

FILED  
Court of Appeals  
Division II  
State of Washington  
10/31/2018 10:05 AM

NO. 50633-5-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KIBBEE,

Appellant.

---

---

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

The Honorable Jill I. Landes, District Court Judge  
The Honorable Keith C. Harper, Superior Court Judge

---

---

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>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Substantive Facts</u> .....	3
2. <u>Facts Related to Appearance of Fairness Doctrine</u> .....	5
i. <u>Arraignment</u> .....	5
ii. <u>Pretrial Hearing</u> .....	8
iii. <u>Sentencing</u> .....	9
3. <u>Scope of this Appeal</u> .....	11
C. <u>ARGUMENT</u> .....	14
1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT KIBBEE OF TELEPHONE HARASSMENT.....	14
i. <u>The State Failed to Prove Kibbee Used Language             that Was Lewd, Lascivious, Indecent or Obscene. . .</u>	16
ii. <u>The State Failed to Prove Kibbee Telephoned             Anonymously. ....</u>	24
iii. <u>The State Failed to Prove One of the Two             Alternative Means of Telephone Harassment. ....</u>	26
2. THE STATE FAILED TO PROVE THE ALLEGED OFFENSES WERE CRIMES OF DOMESTIC VIOLENCE.....	28

**TABLE OF CONTENTS (CONT'D)**

	Page
3. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE. ....	31
D. <u>CONCLUSION</u> .....	34

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Christensen v. Ellsworth</u> 162 Wash.2d 365, 173 P.3d 228 (2007) .....	17
<u>City of Bellevue v. Lorang</u> 140 Wn.2d 19, 922 P.2d 496 (2000). .....	15, 25
<u>City of Redmond v. Butkhart</u> 99 Wn. App. 21, 991 P.2d 717 (2000).....	20
<u>City of Seattle v. Slack</u> 113 Wash.2d 850, 784 P.2d 494 (1989) .....	14
<u>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</u> 146 Wn.2d 1, 43 P.3d 4 (2002) .....	17
<u>In re Det. of Williams</u> 147 Wash.2d 476, 55 P.3d 597 (2002). .....	16
<u>Matter of Arnold</u> 190 Wash. 2d 136, 410 P.3d 1133 (2018) .....	23
<u>Ravenscroft v. Wash. Water Power Co.</u> 136 Wash.2d 911, 969 P.2d 75 (1998). .....	17
<u>State v. Alphonse</u> 142 Wn. App. 417, 174 P.3d 684 (2008).....	19, 20, 21, 22
<u>State v. Arndt</u> 87 Wn.2d 374, 553 P.2d 1328(1976). .....	27
<u>State v. Baeza</u> 100 Wash.2d 487, 670 P.2d 646 (1983) .....	14
<u>State v. Chamberlin</u> 161 Wash.2d 30, 162 P.3d 389 (2007) .....	32

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Colquitt</u> 133 Wash. App. 789, 137 P.3d 892 (2006) .....	14
<u>State v. Dyson</u> 74 Wn. App. 237, 872 P.2d 1115 (1994) .....	25
<u>State v. Galbreath</u> 69 Wash.2d 664, 419 P.2d 800 (1966) .....	18
<u>State v. Gamble</u> 168 Wash.2d 161, 225 P.3d 973 (2010) .....	31
<u>State v. Jacobs</u> 154 Wash.2d 596, 115 P.3d 281 (2005) .....	17
<u>State v. Jefferson</u> 199 Wash. App. 772, 401 P.3d 805 (2017) <u>rev. granted</u> , 189 Wash. 2d 1038, 409 P.3d 1052 (2018)3, 11, 16, 31	17
<u>State v. Lansdowne</u> 111 Wn. App. 882, 46 P.3d 836 (2002) .....	22, 23
<u>State v. Lilyblad</u> 163 Wn.2d 1, 177 P.3d 686 (2008) .....	20
<u>State v. Madry</u> 8 Wash. App. 61, 504 P.2d 1156 (1972) .....	32
<u>State v. McGee</u> 122 Wash.2d 783, 864 P.2d 912 (1993) .....	24
<u>State v. Murray</u> 190 Wn.2d 727, 416 P.3d 1225 (2018). .....	18
<u>State v. Owens</u> 180 Wn.2d 90, 323 P.3d 1030 (2014) .....	27
<u>State v. Rice</u> 180 Wn. App. 308, 320 P.3d 723 (2014) .....	24

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Snedden</u> 149 Wash.2d 914, 73 P.3d 995 (2003) .....	24
<u>State v. W.R., Jr.</u> 181 Wn.2d 757, 336 P.3d 1134 (2014) .....	14
<u>State v. Woodlyn</u> 188 Wn.2d 157, 392 P.3d 1062 (2017) .....	26, 27, 28
<u>State v. Wright</u> 165 Wn.2d 783, 203 P.3d 1027 (2009) .....	28
<u>United Pacific Insurance Company v. McCarthy</u> 15 Wn. App. 70, 546 P.2d 1226 (1976) .....	31

**FEDERAL CASES**

<u>Apprendi v. New Jersey</u> 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	29
<u>Cohen v. California</u> 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) .....	24
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	14, 28
<u>Swearingen v. United States</u> 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765 (1896) .....	23

**TABLE OF AUTHORITIES (CONT'D)**

Page

**OTHER JURISDICTIONS**

<u>Briggs v. State</u> 90 Md. App. 60, 599 A.2d 1221 (Ct. App. Maryland, 1992).....	19
<u>City of Columbus v. Fraley</u> 41 Ohio St.2d 173, 324 N.E.2d 735, 70 O.O.2d 335 (Ohio 1975) .	19
<u>Dougherty v. State</u> 230 P.3d 1176 (Wyoming 2010).....	23
<u>Hartney v. State</u> 823 S.W.2d 398 (Tex. Ct. App. 1992) .....	25
<u>State v. Settle</u> 90 R.I. 195, 156 A.2d 921 (Rhode Island 1959).....	23

**RULES, STATUTES AND OTHER AUTHORITIES**

CJC 2.11 .....	32
RAP 2.5.....	14
RCW 9.61.230.....	15, 20, 21
RCW 9.94A.030 .....	29
RCW 9.94A.525 .....	29
RCW 9A.46.110 .....	29
RCW 10.99.020.....	29, 30
RCW 26.50.010.....	29
U.S. Const. amend. XIV.....	14, 28
U.S. Const. amend. XIV, § 1 .....	14

**TABLE OF AUTHORITIES (CONT'D)**

	Page
Const. art I, § 21.....	26
Webster's Third New International Dictionary (2002) .....	18, 22, 23

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of telephone harassment.
2. Appellant was denied his right to a unanimous jury verdict.
3. The evidence was insufficient to prove appellant's alleged offenses were "crimes of domestic violence."
4. The court violated the appearance of fairness doctrine.

