-10. She also claimed that JJ's door did close, and that sometimes she would find the door closed. RP 456.

Recognizing that this would be a disputed issue, and that the prosecutor would question Mr. Harris' credibility, the defense had earlier hired a private investigator named Ron Bone to inspect the house and take measurements. Defense counsel told the jury in opening that they would hear from Mr. Bone about the layout of the house and the absence of doors. OCP 17. *Id.* That did not happen.

Prior to Mr. Harris taking the stand the prosecutor moved to exclude the investigator's testimony as cumulative of Mr. Harris' testimony. The defense agreed that the testimony would be similar to the testimony of Mr. Harris, but that it was nevertheless needed: "To be very blunt, it's an independent person that's not the defendant testifying. . . . I think that this is something important that the jury hear that it's not just coming from the accused." RP 619-20. Defense counsel added, "We are not going to spend a lot of time on it, but I think the independence of his investigation, and he may be more specific in terms of measurements and things." RP 620.

The court nevertheless excluded all testimony from the defense investigator on the basis that it was cumulative to Mr. Harris' testimony. RP 621. The court added that the investigator could testify only if Mr. Harris did not take the stand. *Id.*

As anticipated, the prosecutor crossed examined Mr. Harris extensively about the door, challenging his credibility. She questioned the

choice of the pictures he presented, and questioned him why he did not present other pictures that were taken. RP 696-98. She also questioned him about whether he staged the photographs and whether a door seen in one of the photographs could have fit in his door frame. RP 696-99; CRP 11-12.

Janet Satre, a neighbor who lived across the street from Mr. Harris, would spend a few hours every day having coffee and visiting with KM. JJ would always come over as well. RP 644. Ms. Satre testified that KM did so on November 6th. Ms. Satre remembers the date because the next day was her anniversary. RP 649. There was nothing out of the ordinary. It was a typical day with KM very talkative and friendly. KM did not seem at all agitated. RP 650.

c. The court's exclusion of the security videotape taken the morning of the alleged assault.

KM claimed that she was sexually assaulted on the morning of November 6, 2013. She described an assault so traumatic that she was in shock and could not think straight to call the police until three days later. As noted above, when she did call the police, she was in hysterics.

In order to rebut the claim that Mr. Harris had sexually assaulted KM, the defense sought to introduce home-security videotape taken the same day. RP 214-16. The tape showed Mr. Harris, KM and JJ acting

and appearing normal when leaving the house an hour after the alleged abuse. RP 216, 220-21. Another part of the video showed them returning with takeout food. Defense counsel explained how that same segment then shows Mr. Harris leaving for work. "KM waves him back over and gives him a hug. And again, very inconsistent with an individual that is alleging abuse." RP 220. The video also showed KM coming back to the property two weeks later to retrieve more belongings. She does not bring the police and merely hops the fence. She does not appear fearful. RP 221.

The court initially ruled that the tape was not relevant. The court later said it might be relevant as impeachment, depending upon KM's testimony. RP 232. However, during an earlier interview, defense counsel had already showed KM the picture of her giving Mr. Harris a "big hug." At trial, she testified that she was so scared of Mr. Harris that she gave him the hug so that he would not know anything was wrong. RP 469. Later, however, when asked "Isn't it true that he was leaving and you called him back to you and then gave the hug?" KM responded, "I don't believe so. I don't know." RP 492. She then said she didn't remember. *Id.*

Outside the presence of the jury, defense counsel moved the court to allow the video to be played. Defense counsel pointed out that the im-

ages were different than the image painted by KM. RP 617. The court stated it would look at the video. *Id.*

The next morning, the parties addressed the video issue again. Defense counsel stressed that it was admissible for more than just direct impeachment. "I think that that visual of KM engaging with an individual that she has alleged has just molested her earlier that same day is absolutely essential for the jury to see." RP 633. The court disagreed:

> The issue here isn't what happened out in the side area that's viewed from that camera. I still think that the defense will be able to argue their case, that the testimony of the witnesses shows something different than what KM may be asserting, but I don't think that at this point it goes to credibility or impeachment for the jury, so the motion is denied.

