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A. **ARGUMENT IN REPLY**

1. *THE TRIAL COURT ERRED WHEN IT ADMITTED THE KNIFE EVIDENCE.*

In his opening brief, appellant Samuel McDonough asserts the trial court abused its discretion when it admitted irrelevant and prejudicial evidence despite the defense's timely objection. Brief of Appellant (BOA) at 7-12. This evidence consisted of a knife that just happened to be found on McDonough and was in no other way even remotely connected to the charged crimes. RP 320.

In response, the State claims the trial court did not abuse its discretion because there was a "good faith basis" at the time the evidence was offered to believe the knife was relevant to proving McDonough was attempting to accomplish an assault by having a pocket knife on his person. Brief of Respondent (BOR) at 13-14. Yet, the trial court ultimately disagreed, eventually concluding the knife evidence was so far disconnected from the facts at issue that it could not support such an argument. RP 663.

Trying to explain away trial court's final ruling, the State suggests the relevance of the knife evidence somehow diminished over the course of the trial. BOR at 14. However, it points to nothing in the record that supports such a notion. This is not a case where new evidence was discovered during the course of the trial, where a State's witness unexpectedly changed his testimony, or where evidence was excluded at the last minute. Indeed, this record shows the probative value of the

evidence, and the State's proposed use of it, never changed throughout the trial. Thus, there is no reasonable explanation for why the trial court overruled the defense's ER 401/403 objection during the State's case-in-chief, while later agreeing there was no logical connection between the knife and the charged offenses. As such, the trial court abused its discretion when it admitted the knife evidence over defense objection under ER 401.

Even if this Court finds the evidence was at least minimally probative of a material fact, the evidence still should have been excluded under ER 403. Based on the record, it is unclear whether the trial court undertook a complete analysis under ER 403 at the time defense counsel made his initial objection. However, the trial court's later comments makes it quite clear that it considered the probative value of the knife evidence so minimal as to be easily outweighed by the potential prejudice of the evidence. RP 663.

In his opening brief, McDonough argued in detail that the trial court erred when it overruled defense counsel's objection under ER 403. BOA at 9-12. Apparently the State does not disagree, as it offers absolutely no argument in response. BOR at 12-17. For this reason, and those explained in appellant's opening brief, this Court should find the trial court abused its discretion when it admitted the knife evidence over the defense's ER 403 objection.

Finally, the State claims the trial court's error in admitting the knife evidence was harmless. BOR at 17. The State myopically focuses on the evidence it presented in its case-in-chief, suggesting the evidence of guilt was "overwhelming." However, the State fails to take into account the fact that McDonough raised a defense that seriously weakened the State's case as it pertained to the knowledge element.

To prove indecent exposure, the State was required to prove the defendant knew that his conduct was likely to cause reasonable affront or alarm. CP 79. This was the core element in dispute. The defendant presented considerable evidence showing he lacked capacity to know that his conduct was likely to cause affront or alarm. Records from Harborview hospital established McDonough was high on methamphetamine and suffering from diabetes-induced hyperglycemia at the time of the incident. RP 529, 540-41. Other records confirmed McDonough suffers from schizophrenia. RP 537. Based on these facts, the defense expert opined McDonough was suffering from drug induced delirium during the incident and, consequently, did not have the requisite knowledge. RP 520, 533, 543. Factoring in this defense, it cannot be said the State's proof as to the knowledge element was overwhelming.

More importantly, the knife evidence was highly prejudicial. See, State v. Freeburg, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) (recognizing that evidence of dangerous weapons found in the possession of a defendant is highly prejudicial). As argued in detail in appellant's

opening brief, putting a knife in the pocket of Mr. McDonough – a schizophrenic who has a drug problem and a physical condition that both exacerbate his mental illness – served to paint the frightening picture of a very unstable man who walks around armed with a dangerous weapon while ignoring society's sexual boundaries. BOA at 11-12.