Issues Pertaining to Assignments of Error

1. Where the state alleged appellant Michael Kibbee called his ex-wife's current husband Lee Fox and said, "I hope you mother-f-ing die,"<sup>1</sup> did the state fail to prove Kibbee used "lewd, lascivious, indecent or obscene" language as required to prove the crime of telephone harassment?
2. Did the state fail to prove Kibbee called Fox "anonymously" as required to prove the crime of telephone harassment where: (1) Fox's phone reported the incoming call as either blocked or unknown; but (2) Fox instantly recognized Kibbee's voice as the caller; (3) Fox and Kibbee knew each other

---

<sup>1</sup> Fox paraphrased the statement. RP 105.

for years; (4) Fox and Kibbee used to speak on the phone in earlier days when they were friendly; (5) the phone call potentially lasted as long as two minutes; and (6) Kibbee made no attempt to hide his identity?

3. Assuming arguendo this Court finds sufficient evidence to support one of the alternative means of committing telephone harassment, was Kibbee's right to a unanimous jury verdict violated where the jury returned a general verdict and the other alternative means was not supported by sufficient evidence?

4. Kibbee's ex-wife is married to Lee Fox, the protected party of the no contact order Kibbee was convicted of violating and the answering party for the telephone harassment charge. Did the state fail to prove Kibbee and Fox are related by blood or marriage such that the alleged offenses constitute crimes of domestic violence?

5. Kibbee is a United States Marine Corp veteran. At arraignment, the district court judge expressed her opinion that Marines, particularly sergeants such as Kibbee, have control issues and don't follow orders. At sentencing, the same judge refused to impose a suspended sentence based on treatment conditions (as requested by the prosecutor) based on the judge's opinion Kibbee

would not comply with treatment conditions. After the court announced its sentence (the statutory maximum), the officer on guard at the jail (where Kibbee appeared via video) unfurled a banner stating “Goodbye” and depicting a smiley face; at which point, court personnel could be heard laughing and the judge said, “Bravo.” Did the court’s conduct violate the appearance of fairness doctrine?

B. STATEMENT OF THE CASE

1. Substantive Facts

The Jefferson county prosecutor charged Michael Kibbee with the following gross misdemeanors: (1) domestic violence (DV) violation of a protection order allegedly committed against Lee Fox on January 6, 2016; and (2) DV telephone harassment allegedly committed against Fox on January 6, 2016. RP 46.<sup>2</sup> Fox is the husband of Kibbee’s ex-wife Jan Fox. RP 10, 34-35, 90.

At Kibbee’s trial in July 2016, Fox testified he and Kibbee became acquainted back in 2009 through the “pool league.” RP 101. Kibbee was still married to Jan at the time.<sup>3</sup> RP 101. Fox would trade vegetables from his garden with Kibbee for fresh

---

<sup>2</sup> “RP” refers to the verbatim report of proceedings on: 2/22/16, 5/4/16, 7/28/16 (Volume I); and 12/15/16 (Volume II). The two volumes are consecutively paginated.

seafood. RP 101. The two occasionally spoke on the phone during this time and Fox testified he would recognize Kibbee's voice. RP 101.

Jan and Kibbee were married for 34 years but divorced in April 2012. RP 117. In June 2012, Jan married Fox. RP 102.

On December 23, 2011, Fox obtained a protection order prohibiting Kibbee from contacting Fox. RP 103. Its expiration date was December 23, 2016.

In December 2015, Fox learned he had a terminal brain tumor. RP 94-95.

At 4:23 p.m. on January 6, 2016, Fox was watching television with Jan and received a telephone call from an unknown or blocked number. RP 105, 133. Fox testified that when he answered:

I was told in a sarcastic way – hey, Lee, heard you have a brain tumor – and I can't say the F word, but he said – I hope you mother-f-ing die.

RP 105. Fox testified the caller was Kibbee. RP 105.

Fox testified he put the call on "speakerphone" and called Jan over. RP 106. When asked what else the caller said, Fox answered:

---

<sup>3</sup> To avoid confusion, Jan Fox is referred to by her first name.

THE WITNESS [Fox]: He wished that I'd die from my brain tumor.

BY MS. WILSON [prosecutor]: How long did the – did he say more that day?

A. Well, he said that you need to die.

Q. Did he say that one time?

It was several – I mean, it was over and over, you know? Glad to hear you have a brain tumor.

RP 107. The caller hung up after saying (4-5 times) that he hoped Fox would die. RP 107-108.

Fox and Jan subsequently called police. Fox admitted that in 2007, he was convicted of lying to a police officer. RP 108, 110.

2. Facts Related to Appearance of Fairness Doctrine

i. Arrestment

At arraignment on February 22, 2016, after the Honorable Judge Jill Landes found probable cause, the parties discussed release. RP 6-7. The prosecutor did not request bond but asked the court to impose certain conditions. RP 6-7. Defense counsel agreed and stated that as a Marine Corp veteran, the court could count on Kibbee's appearance. RP 7.

Judge Landes responded that in her experience, Marine Corp veterans have “control issues:”

THE COURT: Well, you know, I know a lot of Marine Corp vets that go back to Viet Nam. I know (indiscernible) and that doesn't mean that they have halos over their head, okay? And a lot of them were having troubles because a lot of them had control issues. As a matter of fact, one of them sits on the Court's Mental Health Board.

RP 7.