CP 637. The jury never had the opportunity to view KM's recorded behavior and decide for themselves whether it was consistent or not with her claimed "shock" and fear following the alleged assault.

d. Court orders Mr. Harris to be "emotionless" in court.

Outside the presence of the jury, defense counsel and the prosecutor addressed preliminary issues relating to JJ's testimony. RP 376. Defense counsel began explaining why a foundation had to be laid before leading questions could be asked when Judge Hogan interjected:

> Tell your client to quit emoting. I don't want him nodding or agreeing or trying to send the Court a clue, not with regard to what is being said in the courtroom. That applies to

> all the viewing public. Everybody has to remain emotionless.

RP 377.

Apparently Mr. Harris was not expressionless enough for the judge or prosecutor, as later that day the prosecutor complained that the defendant was shaking his head and "kind of smirking." RP 497. The prosecutor reminded the judge that the court had already warned Mr. Harris "not to emote." RP 497. Defense counsel stated that he had not noticed it. RP 498.

The court said she did not care if a witness emoted, but no one at counsel table could do so. RP 498. The judge continued, "the Court has observed it through the entire trial. I had it this morning with him trying to give me advice by indicating what he thought that I should do based upon what you were presenting to the Court. Not acceptable." RP 498-99. The court did not offer any advice as to how Mr. Harris should remain emotionless while his future was being decided in her courtroom.

e. Prosecutor's closing argument.

The prosecutor's main theme in closing was that the law does not require corroborating evidence of a child's words. CRP 52. This is technically true, and had the prosecutor stopped there, there would be no issue. Unfortunately, from this proposition the prosecutor turned logic on its

head and told the jurors they were required by law **not** to require corroboration.

> It was talked about in voir dire about this being the situation. It came up that some people might require more, might not just think it would be nice to have more, but actually would require more. As a juror on this case, *all of you as jurors on this case, you have taken an oath to follow that law in your instructions. That law does not require more. You took an oath to follow that law.*

CRP 52 (emphasis added).

The prosecutor followed this with the parade of horribles that would ensue if the jury required corroboration of the child witness. The prosecutor told the jury that corroborating evidence rarely exists, and that if corroboration was required, the State would rarely be able to prosecute crimes against children:

> ...[C]an you imagine a system wherein the majority of cases that are like this one, a child or victim would have to be told, sorry, we can't go forward, we can't prosecute your case because there is nothing to corroborate what you are saying. No one is going to believe a kid with nothing beside your word to prove it.

CRP 53-54. Defense counsel did not object to this or any other statements during the prosecutor's closing argument.

In closing, defense counsel disagreed that most cases do not have corroborating evidence. CRP 70-72. He then spoke about KM's anger at Mr. Harris for kicking her out, and how KM most likely influenced JJ in making these false claims. CRP 73-75, 82. In response to the prosecutor's

question of why anyone would continue to put themselves through this, counsel reminded the jury how once the falsehoods were uttered, there was no easy way for KM to admit the truth. CRP 73. Defense counsel focused upon the major inconsistencies in KM and JJ's stories, and how some of the claims were inconsistent with the physical layout of the house. *See e.g.* CRP 83-85. Defense counsel told the jury that there was simply insufficient proof to support the State's allegations. CRP 86-88.

The prosecutor rebutted: "Lucky for rapists that there is hardly any physical evidence, if any, that is ever left." CRP 96-97. The prosecutor first warned the jury that they would only be able to prosecute "maybe one percent of the crimes" if the law required more proof (CRP 91.), but then assured the jury that rape cases are prosecuted frequently with no more proof than what they had been presented here:

> What I am telling you is that there almost never is other proof. This is not unusual. Yet, these cases are prosecutable.

CRP 97.

The prosecutor closed with a plea to the jury: "Don't let the defendant get away with this because it is like so many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty." CRP 98.