It hardly needs to be said that such an image runs a high risk of provoking in even the most reasonable person the instinct to protect the community by removing this individual from the streets and the desire to punish him.¹ Given the power of this image in addition to the prosecutor's closing argument – which did not directly address the knife, but which directly pandered to the jurors' emotions – it cannot be said that the trial court's error in admitting this irrelevant and prejudicial evidence was harmless.

2. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL.

In his opening brief, appellant asserts the prosecutor committed misconduct by appealing to the jurors' passions, making an impermissible golden rule argument, and inflaming the jurors' community safety concerns. BOA at 12-20. In response, the State claims the prosecutor

¹ The State suggests that the fact the jury only found McDonough guilty of one of the two charges demonstrates the knife evidence did not invoke the instinct to punish. BOR at 18. However, the jury only needed to convict McDonough of one crime to insure punishment and his removal from society. Additionally, indecent exposure with sexual motivation is a charge that is inherently more susceptible to raising the jury's prejudices. See, State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982). Thus, the State's argument is not persuasive.

properly argued the evidence and the law. BOR at 22-27. As shown below, neither the record nor case law supports the State's analysis.

First, the State claims it was the jurors' job to "consider the reasonableness of the victim's fear and therefore assess how a reasonable person would be feeling in the victim's circumstances." RP 23. However, it was not the job of the jury to determine whether the victim's subjective fears were reasonable. It was the job of the jury to determine whether McDonough knew his actions were likely to cause reasonable affront or alarm. The concept of fear is to be considered using an objective standard. See, State v. Vars, 157 Wn. App. 482, 493, 237 P.3d 378 (2010) (analyzing the knowledge from an objective perspective). Thus, it was unnecessary for the prosecutor to fixate on the subjective fears of the witnesses when arguing his case, especially when he had a duty to refrain from provoking a verdict based on emotion.

The prosecutor's fixation on the witness' subjective fears led him to move far beyond merely arguing relevant facts and the law. Instead, he put forth an argument that essentially asked the jurors to evaluate the strength of the State's case by standing in the victim's shoes and that conjured community safety concerns. RP 671-73. This was improper. No matter how one parses the actual words and sentences used by the prosecutor (see BOR at 23-27), the prosecutor was not merely arguing the elements and the evidence. He was appealing to the jurors' fears and passions. See, BOA 12-20 (providing more detailed argument).

Next, the State claims McDonough was not prejudiced by any misconduct during closing argument. BOR at 29-34. This is not so.

Because McDonough preserved the issue by objecting at trial, this Court applies the more lenient standard requiring only that the record show there was a substantial likelihood that the improper comments prejudiced the trial by affecting the jury. State v. Emery, 174 Wn. 2d 741, 760, 278 P.3d 653 (2012).

The State suggests this Court should focus on the strength of the State's case alone. BOR at 30-33. However, it is well-established in Washington that "[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom." State v. Emery, 174 Wn. 2d 741, 762, 278 P.3d 653 (2012) (citing State v. Navone, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). "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?" Id. (citing Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)). Thus, this Court's inquiry should hinge on determining whether there is a likelihood that a prejudicial, emotional response has flowed from the prosecutor's misconduct.

As discussed in detail in appellant's opening brief (BOA at 17-20), the prosecutor's argument served to encourage a close emotional attachment between the jurors and the alleged victims and to focus the jury on their subjective fears. The jury was diverted from applying an

objective standard in relation to the knowledge element and instead encouraged to decide that element based on the victims' subjective fears. Hence, there is a substantial likelihood that prejudice to the defendant's right to a fair trial flowed from the prosecutor's misconduct.

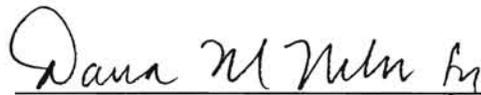
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this court should reverse appellant's conviction.

DATED this 8th day of August, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 69378-6-1
)	
SAMUEL MCDONOUGH,)	
)	
Appellant.)	

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 8TH DAY OF AUGUST, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SAMUEL MCDONOUGH
P.O. BOX 885
PRESTONM, WA 98050

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF AUGUST, 2013.

X Patrick Mayovsky

2013 AUG -8 PM 4:09
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE