

72514-9

72514-9

FILED
Oct 12, 2015
Court of Appeals
Division I
State of Washington

NO. 72514-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCUS RUFFIN,

Appellant.

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

The Honorable Timothy A. Bradshaw, Judge

REPLY BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.	1
2. PROSECUTORIAL MISCONDUCT DEPRIVED RUFFIN OF HIS RIGHT TO A FAIR TRIAL.	12
3. THE COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT WOULD HAVE REBUTTED THE PROSECUTOR'S INSINUATION RUFFIN RECENTLY FABRICATED HIS ALIBI, IN VIOLATION OF RUFFIN'S RIGHT TO PRESENT A DEFENSE.....	15
C. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1
124 Wn.2d 816, 881 P.2d 986 (1994) 6

In re Electric Lightwave, Inc.
123 Wn.2d 530, 869 P.2d 1045 (1994) 6

Kucera v. State
140 Wn.2d 200, 995 P.2d 63 (2000) 6

State v. Bennett
161 Wn.2d 303, 165 P.3d 1241 (2007) 5

State v. Davila
183 Wn. App. 154, 333 P.3d 459 (2014) 13

State v. Emery
174 Wn.2d 741, 278 P.3d 653 (2012) 4, 5, 9, 11

State v. Finch
137 Wn.2d 792, 975 P.2d 967 (1999) 16

State v. Harras
25 Wn. 416, 65 P. 774 (1901) 9

State v. Harsted
66 Wn. 158, 119 P. 24 (1911) 9, 10, 11

State v. Kalebaugh
183 Wn.2d 578, 355 P.3d 253 (2015) 1, 2, 3, 4, 5, 9, 11

State v. Kirkman
159 Wn.2d 918, 155 P.3d 125 (2007) 3

State v. McWilliams
177 Wn. App. 139, 311 P.3d 584 (2014) 18

<u>State v. Nabors</u> 8 Wn. App. 199, 505 P.2d 162 (1973).....	8
<u>State v. O'Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009).....	2, 3
<u>State v. Tanzymore</u> 54 Wn.2d 290, 340 P.2d 178 (1959).....	8
<u>State v. Thompson</u> 13 Wn. App. 1, 533 P.2d 395 (1975).....	7, 8, 9
<u>State v. Vandenberg</u> 19 Wn. App. 182, 575 P.2d 254 (1978).....	19

OTHER JURISDICTIONS

<u>Burt v. State</u> (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342).....	9
<u>Butler v. State</u> 102 Wis. 364, 78 N.W. 590 (Wis. 1899).....	10

RULES, STATUTES AND OTHER AUTHORITIES

ER 602	13
ER 801	15, 16, 18
RAP 2.5.....	1, 2, 3
RCW 9A.08.020	13
WPIC 4.01.....	1, 2, 3, 4, 5, 6, 7, 9, 11

A. ARGUMENT IN REPLY

1. WPIC 4.01 DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED.

In his opening brief, Ruffin argued WPIC 4.01, which defines reasonable doubt as “one for which a reason exists,” is unconstitutional because it requires jurors to articulate a reason for their doubt. Brief of Appellant (BOA) at 32-41. In response, the State argues any error in the instruction is waived, since Ruffin did not object to the state’s proposed instruction. Brief of Respondent (BOR) at 22-24. Alternatively, the state argues WPIC 4.01 is a correct statement of the law. BOR at 24-26. The state is incorrect on both counts.

First, the constitutional error is reviewable for the first time on appeal. As a general matter, a party waives the right to appeal an error unless there is an objection at trial. RAP 2.5(a). But as with many general rules, there are exceptions and the appellate court will review some errors even without an objection below. State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253, 255 (2015).

One exception is for “manifest error[s] affecting a constitutional right.” RAP 2.5(a)(3). Before reviewing the merits of

an unpreserved error under RAP 2.5(a)(3), the court asks two questions: (1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest? State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

Applying the reasoning from the Supreme Court's recent decision in Kalebaugh, both questions must be answered affirmatively here. At issue in Kalebaugh was the trial judge's opening remarks to the jury explaining "reasonable doubt." Specifically, after reading the pattern instruction (WPIC 4.01), the judge stated:

If after your deliberations you do not have a doubt for which a reason can be given as to the defendant's guilt, then, you are satisfied beyond a reasonable doubt.

On the other hand, if after your deliberations you do have a doubt for which a reason can be given as to the defendant's guilt, then, you are not satisfied beyond a reasonable doubt.

Kalebaugh, 355 P.3d at 255.