III. ARGUMENT

1. RAMPANT PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED APPELLANT OF A FAIR TRIAL

a. Standard of review.

A prosecutor has a special duty in trial to act impartially in the interest of justice and not as a "heated partisan." *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Her "devotion to duty is not measured, like the prowess of the savage, by the number of their victims." *State v. Montgomery*, 56 Wash. 443, 447–48, 105 P. 1035 (1909). Rather, as a quasi-judicial officer, a prosecutor must seek verdicts free of prejudice and based on sound reason and admissible evidence. *In re Glassmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In falling short of this standard, the prosecutor not only deprives the defendant of a fair trial, but also denigrates the integrity of the prosecutor's role. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The appellant carries the burden of establishing that the prosecutor's actions were both improper and prejudicial when viewed "in the context of the record and all of the circumstances at trial." *Glassmann*, 175 Wn.2d at 704. In establishing prejudice, the appellant must establish a "substantial likelihood" that the misconduct affected the jury's verdict. *Id.* There is an additional requirement when, as is the case here, defense coun-

sel did not object to the misconduct. Appellant must also establish that the conduct was flagrant and ill-intended, and that an instruction from the court would not have cured the defect.

b. The prosecutor's arguments were designed to arouse the jury's passion by focusing on social policy and the need to protect children.

Prosecutors may not "use arguments calculated to inflame the passions or prejudices of the jury." *Glassmann*, 175 Wn.2d at 704 (quoting American Bar Ass'n, Standards for Criminal Justice, std. 3-5.8(c) (2nd ed. 1980)). This is because improper appeals to passion or prejudice prevent calm and dispassionate appraisal of the evidence. *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d 271 (2001). A prosecutor must not suggest that a conviction is needed in order to protect the community from danger. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). The reason for this is obvious: "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem." *Id.* The corollary is also true, a jury may be led to believe that by failing to convict, the jury is making society a more dangerous place. *See e.g., State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991) (finding reversible error where prosecutor suggested that by telling chil-

dren that we do not believe them when they make these complaints, it was akin to declaring "open season" on children).

In the present case, the prosecutor warned the jurors of the terrible consequences that would follow if they required more than the word of the child:

> So can you imagine a system wherein the majority of cases that are like this one, a child or victim would have to be told, sorry, we can't go forward, we can't prosecute your case because there is nothing to corroborate what you are saying. No one is going to believe a kid with nothing beside your word to prove it. You know, the law requires more. But we don't have that system. Our system doesn't require more.

CRP 53-54. The prosecutor told the jury that if some type of corroboration is required in rape cases they "could prosecute maybe one percent of the crimes." CRP 91. To everybody else they would have to say, "too bad." *Id.* Requiring more would allow rapists to escape justice because "lucky for rapists that there is hardly any physical evidence, if any, that is ever left." CRP 96-97.

The prosecutor's argument mirrors the misconduct in *State v. Thierry*, (Slip Op. No. 453769-7-II, filed Oct. 20, 2015).[2] In that case, defense counsel had focused on the inconsistencies in the child's statement, the age of the child, and the child's possible motives to lie. The prosecutor

[2] Notably, the trial prosecutor in the present case was also the trial prosecutor in *State v. Thierry*.

responded, "if that argument has any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that 'the word of a child is not enough.'" *Thierry*, Slip Op. at 4. This Court properly concluded that by focusing upon social policy and the need to protect children, the prosecutor's statement deprived the defendant of a fair trial. The same result is required here. Indeed, the misconduct in the present case surpasses that in *Thierry*.

c. The prosecutor expressed her personal opinion by introducing outside evidence in closing and expressing her personal opinion that the jury should look past the lack of corroboration because "he did it."

The prosecutor committed reversible error in closing argument when she evoked outside cases that she said were prosecuted on the same kind of evidence as what the jury was presented with in Mr. Harris' trial. In so doing, the prosecutor improperly advised the jury they could consider evidence outside the four corners of Mr. Harris' case. Additionally, she committed misconduct in campaigning for blanket justice rather than justice based on the individual facts in Mr. Harris' case.