Judge Landes noted Kibbe had prior no contact order violations and “some domestic violence stuff[.]” Landes then engaged in the following colloquy with Kibbee and the prosecutor:

THE COURT: Okay. That's all I wanted to know. So, here's the thing, Mr. Kibbee. I don't have any confidence, given these – all these charges – because there's horrible (indiscernible) on all of them that you're going to follow any order that I tell you at all. If its' a – you know, in terms of following Protection Orders, don't violate in any way, shape, or form. I don't know – did you serve in combat?

MR. KIBBEE: Your Honor, yes, I did. I lost men, but –

THE COURT: Well, did you or didn't. I mean, I –

MR. KIBBEE: Yes, yes.

THE COURT: The only thing (indiscernible) served in combat (indiscernible).

MR. KIBBEE: Yes, Your Honor, during the Iranian conflict.

THE COURT: During what?

MR. KIBBEE: During the Iranian conflict, I did.

THE COURT: How old are you?

MR. KIBBEE: I am going on 60 years old now.

THE COURT: So, you know, one of these things could be PTSD, it could be a lot of things, I don't know. I don't know what it is with you, but you don't follow orders. So, it sounds like you might have been a Sergeant or something. Were you?

MR. KIBBEE: Pardon?

THE COURT: What was your rank?

MR. KIBBEE: I was an E5 – Sergeant.

THE COURT: Sergeant?

MR. KIBBEE: Yes, Your Honor, I was.

THE COURT: (Indiscernible)

MR. KIBBEE: And I will.

THE COURT: So, and you're not asking for bail?

MS. WILSON [prosecutor]: Your Honor, right. And, again – rights and yes. With hindsight, Your Honor, I actually didn't realize that there had been two new cases since this charge was brought. I was looking at just the facts of this case. So, Your Honor, I didn't ask for bond in this case, but if the Court saw

–

THE COURT: (Indiscernible) you're not some whack job that's going to go out and shoot somebody after this, so I hope you don't.

MR. KIBBEE: I won't, Your Honor.

RP 10. The court ultimately resolved to release Kibbee on his personal recognizance. RP 10.

ii. Pretrial Hearing

At the pretrial hearing on May 4, 2016, Judge Landes called defense counsel a "smug little person" for being late to court:

THE COURT: You're late 45 minutes.

MR. ANDERSON: I had a conflict this morning. Just that –

THE COURT: Don't take cases over here if you can't handle them.

MR. ANDERSON: I'll take – Your Honor, I can take cases anywhere in the State of Washington. And I'll tell you that –

THE COURT: You know, your smart mouth is going to get you in contempt of Court, Mr. Anderson. You're 45 minutes late. We called him early because he had an out-of-town attorney. (Indiscernible) –

MR. ANDERSON: And I –

THE COURT: No, you listen to me, you smug little person, you. You just listen to me. \$25 a minute for every minute you're late – that's normally what I charge people. So, if you want to pay that, you continue on with your arrogant, egotistical type of conversation you're having with me, you understand? We're here for a pre-trial. It won't affect Mr. Kibbee at

all to be very polite and very nice. And he waited for you – you he's hired to represent him. So, don't tell me about a conflict you might have had. And if you can't make it over here to the hinterlands on time, don't take cases here. Do you understand me?

MR. ANDERSON: Yeah. I was just –

THE COURT: Do you understand me? Yes, is the answer.

MR. ANDERSON: Yes, I think you've made yourself clear. I understand you.

THE COURT: Very good. Then you be quiet, we'll do the pre-trial and we'll carry on.

RP 14-15.

iii. Sentencing

At sentencing on December 15, 2016, the prosecutor asked for consecutive sentences of 364 days each with 184 days suspended with a DV treatment requirement, resulting in 360 days in jail. RP 212-13. The prosecutor initially intended a shorter recommendation but upped the ante when Kibbee left the courtroom at the original sentencing hearing. RP 212.

Defense counsel asked for 60 days on each count to run concurrently, after pointing out Fox previously assaulted Kibbee and that the animosity has run both ways for many years. It was a two-way street. RP 215-17.

In his allocution, Kibbee happened to mention that he used to be a minister:

And, Your Honor, you know something you don't know about me – I was a minister for 23 years and I saw the hypocrisy and I decided to step away for a while and look and try to get my life back. . . .

RP 219-20.

Judge Landes responded that she did not care whether Kibbee was “the Pope,” that to her, he was “a vicious person” who “basically spit in [her] face” when he left the initial sentencing. RP 222-223. Landes did not perceive Kibbee as amenable to treatment and imposed the maximum:

You know, you've been playing the role when you're sitting there in jail and have had a chance to have the taste of it for a while. But, you know, I don't think you need treatment. You're not going to do well in treatment. You're going to say screw you, I don't need this, there's nothing wrong with me (indiscernible). You know, regardless of what you said about you know you're not imperfect. You think you're perfect and that's my contention.

So, you're going to get a year on both, consecutive to each other and the case is closed. You're going to do two years in jail, get it done, that's it, okay? On this case. Because that's how dangerous I think you are to Mr. and Mrs. Fox, all right? Thank you. No (indiscernible).

THE COURT: Hey – what? (Indiscernible) say  
goodbye.

(Officer pulls down sign which reads goodbye)

(Laughter)

THE COURT: Bravo.

(CASE ADJOURNED).

RP 224.

### 3. Scope of this Appeal

Kibbee appealed his district court convictions to Jefferson County Superior Court on grounds Judge Landes violated the appearance of fairness doctrine.<sup>4</sup> CP 1-2, 7-14. Kibbee pointed to three instances in particular: (i) at arraignment on February 22, 2016, when the judge expressed her opinion that Marine veterans have control problems; (ii) at the pretrial hearing on May 4, 2016, when the judge called Kibbee’s attorney Ryan Anderson a “smug little person;” and (iii) on December 15, 2016, which Kibbee described as follows:

---

<sup>4</sup> Kibbee also argued defense counsel was ineffective in failing to ensure a fair magistrate. CP 7-14. Kibbee is not pursuing this point on appeal.