Although there was no objection, the Supreme Court held the judge's misstatement of the law was reviewable for the first time on appeal. First, the Court held Kalebaugh met the first part of the RAP 2.5(a)(3) test, as his asserted error implicated the

constitutional interest in the presumption of innocence. Kalebaugh, 355 P.3d at 256 (instructions that misstate reasonable doubt or shift the burden of proof to the defendant are constitutional errors).

And because the trial judge could have corrected the error, the error was manifest from the record:

In O'Hara we held that under RAP 2.5(a)(3), manifestness “requires a showing of actual prejudice.” 167 Wn.2d at 99, 217 P.3d 756 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). “To demonstrate actual prejudice, there must be a ‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” Id. (alteration in original) (internal quotation marks omitted) (quoting Kirkman, 159 Wn.2d at 935, 155 P.3d 125). Next, “to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” Id. at 100, 217 P.3d 756. The trial judge instructed that a “reasonable doubt” is a doubt for which a reason can be given, rather than the correct jury instruction that a “reasonable doubt” is a doubt for which a reason exists. WPIC 4.01, at 85. The jury instruction given was a misstatement of the law that the trial court should have known, and the mistake is manifest from the record. Thus, Kalebaugh’s claim is manifest constitutional error and can be raised for the first time on appeal.

Kalebaugh, 355 P.3d at 256.

The same is true here. The error raised by Ruffin is likewise a constitutional error because the reasonable doubt instruction

improperly added an articulation requirement and thereby required more than a reasonable doubt to acquit. It implicated the presumption of innocence to the same extent as did the judge's comments in Kalebaugh.

And as in Kalebaugh, the court could have corrected the error. The judge instructed the jury "a reasonable doubt is one for which a reason exists." CP 29. This was a misstatement of the law for the same reason as a "fill-in-the blank" argument is misconduct in closing argument – it "improperly implies that the jury must be able to articulate its reasonable doubt." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The trial court should have known, and thus, the mistake is evident from the record. Ruffin's claim is manifest constitutional error that may be raised for the first time on appeal.

As the state notes in its response, the Kalebaugh Court went on to find the judge's misstatement of the law harmless in that case because the "the judge gave the proper instruction from WPIC 4.01." Kalebaugh, 355 P.3d at 256. The state therefore asserts the Supreme Court held WPIC 4.01 is a correct statement of the law. BOR at 25.

Importantly, however, the court accepted Kalebaugh's concession at oral argument "that the judge's remark 'could live quite comfortably' with the final instructions given here." Kalebaugh, 355 P.3d at 256.

The court's recognition that the instruction "a doubt for which a reason can be given" can "live quite comfortably" with WPIC 4.01's language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors likewise are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their reasonable doubt. WPIC 4.01 requires jurors to articulate to themselves or others a reason for having a reasonable doubt. No Washington court has ever explained how this is not so. Kalebaugh did not provide an answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case.

None of the appellants in Kalebaugh, Emery, or State v. Bennett argued that the language requiring "a reason" in WPIC 4.01 misstates the reasonable doubt standard. In Bennett, the Supreme Court directed trial courts to give WPIC 4.01 at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). In Emery, the court contrasted the

“proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. 174 Wn.2d at 759. As indicated above, in Kalebaugh, the court contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” Kalebaugh, 355 P.3d at 326.

“In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01’s language does not control. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. Kucera v. State, 140 Wn.2d 200, 220, 995 P.2d 63 (2000); In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

Moreover, WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which there is a reason with a doubt for which a reason can be given. Forty years ago, the Court of Appeals addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside the articulation argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Id. at 5.

That cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further “context” erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors] doubts

must be based on reason” fails to account for the obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.” Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing “this instruction has its detractors,” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5. In holding the trial court did not err in refusing the defendant’s proposed instruction on reasonable doubt, Tanzymore simply stated the standard instruction “has been accepted as a correct statement of the law for so many years” that the defendant’s argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cites Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addresses the doubt “for which a reason exists” language in the instruction. There was no challenge to that language in either case, so it was not an issue.

Thompson observed “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing

State v. HARRAS, 25 Wn. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. HARRAS found no error in the following instructional language: “It should be a doubt for which a good reason exists.” 25 Wn. at 421. HARRAS simply maintained the “great weight of authority” supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). Id. This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.

So HARRAS viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in HARRAS. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which a reason exists” language means a doubt for which a reason can be given. That is a problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Emery, 174 Wn.2d at 759-60; Kalebaugh, 355 P.3d at 256.

State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) further illuminates the dilemma. Harsted took exception to the following

instruction: “The expression ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The Supreme Court explained the phrase “reasonable doubt” means:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63.