In her zeal to convince the jury that JJ's uncorroborated testimony was sufficient for a conviction, the prosecutor told the jury, "What I am telling you is that there almost never is other proof. This is not unusual. Yet, these cases are prosecutable." CRP 97.

Not only is the prosecutor arguing facts not admitted into evidence, she is offering them as an eyewitness. She essentially tells the jury that as a prosecutor she is familiar with many cases like the one before them, and she knows that the amount of evidence before the jury is more than enough to convict. This was an outrageous violation of Mr. Harris' right to confront the witnesses and evidence before him. He could not cross-examine the prosecutor, who was the sole source of this inflammatory information. Nor should he have to. Such evidence never should have been presented to the jury.

One of the reasons why this type of argument is improper is because jurors often believe that the prosecutor's have more knowledge then they do about what is really going on. As the Washington Supreme Court explained, "Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." *In re Glassmann*, 175 Wn.2d 696, 706, 286 P.3d 673, 679 (2012), (quoting ABA Standards for Criminal Justice std. 3-5.8).

The prosecutor punctuated her misconduct by ending her closing as follows: "Don't let the defendant get away with this because it is like so

many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty." CRP 98. Read in context, this was no longer an inference based on the evidence. This was the prosecutor expressing her personal opinion of Mr. Harris' guilt. This was flagrant and ill-intended error, as it is well established that a prosecutor may not express a personal opinion as to the defendant's guilt. *State v. Reed,* 102 Wn.2d 140, 145, 684 P.2d 699 (1984). And while a prosecutor is allowed to argue that the evidence supports a conviction; that is not what happened here. The prosecutor did the opposite, assuring the jury that Mr. Harris "did it" despite the lack of corroborating evidence. Given the context, it would have been clear to the jury that the prosecutor was expressing her personal opinion based on her knowledge as a prosecutor that the defendant was guilty. Mr. Harris' conviction should be reversed as a result of this prejudicial misconduct.

d. In her closing argument, the prosecutor misrepresented the law and the jury's function.

The prosecutor misrepresented the law and the jury's function when she told the jurors that they had all taken an oath to not require more than the child's word: "It came up that some people might require more, might not just think it would be nice to have more, but actually would require more. As a juror on this case, all of you as jurors on this case, you

have taken an oath to follow that law in your instructions. That law does not require more." CRP 52. Under the prosecutor's statement of the law, the jurors would be violating their oath if they decided that the child's word alone was insufficient to meet the State's burden. This misrepresentation of the law constitutes misconduct.

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213, 1217 (1984). Thus, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) (improper for prosecutor to argue reasonable doubt does not mean to give the defendant the benefit of the doubt).

The prosecutor further misrepresented the jury's function when she implored them to ignore the evidence, or lack thereof, in reaching their verdict. She told them the lack of corroboration "doesn't matter. He did it. Find him guilty." CRP 98. With this statement, the prosecutor not only diminished the importance of evidence, she encouraged the jury to follow their intuition as to what actually happened, regardless of the evidence. But, "truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden. *State v. Berube*, 171 Wn. App. 103, 120,

286 P.3d 402, 411 (2012). The jury's function in a criminal trial is to determine whether the State has presented sufficient evidence to overcome the presumption of innocence with proof beyond a reasonable doubt. *State v. Walker*, 182 Wn.2d 463, 480, 341 P.3d 976 (2015). The lack of corroboration *does* matter; it is a factor the jury was required to consider in deciding whether the State had met its burden.

e. The error is preserved for appeal and reversal is required because cumulative misconduct affected the jury's verdict.