On December 15, 2016, Mr. Kibbee appeared over a video feed from the jail for his sentencing hearing. Judge Landes listened to recommendations from the prosecutor, defendant's counsel, the victims, and Mr. Kibbee himself. The prosecutor asked for a year in jail. Mr. Kibbee's counsel submitted an extensive packet of information about one of the victim's prior false statements and assaults on Mr. Kibbee, and asked for a 60 day concurrent sentence on each count. Instead, the court sentenced Mr. Kibbee to two years consecutive, the maximum amount of jail authorized by law. The court reasoned that Mr. Kibbee would not be amendable to treatment. Immediately following the sentence, jail guards escorted Kibbee off camera and unraveled a prank sign behind where he stood which said "Goodbye" over a bright yellow smiley face. The judge and court staff laughed.

CP 9; see also RP 224.<sup>5</sup> Kibbee requested a new sentencing hearing before a different judge. CP 10.

The Superior Court denied the appeal. CP 43-48. Regarding arraignment, the court found Judge Landes merely reflected on some of her own experience with persons in the

---

<sup>5</sup> The state's description of what occurred at sentencing was similar but claimed the "goodbye" sign was not directed at Kibbee personally:

At the conclusion of the hearing and after Mr. Kibbee went out of camera view at the jail, the jail Deputy appeared on the screen. The judge said to the deputy, and directed at the lone deputy standing there, "Well?" "you better say goodbye!" The deputy paused, then turned down a paper that was taped to the wall that revealed the words Goodbye and under that words was a smiley face. Laughter erupted. (CD 2016-12-15 at 2:22:29).

CP 34.

military. CP 46. Regarding the pretrial hearing, the Superior court found that while “the trial judge may have used words and a tone that many other judges may not choose to use[,]” the judge was entitled to admonish counsel for being late. CP 47. Regarding sentencing, the Superior court found the “goodbye” poster had nothing to do with Kibbee.<sup>6</sup> CP 47.

Kibbee filed for discretionary review and filed a pro se brief in support. CP 64. In addition to the appearance of fairness issue, Kibbee sought review of the sufficiency of the evidence at trial. See Brief of Petitioner filed with this Court on August 1, 2017.

In its ruling, this Court granted review of the issues addressed by the superior court on appeal – the appearance of fairness issue and the related ineffective assistance of counsel claim. Ruling at 7. This Court also granted review of Kibbee’s sufficiency of the evidence “as well as any other issue that can be raised for the first time on appeal.” Ruling at 8.

---

<sup>6</sup> The court also rejected Kibbee’s ineffective assistance of counsel claim. CP 48.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT KIBBEE OF TELEPHONE HARASSMENT.

The due process clause of the Fourteenth Amendment guarantees, “No state shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove “beyond a reasonable doubt ... every fact necessary to constitute the crime with which [a defendant] is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. W.R., Jr., 181 Wn.2d 757, 761–62, 336 P.3d 1134, 1136 (2014).

Sufficiency may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Colquitt, 133 Wash. App. 789, 796, 137 P.3d 892, 895 (2006) (citing City of Seattle v. Slack, 113 Wash.2d 850, 859, 784 P.2d 494 (1989) (“Due process requires the State to prove its case beyond a reasonable doubt; thus, sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.”) (citing State v. Baeza, 100 Wash.2d 487, 488, 670 P.2d 646 (1983))).

Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. No rational trier of fact could find the essential elements of telephone harassment in this case.

The telephone harassment statute provides:

(1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:

(a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or

(b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or

(c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household;

is guilty of a gross misdemeanor[.]

RCW 9.61.230 (emphasis added). The prohibition against profane language has been held unconstitutionally overbroad. City of Bellevue v. Lorang, 140 Wn.2d 19, 922 P.2d 496 (2000).

Here, the jury was instructed:

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

(1) That on or about January 6, 2016, the defendant made a telephone call to another person;

(2) That at the time the defendant initiated the phone call the defendant intended to harass, intimidate, torment, or embarrass that other person;

(3) That the defendant:

(a) used lewd, lascivious, indecent, or obscene words or language in the telephone call; or

(b) called anonymously, whether or not a conversation occurred;

And

(4) That the phone call was made or received in the State of Washington, County of Jefferson.

CP \_\_\_ (095, Instruction No. 6), attached as Appendix A; RP 170.

- i. The State Failed to Prove Kibbee Used Language that Was Lewd, Lascivious, Indecent or Obscene.

The only “bad language” or “foul language”<sup>7</sup> used by Kibbee during the phone call was “mother-f-ing,” as in “I hope you mother-f-ing die.” RP 105. Granted this was a mean thing to say. However, it was not a crime.

Statutory construction is a question of law interpreted de novo. In re Det. of Williams, 147 Wash.2d 476, 486, 55 P.3d 597 (2002). When interpreting a statute, “the court's objective is to

determine the legislature's intent.” State v. Jacobs, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the court will “give effect to that plain meaning.” Id. (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, the court will look to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” Id. An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.” Ravenscroft v. Wash. Water Power Co., 136 Wash.2d 911, 920–21, 969 P.2d 75 (1998). If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and we “may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” Christensen v. Ellsworth, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

---

<sup>7</sup> RP 176 (prosecutor’s closing argument).

The terms “lewd,” “lascivious,” “indecent” and “obscene” were not defined for the jury and are not defined by statute. CP \_\_\_ (Courts Instructions to the Jury). However, our Supreme Court has noted the following dictionary definitions for obscene, lewd and lascivious:

“[O]bscene” is defined in the dictionary as “disgusting to the senses usu. because of some filthy, grotesque, or unnatural quality[;] ... grossly repugnant to the generally accepted notions of what is appropriate[;] ... offensive or revolting as countering or violating some ideal or principle: as ... abhorrent to morality or virtue : stressing or reveling in the lewd or lustful ....” Webster's Third New International Dictionary 1557 (2002). This court has also defined “obscene” as “a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others.” State v. Galbreath, 69 Wash.2d 664, 668, 419 P.2d 800 (1966).

In turn, “lascivious” is defined as “inclined to lechery: Lewd, Lustful” or “tending to arouse sexual desire: Libidinous, Salacious.” Webster's, supra, at 1274.

State v. Murray, 190 Wn.2d 727, 735, 416 P.3d 1225, 1229 (2018).