In support of its holding that there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding instructions that defined a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one of these decisions, “[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (Wis. 1899). Harsted noted some courts disapproved of the same kind of language, but was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wn. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation demolishes the argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. The Supreme Court found no such distinction in Harsted and Harras.

The problem has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. This is apparent because the Supreme Court in Emery and Kalebaugh, and numerous Court of Appeals decisions in recent years, condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law has evolved. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01’s doubt “for which a

reason exists” and the erroneous doubt “for which a reason can be given.” Both require a reason for why reasonable doubt exists. That requirement distorts the reasonable doubt standard to the accused’s detriment.

2. PROSECUTORIAL MISCONDUCT DEPRIVED RUFFIN OF HIS RIGHT TO A FAIR TRIAL.

On direct of Mommer, the prosecutor elicited that Mommer was convicted of the same crime for which Ruffin stood charged as an “accomplice.” 9RP 122, 182-83. The prosecutor elicited that an accomplice is “Somebody that aids somebody.” 9RP 122. He elicited from Mommer that his convictions were akin to aiding and abetting and/or that his jury found he merely helped out. 9RP 122.

In his opening brief, Ruffin argued the prosecutor’s assertion at Ruffin’s trial that Mommer was *convicted* as an accomplice was based on nothing more than the prosecutor’s unsubstantiated speculation, as the jury instructions and verdict forms provided no means to deduce the jury’s thought process. BOA, at 41-42.

Ruffin argued that by inserting this speculation as fact into Ruffin’s trial, the prosecutor invaded the province of the jury to determine the facts as tried before them. BOA at 42-46. Ruffin also argued the prosecution’s insertion of speculation as fact also

amounted to vouching by asserting a jury already decided Mommer was the less culpable of the two alleged participants, which likely caused jurors to attach more weight to his testimony than they otherwise would. Id.

In response, the state argues there was no misconduct, claiming (again) Mommer was convicted as an accomplice:

The prosecutor did not interject anything. The prosecutor asked Mommer if he had been convicted as an accomplice.¹⁶ Certainly Mommer knew (as did Ruffin's trial counsel) that the State's theory at his trial, and the evidence that was produced at the trial, was that he was not the shooter.¹⁷ A witness is permitted to testify to evidence to which he or she has personal knowledge. See ER 602.

¹⁶ [definition of accomplice liability under RCW 9A.08.020(3)(a)(i), (ii).]

¹⁷ Had the prosecutor proceeded on inconsistent theories against Mommer and Ruffin, this could have amounted to a due process violation. See State v. Davila, 183 Wn. App. 154, 174, 333 P.3d 459 (2014) (The use of inconsistent theories to obtain convictions against separate defendants in prosecutions for the same crime violates the due process clause if the prosecutor uses false evidence or acts in bad faith").

BOR at 37.

However, the state's theory and what the jury actually decided are two separate matters. The jury was free to disbelieve the state's theory and find that Mommer was in fact the shooter. He was the only one on trial and the state did not offer the identity

of the other alleged participant. And as indicated in the opening brief, Susan Usmaal's testimony suggests there could have been two shooters, one who shot Rose and one who shot Ashton after the first shooter left, in which case the jury could have found Mommer principally responsible for the murder. See BOA at 48-49. The state does not address this testimony in its response, however. BOR at 37-38.

And significantly, the state also does not argue the defense failed to preserve its objection to the prosecutor's misconduct. BOR at 37-38. Nor can it, as defense counsel lodged two objections to the prosecutor's questioning of Mommer regarding his "conviction" as an accomplice. 9RP 122. Counsel was correct it was not relevant in Ruffin's trial. Indeed, it invaded the province of the jury and amounted to improper vouching by the prosecutor. Because Ruffin was prejudiced by this misconduct, this Court should reverse. See BOA at 48-49 (outlining testimony from which jury could have found Mommer shot Reyes after Ruffin left).

3. THE COURT ERRONEOUSLY EXCLUDED EVIDENCE THAT WOULD HAVE REBUTTED THE PROSECUTOR'S INSINUATION RUFFIN RECENTLY FABRICATED HIS ALIBI, IN VIOLATION OF RUFFIN'S RIGHT TO PRESENT A DEFENSE.

Ruffin's defense was alibi, although it was not timely disclosed to the prosecutor's office. The prosecutor insinuated on cross-examination of Ruffin's girlfriend (Monica King) and Ruffin the late disclosure was evidence of recent fabrication. Although King did not come forward to the defense as an alibi witness until the week before testifying, Ruffin previously told defense counsel – with an investigator present – that he had an alibi witness but would not say who it was because he did not want to involve her. In his opening brief, Ruffin argued testimony of the investigator regarding this conversation was admissible under ER 801(d)(1)(ii) and that its exclusion violated Ruffin's right to present a defense. BOA at 50-61.