As a general rule, defense counsel is required to object in order to preserve an issue on appeal. "However, the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (reversing a conviction based on prosecutorial misconduct which had not been objected to below). The initial question to be resolved is whether the misconduct was so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In applying this standard, courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In our case, the much repeated argument by the prosecutor was that jurors must convict without corroborating evidence, or child rapists will never be held accountable. This same type of improper argument was addressed in *State v. Powell, supra,* where the prosecutor discussed the consequences of failing to accept a child's word. Defense counsel failed to request a curative instruction. In deciding whether the issue could be raised on appeal, the appellate court reasoned that it was mere speculation that a carefully worded instruction would have remedied the prejudice caused by the remarks. *Powell*, 62 Wn. App. at 919. "This is one of those cases of prosecutorial misconduct in which 'the bell once run cannot be unrung.'" *Id., quoting State v. Trickel*, 16 Wn. App. 18, 30, 533 P.2d 139 (1976).

The same reasoning applies in the present case. The prosecutor told the jury that this type of case is prosecuted all the time on this type of evidence, and that a refusal to convict on this type of evidence would mean that most rapists and child molesters would go free. No curative instruction could unring this bell.

Although social policy of protecting children was the predominate theme in closing, there was additional misconduct. As described above, the prosecutor misstated the jury's role, misrepresented the law, trivialized the reasonable doubt standard, and expressed her personal opinion as to

the defendant's guilt. As this Court previously recognized, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker,* 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (citing *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500, 504 (1956)). Because a curative instruction would not have remedied the various acts of misconduct, the lack of an objection does not preclude appellate review.

After determining that the error can be addressed on appeal, the next question is whether there is a reasonable likelihood the misconduct affected the jury verdict. "The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, 'do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.'" *State v. Rose,* 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting *State v. Buttry,* 199 Wash. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). In assessing the prejudicial impact of the prosecutor's misconduct, the reviewing court does not consider each statement in isolation. Rather, the court focuses upon the

"cumulative effect of the prosecutor's improper conduct." *State v. Jungers*, 125 Wn. App. 895, 906, 106 P.3d 827 (2005).

In *State v. Emery*, *supra*, the Supreme Court concluded that Emery could not demonstrate that the statements affected the jury's verdict because the State's case was "very strong, probably overwhelming" and lacked conflicting testimony. *Emery*, 174 Wn.2d at 764. By contrast, where the State's case turns almost exclusively on the credibility of the complaining witness, a prosecutor's improper remarks are more likely to affect the verdict. *State v. Boehning*, 127 Wn. App. 511, 523, 111 P.3d 899 (2005). In the present case, the State's evidence was far from "overwhelming" as there was no physical evidence, no other witnesses, and plenty of conflicting testimony. This was a difficult case for the State, which may explain why the prosecutor resorted to improper comments in closing.

2. IN THE ALTERNATIVE, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO OBVIOUS MISCONDUCT.

The Federal and State Constitutions guarantee all criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). If this Court finds that the prejudice resulting from the prosecutor's repeated acts of misconduct could have been cured by an

objection and instruction from the trial court, then defense counsel was ineffective in failing to make those objections.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness and may be satisfied by showing that defense counsel failed to object to improper remarks by the prosecutor in closing. *State v. Horton*, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003). *Burns v. Gammon*, 260 F.3d 892, 895-96 (8th Cir. 2001). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." *In re Cross*, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

In some limited circumstances, the failure to object may be strategic. For instance, in *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995), defense counsel did not object to an improper line of questioning where the prosecutor was trying to provoke the defendant in cross examination to call the officers liars. Defense counsel did not object. In finding that this was a strategic decision, the court noted that the defendant "stood up well to the improper questioning" and "refused to agree that the State's witnesses were

lying or incorrect." *Id.* Such is not the case here. There was no strategic value in remaining silent and allowing the prosecutor to mislead the jury. Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. *State v. Powell*, 62 Wn. App. at 919.