Under the above definitions, the word “motherfucking” is not obscene. It is not grossly repugnant to the generally accepted notion of what is appropriate. Indeed, a review of recent television shows and movies show the word is generally accepted and

commonly used in today's society.<sup>8</sup> Moreover, "obscene" generally has a sexual connotation to it. See e.g. Briggs v. State, 90 Md. App. 60, 68, 599 A.2d 1221 (Ct. App. Maryland, 1992) ("Fuck you, motherfucking cops" not "obscene in the sense of being erotic"). Kibbee's statement I hope you "mother-f-ing die" certainly was not "erotic so as to conjure up psychic stimulation in anyone likely to be confronted with it." Briggs, 90 Md. App. at 68; see also City of Columbus v. Fraley, 41 Ohio St.2d 173, 324 N.E.2d 735, 70 O.O.2d 335 (Ohio 1975) (At the very least, obscene language must appeal to a prurient interest in sex).

Nor is the word "motherfucking" "lewd" or "lascivious." As indicated in the passage quoted above, lewd and lascivious are synonymous and, like "obscene," have a sexual connotation in that they tend to arouse sexual desire. Division One has strongly suggested "motherfucking" does not qualify as lewd, lascivious, indecent or obscene language. State v. Alphonse, 142 Wn. App. 417, 174 P.3d 684 (2008), petition for review granted and remanded in light of State v. Lilyblad, 163 Wn.2d 1, 177 P.3d 686

---

<sup>8</sup> See e.g. <https://www.youtube.com/watch?v=O74ELua6xIY> (YouTube video of Snakes on a Plane, last accessed 10/25/18) <http://www.newser.com/story/220743/fx-raises-the-bar-for-basic-cable-cursing.html> (FX's American Crime Story, last accessed 10/25/18)

(2008) (state must prove intent to harass formed at the time the defendant initiated the call), abrogating City of Redmond v. Butkhart, 99 Wn. App. 21, 991 P.2d 717 (2000).

Alphonse was convicted of telephone harassment under RCW 9.61.230 for calling police officer Matt Meyers who investigated him for sending harassing emails to an ex-girlfriend. Alphonse, 142 Wn. App. at 423. Following the conclusion of the investigation, Alphonse left an angry voice mail on Meyer's office phone in which, among other things, he told Meyers: "There was never any Matt Meyers. He never existed." And "you're dead anyway. You're dead any motherfucking way!" He also stated, "I will blow away 40 hundred cops over my kids dog. 40 hundred, let alone one, let alone one by the name of Matt Meyer." Later, Alphonse left two more voice mails in which he described sexual acts he wished to perform with Meyers' wife. For instance, he stated:

Exhibit 2 at 1 (transcript of voice mail recording, attached as Appendix B) ("[M]y dick is gonna stay long and I am gonna continuously keep dicking your motherfucking girl."); Appendix B at 2 ("And maybe one of these days when you're at work in that motherfucking cubicle sweating bricks, I might be pounding down that pussy ... Maybe one of these nights when I feel like getting some pussy, I might give [your wife] a call."); Appendix B at 3 ("I am gonna

forever remain beating your motherfucking bitches down. Every time, open wide, open wide, open wide nigger because this big long ass long fucking dick is coming in, beating that motherfucking pussy down.”).

Alphonse, 142 Wn. App. at 425, n. 1.

One of Alphonse’s arguments on appeal was that the portion of the statute proscribing “lewd, lascivious, indecent or obscene” words was unconstitutionally vague. Alphonse, at 437. Specifically, he argued that because *some* of the words he used may be deemed by some to be “indecent,” “lewd” or “lascivious,” but may commonly be used by others, a person must guess whether using these words would constitute criminal conduct. Id. at 438. Division One disagreed because Alphonse’s statements were clearly *sexual* in nature:

As discussed above, Alphonse used obscene language here precisely so that he could offend, humiliate and torment Meyers. The record is also undisputed that he used language “suggesting the commission of any lewd or lascivious act,” which is clearly prohibited by the statute.<sup>54</sup>

<sup>54</sup> RCW 9.61.230(1)(a). Alphonse refers to his use of the words “nigger, cracker, motherfucker and pussy,” but neglects to mention the more explicit sexual references he used to describe sex acts he wished to perform with Meyers’ wife, which would clearly fall within the statute.

Alphonse, 142 Wn. App. at 424 n. 54. This passage strongly suggests that the word “motherfucking” in isolation without any erotic connotation does not fall within the ambit of the statute’s prohibition.

Under the above authorities, the word motherfucking is neither obscene nor lewd or lascivious, which leaves only “indecent.” In State v. Lansdowne, 111 Wn. App. 882, 46 P.3d 836 (2002), Division Three of this Court defined indecent as:

“not decent: ... altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly.”

Lansdowne, 111 Wn. App. at 891-92 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1147).

However, that is not the entire definition in Webster’s, which also defines “indecent” as:

Not conforming to generally accepted standards of morality : tending toward or being in fact something generally viewed as morally indelicate or improper or offensive : being or tending to be obscene.

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1147 (emphasis added). The underlined definition is in keeping with jurisdictions interpreting “indecent” as synonymous with

“obscene.” See e.g. Dougherty v. State, 230 P.3d 1176 (Wyoming 2010); State v. Settle, 90 R.I. 195, 200, 156 A.2d 921, 924 (Rhode Island 1959) (citing Swearingen v. United States, 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765 (1896) (Lewd, lascivious and indecent are but synonyms of obscene).

Relying on the incomplete definition of “indecent” as well as an incomplete definition of “obscene,”<sup>9</sup> the Lansdowne court found the words “shit” and “bitch” to be indecent and obscene. Lansdowne, 111 Wn. App. at 891-91. The holding of Lansdowne is inconsistent with the authorities cited above and its decision is based on incomplete dictionary definitions. This Court should afford it no weight. Matter of Arnold, 190 Wash. 2d 136, 138, 410 P.3d 1133, 1134 (2018) (rejecting rule of “horizontal stare decisis”).

In short, Kibbee’s use of the word motherfucking does not qualify as lewd, lascivious, indecent or obscene under the plain language of the statute.