In response, the state claims Ruffin “was merely prevented from presenting inadmissible evidence in a situation that likely would have caused a substantial delay of trial, if not an outright mistrial of his case.” BOR at 38. This is not the case.

First, Ruffin's argument does not in fact “boil[] down to a claim that his constitutional right to put on a defense trumps well-

established rules of evidence[.]” See BOR at 38. On the contrary, Ruffin’s brief devoted approximately five pages to explain why the evidence was admissible under ER 801(d)(1)(ii). BOA at 54-59. Alternatively, Ruffin argued evidentiary rules must sometimes give way when constitutional rights are at stake. Considering the importance of the evidence to the defense case, Ruffin argued this was one such circumstance. BOA at 59-61. Thus, Ruffin presents two arguments to support his argument the court erred in excluding Ruffin’s prior consistent statement.

The state’s reliance on State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), is misplaced. As the state notes in its own brief in a passage quoted from Finch – allowing the testimony in that case would have placed the defendant’s version of the facts before the jury without subjecting the defendant to cross-examination. BOR at 40 (quoting Finch, 137 Wn.2d at 825). But that is not the case here, as Ruffin testified and the state therefore would have had the opportunity to cross-examine him about the statement and his motivation at the time.

The state’s discussion about King being the alibi witness, not Ruffin, is confusing. It was not just King who presented evidence

of Ruffin's alibi. And the prosecutor's insinuation of recent fabrication was not limited to her testimony.

On direct, Ruffin testified he initially requested King not testify about his alibi because he was concerned with her emotional wellbeing. 14RP 114.

On cross, the prosecutor elicited that Ruffin spoke with King right after detectives first came to talk to him about this case. 14RP 124. The prosecutor followed up:

Q And, on that day, you didn't say anything to Monica about helping you out?

A Absolutely not.

Q You didn't say anything to Monica about an alibi; did you?

A Absolutely not.

14RP 124.

The prosecutor further elicited from Ruffin that he did not speak to King about his alibi after he was charged with murder in August 2013. 14RP 129-30. The prosecutor continued:

Q You never asked her to call your lawyer and tell your lawyer that she had evidence you weren't there?

A That's right.

Q Until six days ago?

14RP 130.

The prosecutor's cross-examination was designed to suggest Ruffin just made up his alibi defense 6 days before testifying. This left the jury with the inaccurate impression Ruffin "never discussed [his alibi] with anyone and it never came to him or to his counsel until last week." 14RP 137-38. It was crucial to rebut this claim of recent fabrication that Ruffin be allowed to present evidence that he had in fact previously discussed his alibi with defense counsel but chose not to pursue it at the time, due to personal reasons. ER 801(d)(1)(ii); State v. McWilliams, 177 Wn. App. 139, 311 P.3d 584 (2014). Contrary to the prosecutor's assertion, the timing of Ruffin's claim he was not present at the crime scene was very much an issue before the jury. See BOR at 42.

Finally, the state's argument that admission of Ruffin's prior consistent statement would have led to a lengthy continuance or mistrial should be rejected. BOR at 44-45. Oftentimes, investigators are called to give evidence about a prior consistent or inconsistent statement made by a witness during an interview with defense counsel. The state cites no authority in support of its claim

the state would be entitled to an in camera review of the defense file or entitled to interview defense counsel. The scope of the testimony would be limited to what the investigator heard, not what defense counsel heard on a separate occasion. The state would be entitled to cross-examine the investigator about the circumstances of the statement. There would be no need for defense counsel to become a witness.

Moreover, Ruffin agreed to waive attorney-client privilege as to that communication. 14RP 145-50. Contrary to the state's assertion, admission of the statement would not have opened up to discovery every other confidential communication. See e.g. State v. Vandenberg, 19 Wn. App. 182, 187, 575 P.2d 254 (1978) (client can waive attorney-client privilege as to a specific communication).

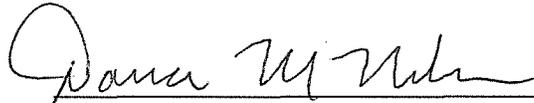
C. CONCLUSION

For the reasons stated in this reply and in the opening brief of appellant, this Court should reverse Ruffin's convictions.

Dated this 12th day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson", is written over a horizontal line.

DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 72514-9-I
)	
MARCUS RUFFIN,)	
)	
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 12TH DAY OF OCTOBER 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARCUS RUFFIN
 DOC NO. 363697
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*