In order to show prejudice, Mr. Harris need not show that his attorney's deficient performance *more likely than not* altered the outcome of the proceeding. *State v. Thomas*, 109 Wn.2d at 226. Rather, he need only show "a probability sufficient to undermine confidence in the reliability of the outcome." *Fleming*, 142 Wn.2d at 866 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As discussed above, the State's case was far from overwhelming. Defense counsel's failure to object lent credence to the prosecutor's arguments and unfairly tipped the jury in favor of the prosecution.

3. THE COURT VIOLATED MR. HARRIS' SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND IMPEACH A WITNESS WHEN IT EXCLUDED THE SECURITY VIDEO AND THE TESTIMONY OF THE DEFENSE INVESTIGATOR.

a. The video footage.

KM claimed that following a sexual assault on the morning of November 6, 2013, she was shocked and terrified for her life. The footage from a security camera outside the house, however, painted a very different picture. Mr. Harris was entitled to present the video so that the jurors

could decide whether KM's actions and demeanor that morning were inconsistent with her account. Further, because KM was unwilling to admit or "remember" whether she called Mr. Harris back for a hug before he left for work that day, the testimony was necessary to establish that fact.

A defendant has the right to present evidence in his or her defense. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Washington courts recognize that the defendant's interest in presenting relevant evidence is strong, and "the integrity of the truth finding process" and the right to a fair trial are also at stake. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Generally, evidentiary issues are reviewed for an abuse of discretion; however, a de novo review applies when the defendant is denied the opportunity to present a meaningful defense. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

In *State v. Hudlow*, the Washington Supreme Court created a test for determining the admissibility of evidence in the defense case. *Hudlow*, 99 Wn.2d at 14. More recently, the Supreme Court in *State v. Jones* reaffirmed the applicability of that test. *Jones*, 168 Wn.2d at 720. First, the evidence "must be of at least minimal relevance." *Jones*, at 720. Second, if evidence passes the threshold of minimal relevance, the burden shifts to the prosecution "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.* Only if the State's need to

exclude the evidence is "compelling in nature" may the trial court exclude even minimally relevant evidence. *Id.* at 723.

Third, the court must assume the evidence to be true and assess its probative value to the issues in the case; the greater the probative value, the greater the State's burden to justify exclusion. Thus, there is no State interest that can justify exclusion of highly probative evidence. *Jones*, at 720; *Hudlow*, 99 Wn.2d at 16.

A trial court is not allowed to substitute its judgment for that of the jury, and may not exclude evidence because the court finds it unpersuasive. *See e.g., United States v. Platero*, 72 F.3d 806, 813 (10th Cir. 1995). ("If a rule were to say that a defendant may not offer evidence in defense unless the Judge believes it, that rule would violate the right to jury trial.")

The trial court believed that evidence of "what happened out in the side area that's viewed from the camera" was not the issue in the case and that the footage was irrelevant. CP 637. Yet in the very next sentence of her ruling, the court agreed that the testimony of the witnesses about KM's actions following the alleged incident was still admissible. *Id.* Clearly, the court and the parties recognized that the actions occurring that morning and afternoon were relevant to the issue of whether a sexual assault had occurred and whether KM was in fear for her life. If the testimony of

what occurred was relevant, there are no conceivable grounds for finding that video of that same subject matter was not relevant. ER 401.

Once relevancy was established, the burden was on the State to establish that admission of the video footage would have been so "prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d 720. The State made no effort to do so, nor is there any argument that would support such a position.

This only leaves the issue of whether the error was harmless. It was not. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Jones*, 168 at 724; *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In our case, the jury heard two different accounts of what happened on November 6, 2013. In one version, Mr. Harris was helping KM with a doctor visit and everyone was getting along well. In the other, KM had just been assaulted, and by her own account, was shocked, terrified for her life, and near hysterical. The security footage provided a means by which Mr. Harris could have raised, at the very least, a reasonable doubt as to the validity of KM's claims of assault. Moreover, because the defense theory was that KM was leading JJ, undercutting KM's credibility would have weakened the State's case on the child rape and molestation charges.