---

<sup>9</sup> According to Lansdowne, “‘Obscene’ is defined as: marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage.” Lansdowne, at 891-92 (quoting WEBSTERS, supra, 1557). But the court left out the following *preceding* definitions by WEBSTERS: “1a: disgusting to the senses usu. because of some filthy, grotesque or unnatural quality . . . b: grossly repugnant to the generally accepted notions of what is appropriate: SHOCKING . . . 2: offensive or revolting as countering or violating some ideal or principle: as a: abhorrent to morality or virtue : stressing or reveling in the lewd or lustful; *specif* : inciting or designed to incite to lust, depravity, indecency[.] Id. (emphasis added)

At the very least the statute is reasonably capable of being interpreted that way, based on the above definitions. The rule of lenity therefore applies and requires any ambiguity be interpreted in favor of Kibbee. State v. Rice, 180 Wn. App. 308, 313, 320 P.3d 723, 726 (2014). The rule of lenity applies to situations where more than one interpretation can be drawn from the wording of a statute. State v. Snedden, 149 Wash.2d 914, 922, 73 P.3d 995 (2003). “Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant.” State v. McGee, 122 Wash.2d 783, 787, 864 P.2d 912 (1993).

Here, Kibbee was clearly using the word “motherfucking” in an *emotive*, non-erotic manner. See e.g. Cohen v. California, 403 U.S. 15, 25-26, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). His use of the word therefore did not qualify as criminal under the telephone harassment statute.

ii. The State Failed to Prove Kibbee Telephoned Anonymously.

The state failed to prove Kibbee called anonymously. While Fox’s phone did not recognize the incoming number and reported it as “unknown” or “blocked,” Kibbee made no effort to conceal his identity. He referred to Fox by first name. The phone conversation

lasted possibly as long as two minutes. RP 133-135. The two men knew each other. This was no “anonymous” call.

This portion of the statute is aimed at anonymous hang-up calls. See e.g. State v. Dyson, 74 Wn. App. 237, 872 P.2d 1115 (1994), overruled on other grounds by Bellevue v. Lorang, 140 Wn.2d 19, 922 P.2d 496 (2000) (ordinance’s “profane” language provision was overly broad). In the span of three days, Dyson made 50 telephone calls to his former girlfriend that were recorded on her answering machine. In many calls, Dyson’s voice could be heard on the answering machine tape. Interspersed between the messages were multiple hang up calls. Dyson, 74 Wn. App. at 240.

On appeal, Dyson argued there was insufficient evidence Dyson called “anonymously.” Division One of this Court disagreed:

Relying on Hartney v. State, 823 S.W.2d 398 (Tex. Ct. App. 1992), Dyson argues that a call is “anonymous” only when the caller attempts to conceal his or her identity and because he made no attempts to conceal his identity, he did not call anonymously.

We disagree. Although Dyson did not conceal his identity in some of the calls, the State presented evidence of multiple hang up calls. Certainly by hanging up, the caller is attempting to conceal his or her identity. Thus, we conclude that the State presented sufficient evidence that Dyson called anonymously[.]

Dyson, 74 Wn. App. at 248-49.

In contrast, Kibbee made no hang up call. He called and spoke directly to Fox, calling him by his first name. Although he never said, “hey this is Mike,” his identity was well known to Fox, which Kibbee made no effort to conceal. If the call number was “blocked,” that is because Lee himself blocked the call. And if the call number was “unknown” it could be because Kibbee had a new phone. It does not follow that he called anonymously, particularly since he was well known to the answering party to whom he spoke to directly and in a familial fashion. The evidence was insufficient to support this alternative means of committing telephone harassment.

iii. The State Failed to Prove One of the Two Alternative Means of Telephone Harassment.

Assuming arguendo this Court finds one of the alternative means proved, this Court should still reverse because there is no evidence supporting the remaining means.

The Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. WASH. CONST. art I, sec. 21; State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017). Our Supreme Court has never recognized a categorical right to express unanimity (i.e. as to means) in an alternative

means conviction. Woodlyn, 188 Wn.2d at 164 (citing State v. Arndt, 87 Wn.2d 374, 377-78, 553 P.2d 1328(1976)).

However, there are particular situations when express unanimity is required, specifically when at least one means lacks sufficient evidentiary support. Woodlyn, 188 Wn.2d at 164 (citing State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). Washington cases have adopted an analysis that turns on the sufficiency of the evidence as a due process concern: if the jury is instructed on one or more alternative means that is not supported by sufficient evidence, a “particularized expression” of jury unanimity as to the supported means is required. Owens, 180 Wn.2d at 95.

In Woodlyn, the Supreme Court also rejected the rule that a complete *lack of* evidence on one alternative renders any unanimity error harmless. The rationale for the rule was that the jury necessarily relied on the means supported by sufficient evidence. Woodlyn, 188 Wn.2d at 165. In rejecting the rule, the Woodlyn Court reasoned it was not possible for an appellate court to see into the minds of jurors.

Here, the jury was instructed on two alternative means of committing telephone harassment and it returned a general verdict.

CP \_\_\_ (084, Verdict Form) attached as Appendix B. Thus, it is not possible to know upon which means the jury relied.

Kibbee's right to a unanimous jury verdict was violated because there was insufficient evidence to support the means that he used "lewd, lascivious, indecent or obscene" language. Motherfucking does not qualify as obscene or its synonyms.

Alternatively, Kibbee's right to a unanimous jury verdict was violated because there was insufficient evidence to support the means that he called "anonymously." He was well known to the answering party and made no attempt to conceal his identity.

Because it is not possible to "rule out the possibility the jury relied on a charge unsupported by sufficient evidence," reversal is required. Woodlyn, at 166 (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)).

2. THE STATE FAILED TO PROVE THE ALLEGED OFFENSES WERE CRIMES OF DOMESTIC VIOLENCE.

As indicated above, under the due process clause of the Fourteenth Amendment, the state carries the burden to prove beyond a reasonable doubt all the elements of the offense. In re Winship, 397 U.S. at 364. This applies to sentencing aggravators as well. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct.