Finally, even if this were treated as non-constitutional error, the court's ruling that the evidence was not relevant was clearly untenable and therefore an abuse of discretion. Further, given the inconsistencies in the State's case and the lack of corroborating evidence, within reasonable probabilities the outcome would have been different had the jury seen the video. *See State v. Smith,* 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (applying non-constitutional standard to erroneous admission of evidence to reverse conviction).

b. Exclusion of the defense investigator.

Evidence relating to the layout of the house and lack of a door on Mr. Harris' room was a key component in the defense case. If true, then JJ's account of Mr. Harris taking her into his room and closing the door could not have been true. Had the jury been aware of this flight of fantasy, the jury would likely have questioned other parts of her testimony as well. Furthermore, because KM insisted that there was a door on Mr. Harris' bedroom and that she often saw JJ's door fully closed, this evidence would have cast doubt upon KM's credibility as well.

The court apparently recognized the disputed door facts had direct bearing on the case, but nevertheless excluded the investigator's testimony as cumulative of Mr. Harris' proposed testimony. RP 621. This was error.

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, relevant evidence "may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or **needless** presentation of cumulative evidence." (emphasis added). A trial court's decision under ER 403 is reviewed for abuse of discretion. *Subia v. Riveland*, 104 Wn. App. 105, 113-114, 15 P.3d 658 (2001) (reversible error where court excluded polygraph evidence under ER 403).

Applying this standard here, the trial court could only exclude the investigator's testimony regarding his inspection of the house if the probative value of that testimony was "substantially" outweighed by the "needless" presentation of cumulative evidence. This standard is not met here. First, the probative value of the evidence itself was great. Moreover, as defense counsel explained to the court, it was important that the jury hear this from a non-party witness who had conducted an independent investigation. RP 620-21. Finally, as defense counsel informed the court, very little time would be required for the witness: "[I]n terms of it being a

waste of time, I think Mr. Bone will be on and off. We are not going to belabor it. We are not going to spend a lot of time on it." RP 621.

The judge did not appear to take any of these factors into consideration when she repeated that there was no reason for the jury to hear from two witnesses on this issue. This was error. *See Mogelberg v. Calhoun*, 94 Wn. 662, 677, 163 P. 29, 34 (1917) (Where "the evidence was not excluded because it was incompetent, irrelevant, or immaterial, but solely because of the ruling of the court limiting the number of eyewitnesses to the accident which might be produced and examined in behalf of appellants," the Court was "constrained to hold that the trial court erroneously excluded the testimony of these witnesses.")

An erroneous ruling requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilson*, 144 Wn.App. 166, 177-178, 181 P.3d 887 (2008). In closing, the prosecutor began her discussion of the doors and the layout of the house by attacking Mr. Harris' credibility.

"The defendant testified. Like I have said, you can consider his motive in weighing his credibility. He does have something to lose or to gain by testifying." CRP 63.

This was consistent with her extensive cross-examination of Mr. Harris. The prosecutor questioned Harris' decision to present certain pho-

tographs of the house over others. RP 696-98. She asked him whether he staged the photographs, and whether a door seen in one of the photographs could have fit in his doorframe. RP 696-99; CRP 11-12. Had the investigator been allowed to testify, the prosecutor would not have been able to assail his credibility in the same way, as the investigator's livelihood is dependent on presenting accurate information.

The trial court's ruling placed Mr. Harris at great disadvantage. Unfortunately, because the possibility of conviction is often viewed as a motive to lie, juries are less likely to accept a defendant's uncorroborated testimony at face value. In contrast, the jury is not likely to view a six year old child as purposefully deceitful. An unbiased witness to testify about the absence of a door would have leveled this uneven playing field. Within reasonable probabilities, the trial court's exclusion of this evidence had a material impact on the jury verdict. The court's ruling deprived the defense of a fair trial.

4. THE COURT VIOLATED APPELLANT'S SIXTH AMENDMENT TRIAL RIGHTS WHEN IT REQUIRED HIM TO REMAIN "EMOTIONLESS" IN THE COURTROOM.

It has long been recognized that a jury observes a defendant in the courtroom, even when the defendant is not on the witness stand, and that jurors will draw conclusions based on such observations. For this reason, a

defendant has the right to appear unshackled in court, absent a specific security risk. *See State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (1999). It is also one of the reasons why defendants cannot be needlessly medicated, as it affects their demeanor in front of the jury. *State v. Maryott*, 6 Wn. App. 96, 101-03, 492 P.2d 239 (1971). The Washington Supreme Court recently declined to disavow the jury's consideration of this evidence, indicating that it remained an open question. *State v. Barry*, 183 Wn.2d 297, 305, 352 P.3d 161 (2015).

The upshot of these principles is that when the court seeks to dictate the defendant's demeanor in trial, including his facial expressions and posture, the court is dictating how the jury will perceive and evaluate the defendant. In doing so, the court infringes upon the defendant's federal and state due process rights and the right to be present and seen in court.

Every accused has a fundamental right to be present at his trial and to confront the witnesses against him. This right is guaranteed by the due process clause and the Sixth Amendment to the United States Constitution, as well as Article 1, section 22 of the Washington State Constitution. *Maryott*, at 103. The state constitution provides: "In criminal prosecutions the accused shall have the right to appear and defend in person." Art. 1, sec. 22.

This right is not without limits. Trial courts may implement rules to promote the state's interest in an orderly trial. Thus, a defendant who disrupts proceedings may be shackled, or in some cases, removed from the courthouse. *See State v. Chapple* 145 Wn.2d 310, 36 P.3d 1025 (2001) (given the severity of the defendant's courtroom behavior, removal from courtroom was least restrictive remedy to defendant's disruption of the courtroom). In each case, however, the limitation must be no more than necessary to meet the state's need.

Here, there was no justification for the court's limitation on Mr. Harris' appearance in front of the jury. By ordering him to remain "emotionless," the judge's order forced Mr. Harris to act unnaturally. This could not help but impact the jury's perception of Mr. Harris.

Because this limitation relates directly to Mr. Harris' Sixth Amendment right to appear at trial, the constitutional error standard applies. Under this test, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Cortistine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The State has no evidence from which it could satisfy this burden.

5. CUMULATIVE ERROR REQUIRES REVERSAL.

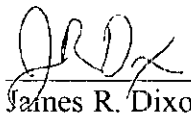
Every defendant has the right to a fair trial. U.S. Const. amend. VI; Const. art. 1, § 22. Cumulative error may deprive a defendant of this

right. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even unpreserved errors may contribute to a finding of cumulative error. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court concludes the above errors do not individually require reversal, their combined effect does. Reversal is required.

IV. CONCLUSION

The combination of the prosecutor's repeated acts of misconduct, the exclusion of necessary defense evidence, and the court's requirement that Mr. Harris remain emotionless throughout the court proceeds all contributed to an unfair trial. Meanwhile, the State's case was rife with inconsistencies and lacking in corroboration. The errors in this case, singularly and collectively, deprived Mr. Harris of a fair trial. For all of these reasons, appellant respectfully requests that the court vacate his conviction and remand the case for a new trial.

Respectfully Submitted on this 17th day of December, 2015.



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CERTIFICATE OF SERVICE

I, James R. Dixon, certify on December 18, 2015, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

Kathleen Proctor (X) Email
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DATED: December 18, 2015, in Seattle WA

James R. Dixon

12/21/2015 12:18 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARREL HARRIS,

Appellant.

No. 47477-8-II

DECLARATION OF PROOF OF SERVICE ON APPELLANT

I, James R. Dixon, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over 18 years old, I am competent to testify, and have personal knowledge of the facts contained in this declaration.

2. I am attorney of record for Appellant Darrel Harris. On December 21, 2015, I did deposit in the US mail, postage prepaid, a copy of appellant's corrected opening brief addressed to Darrel Harris, DOC 381154 at his current address at Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

DATED: December 21, 2015

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