2348, 147 L.Ed.2d 435 (2000) (“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

Under RCW 9.94A.525(21), it is possible for a prior misdemeanor conviction to count towards a defendant’s offender score if he or she is being sentenced for an offense for which the state pled and proved domestic violence and the prior is one in which the state also pled and proved domestic violence as defined in RCW 9.94A.030.

Under 9.94A.030(20), “Domestic violence” has the same meaning as defined in RCW 10.99.020 and 26.50.010.

Under RCW 26.50.010:

(3) “Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

And under RCW 10.99.020:

(3) “Family or household members” means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult

persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 10.99.020.

The court's instructions provided:

For purposes of this case, "family or household members" means spouses or former spouses or adult persons related by blood or marriage, or persons who have a biological or legal parent-child relationship, including stepparents and stepchildren, and grandparents and grandchildren.

CP \_\_\_ (102, Instruction 12), Attached as Appendix B; RP 171.

Contrary to the state's claim, Kibbee and Fox are not related by blood or by marriage. "By marriage" means that when Kibbee and Jan were married, Kibbee was a family or household member of Jan's blood relatives. It does not mean that following a divorce, Kibbee is related to Jan's new husband. Nor do Kibbee and Fox have a biological or legal parent-child relationship. Neither one is a step-parent or step-child to the other. See e.g. United Pacific Insurance Company v. McCarthy, 15 Wn. App. 70, 73-74, 546 P.2d

1226 (1976) (giving examples of being related by blood or marriage).

While Kibbee and Jan are considered family or household members as “former spouses” under the statute, the offenses – as charged and presented – were committed against Lee Fox. The protection order concerned Lee Fox. The phone call was to Lee Fox. This Court should vacate the domestic violence designation from the judgment and sentence. CP \_\_\_ (005-006, Judgment and Sentence) attached as Appendix D.

3. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE.

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” State v. Jefferson, 199 Wash. App. 772, 786, 401 P.3d 805, 813 (2017), review granted, 189 Wash. 2d 1038, 409 P.3d 1052 (2018) (quoting State v. Gamble, 168 Wash.2d 161, 187, 225 P.3d 973 (2010)). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” Gamble, 168 Wash.2d at 186, 225 P.3d 973 (quoting State v. Madry, 8 Wash. App. 61, 70, 504 P.2d 1156

(1972)). “Evidence of a judge’s actual or potential bias must be shown before an appearance of fairness claim will succeed.” State v. Chamberlin, 161 Wash.2d 30, 37, 162 P.3d 389 (2007). Under the Code of Judicial Conduct (CJC), designed to provide guidance for judges, “[a] judge should disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” CJC 2.11(A); Gamble, 168 Wash.2d at 188, 225 P.3d 973.

Judge Landes’ comments at arraignment and sentencing, the judge’s imposition of the statutory maximum and seeming participation in a practical joke at sentencing reveal the judge’s actual bias against Kibbee. At arraignment, Judge Landes expressed her view that Marine Corp veterans have “control issues.” RP 7. She stated she had no confidence Kibbee was capable of following orders, possibly due to serving in combat or suffering from PTSD. RP 10. She suggested Kibbee could be a “whack job” capable of going out and shooting someone. RP 10.

At sentencing, the prosecutor recommended a total of one year for both sentences on condition Kibbee undergo domestic violence treatment. RP 212. Instead, the court imposed the maximum of two years because she did not believe Kibbee would

comply with treatment. To an impartial observer, this sentence would dovetail perfectly with the judge's preconceived opinion that Marine Corp veterans, particularly sergeants have "control issues" and do not follow orders. This is particularly evident because Kibbee did not testify and the judge previously described him as nice and polite. RP 14-15.

Even worse than imposing the maximum on a veteran based on preconceived notions, the judge appeared to take part in a practical joke at the end of sentencing by saying "Bravo" once the jail guard unveiled a smiley face sign with the word "goodbye" written on it. Whether this sign was the result of Judge Landes' ire at jail staff for simply hanging up after a video hearing, a disinterested observer would have no such knowledge. To an impartial observer, it would appear the court was expressing its disdain for Kibbee.

Judge Landes' conduct in this case did not give the appearance of a fair tribunal to the public. The judge's conduct undermines confidence in the judiciary. It should not be tolerated.

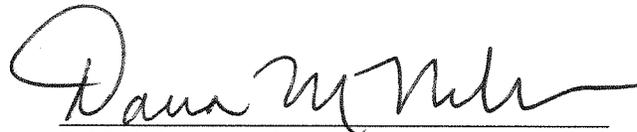
D. CONCLUSION

The state failed to prove Kibbee committed telephone harassment. This Court should reverse that conviction. Because Kibbee is not related to his ex-wife's current husband, the convictions were not crimes of domestic violence. The judgment and sentence should be so amended. The proceeding was invalid because Judge Landes violated the appearance of fairness doctrine.

Dated this 31<sup>st</sup> day of October, 2018

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

## **APPENDIX A**

INSTRUCTION NO. 6

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

(1) That on or about January 6, 2016, the defendant made a telephone call to another person;

(2) That at the time the defendant initiated the phone call the defendant intended to harass, intimidate, torment, or embarrass that other person;

(3) That the defendant:

(a) used lewd, lascivious, indecent, or obscene words or language in the telephone call; or

(b) called anonymously, whether or not a conversation occurred;

and

(4) That the phone call was made or received in the State of Washington, County of Jefferson.

If you find from the evidence that elements (1), (2), and (4), and any of the alternative elements (3)(a) or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

## **APPENDIX B**

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON  
IN AND FOR JEFFERSON COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

MICHAEL KIBBEE,

Defendant.

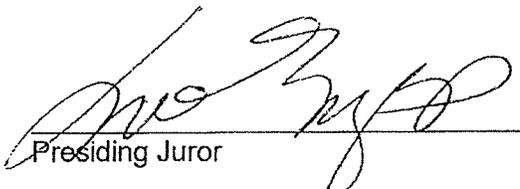
NO. 2016A23

VERDICT FORM

We, the jury, find the Defendant, MICHAEL KIBBEE, Guilty (write  
"Guilty" or "Not Guilty") of the crime of TELEPHONE HARASSMENT.

7/28/16

Date

  
Presiding Juror

## **APPENDIX C**

INSTRUCTION NO. 12

For purposes of this case, "family or household members" means spouses or former spouses or adult <sup>cc</sup> persons related by blood or marriage, or persons who have a biological or legal parent-child relationship, including stepparents and stepchildren, and grandparents and grandchildren.

## **APPENDIX D**

DEC 15 2016

JEFFERSON COUNTY DISTRICT COURT

District Court of Washington For Jefferson County

No. 2016 A23

State of Washington Plaintiff, vs. Michael Kilbee Defendant.

Judgment and Sentence (JS)

The defendant pled guilty, or pled not guilty and the verdict of the jury was guilty, or the finding of the court was guilty of:

Table with 3 columns: Count, Crime, RCW or Ordinance (with subsection). Row 1: 1, Violation of NCO-DV RCW 10.14.170 - DV. Row 2: 2, Telephone Harassment - DV RCW 9.61.250 - DV.

GV For the crime(s) charged in count(s) 1 & 2, domestic violence was pled and proved. RCW 10.99.020.

Therefore, the defendant is adjudged guilty and sentenced as follows:

Sentence is suspended (susp.)/deferred (def.) for 24 months/years on the following conditions:

Count 1) 364 days of jail, susp. def. days; and a fine of \$ with \$

Count 2) 364 days of jail, susp. def. days; and a fine of \$ with \$

Serve a total of 728 days in jail with credit for TBD days served, and serve a total of days of electronic monitoring home detention/electronic monitoring with credit for days served.

Other alternative means of confinement

Jail sentences are concurrent/consecutive with all other commitments

This crime is an offense which requires sex or kidnapping offender registration, or is one of the following offenses, assault in the fourth degree with sexual motivation, communication with a minor for immoral purposes, custodial sexual misconduct in the second degree, failure to register, harassment, patronizing a prostitute, sexual misconduct with a minor in the second degree, stalking, or violation of a sexual assault protection order granted under chapter 7.90 RCW. Therefore, the defendant shall have a biological sample collected for purposes of DNA identification analysis. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from defendant for a qualifying offense. RCW 43.43.754.

Defendant shall pay to the clerk of this court:

waived

Table of fees: fine, assessments, costs, bench warrant fee, jail recoupment fee, DNA fee, PPIA, other, restitution, BAC fee, criminal traffic fee, probation/monitoring fee, booking fee, public defender recoupment, domestic violence assessment, criminal conviction fee, violation of RCW 26.50 DVPO. Total: \$

E-MAIL JES 12/16/16 MEH

\$ \_\_\_\_\_ of this total is converted to \_\_\_\_\_ hours of community restitution (service) which must be completed by \_\_\_\_\_. Proof of completion shall be provided to the court. Online Community Service will NOT be accepted. All community will be verified by the court.

The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

**Additional Conditions of Sentence:**

No criminal violations of law or alcohol related infractions.  
 Not drive a motor vehicle without a valid license and proof of insurance.

Probation for ~~60~~ \_\_\_\_\_ months. Supervised probation for \_\_\_\_\_ months, with probation department and abide by all rules and regulations of probation department. Pay a \$ \_\_\_\_\_ pre-sentence fee. Supervised probation is \$1,500.00 in addition to any other fines imposed, it is payable at \$50.00 per month.

Supervised probation to end upon completion of  Certified domestic violence treatment and/or  \_\_\_\_\_

Begin the following within \_\_\_\_\_ days and complete within \_\_\_\_\_ days and file proof of timely enrollment.  Certified Domestic Violence Program  Anger Management  Consumer Awareness (theft)  Other \_\_\_\_\_

Obtain an  alcohol/drug evaluation from a Washington State-approved agency  a psycho-sexual evaluation from a state certified provider  a mental health evaluation from a state licensed mental health provider, and file a copy of the evaluation within \_\_\_\_\_ days. Begin any recommended treatment or education within \_\_\_\_\_ days and file proof of timely enrollment and completion.

Begin the following within \_\_\_\_\_ days and complete within \_\_\_\_\_ months, and file proof of timely enrollment and completion:  DUI Victim's Panel  Alcohol/Drug Information School  One Year Alcohol/Drug Treatment  Two Year Alcohol/Drug Treatment  Alcohol/Drug Treatment for the period of \_\_\_\_\_  Driver Improvement School.

Use no alcoholic beverages, marijuana, or non-prescribed controlled drugs.

Attend  Alcoholics Anonymous  Narcotics Anonymous  Other self-help program (\_\_\_\_\_) meetings \_\_\_\_\_ times a week for \_\_\_\_\_ months or as recommended by treatment provider.

Do not go upon the property of and have no contact with Lee Fox

Other: \_\_\_\_\_

This crime involves a sex offense, or a kidnapping offense involving a minor, as defined in RCW 9A.44.130. The defendant is required to register with the county sheriff as described in the "Offender Registration" Attachment.

Return for a review hearing: \_\_\_\_\_  Bail or Bond is  Exonerated  Forfeited.

**I have read the rights, conditions and warnings.**

Dated: 12.15.16

Defendant's Signature

Date of Birth

Judge /Pro Tem

Defendant's Mailing and Physical Address and Telephone

Jessie Londer  
Judge /Pro Tem

Maude Wilson  
Prosecuting Attorney W&SBA No. 39654

[Signature]  
Defense Attorney W&SBA No. 39822  
 Written Waiver of Counsel is filed.

36

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 31, 2018 - 10:05 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50633-5  
**Appellate Court Case Title:** State of Washington, Respondent v. Michael D. Kibbee, Appellant  
**Superior Court Case Number:** 17-1-00013-8

**The following documents have been uploaded:**

- 506335\_Briefs\_20181031095933D2722167\_0833.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was BOA 50633-5-II.pdf*

**A copy of the uploaded files will be sent to:**

- lmikelson@co.jefferson.wa.us
- mhaas@co.jefferson.wa.us

**Comments:**

Copy mailed to: Michael Kibbee, 721 145th PL SW Lynnwood, WA 98087

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Dana M Nelson - Email: nelsond@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20181031095933D2722167**