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COA No. 31487-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAM EDWIN POWELL,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

1. Adam Powell's right to public trial was violated.
2. The State's evidence was insufficient to support Mr. Powell's conviction of second degree murder.
3. The court erred by imposing an exceptional sentence.

Issues Pertaining to Assignments of Error

A. Was Mr. Powell's right to public trial violated when the trial court held improper sidebars discussing substantive rather than mundane issues and failed to promptly memorialize the discussions? (Assignment of Error 1).

B. Was the State's evidence insufficient to support the conviction of second degree murder? (Assignment of Error 2).

C. Did the court err by imposing an exceptional sentence? (Assignment of Error 3).

II. STATEMENT OF THE CASE

Mr. Powell was charged by third amended information with first degree murder with a firearm enhancement and a domestic violence (DV) aggravator. (CP 57). After extensive hearings, the court determined certain ER 404(b) evidence as to domestic violence and Mr. Powell's statements to police were admissible. (1/28/13 RP 150-64, 1/29/13 RP 403-20; CP 269). The case

proceeded to jury trial. During voir dire, several conferences with counsel were unrecorded, but were memorialized after Mr. Powell moved to settle the record during this appeal. (CP 1070).

On September 12, 2010, Brenda McCoy saw a lady get hit from behind by a car. (2/4/13 RP 798). After getting hit, the lady was upset and Ms. McCoy helped her up. (*Id.* at 800). The car came back after a few minutes; a male was driving. (*Id.* at 802). There was no blood or broken bones. (*Id.* at 816). The lady appeared to be Hispanic. She called 911. (*Id.* at 804). Ms. McCoy identified Mr. Powell as the driver only because he was in the courtroom and she knew he was the defendant. (*Id.* at 811).

Three officers responded to the possible DV that day at 905 Tieton Ave. in Tieton, WA. (2/4/13 RP 818, 828, 845). The male was Mr. Powell. (*Id.* at 821, 833-34, 852).

Officer Juan Ceja responded at 7:50 p.m. on October 23, 2010, to a possible suicide at 905 Tieton. (2/4/13 859). There was no response to his door knock so he went in. (*Id.* at 860-61). A male was kneeling and on the phone in the living room area; a female was on her back on the ground with blood around her. (*Id.* at 861). The officer escorted the male, Mr. Powell from before, out to the back seat of the police car. (*Id.* at 862, 864). Officer Ceja

did not talk to Mr. Powell, who was hysterical. (*Id.* at 863). The car door was open and he was uncuffed. (*Id.* at 864). The officer went back in and secured the weapon, a 40 caliber hi-point, lying right next to the victim. (*Id.* at 865). The female, Ms. Flores, was in the living room on her back, left arm over her face, and left foot crossed over the right. (*Id.* at 870).

Ernesto A. Manzo, lived at 903 Tieton, and was a neighbor of Mr. Powell's in the duplex. (2/4/13 RP 876). He did not see Mr. Powell in the courtroom, but the court nevertheless allowed his testimony. (*Id.* at 877-78). On October 23, 2010, he heard a male yelling and a female crying. (*Id.* at 892-84). Mr. Manzo heard the male shouting "shut the fuck up", "fuck you", "fucking bitch", and "stupid". (*Id.* at 895). He heard it about three times a week. (*Id.* at 896). The yelling this day occurred about a half hour before he heard a gunshot. (*Id.* at 899-900). Mr. Manzo did not call the police, but talked to them when they arrived later. (*Id.* at 905).

Mr. Manzo's wife did not know the names of the Hispanic female and white male who lived next door to them. (2/4/13 RP 916). The Manzos had lived at 903 Tieton since February 2009 and the couple at 905 Tieton moved in on June 2010. (*Id.* at 916-18). She heard them arguing about once a week. (*Id.* at 921).

Detective Brian Jackson was called out to 905 Tieton on October 23, 2010, and processed the duplex. (2/4/413 at 946, 948). He shot video, took pictures, and gathered evidence. (*Id.* at 950). Ms. Flores's body was on the floor and the detective saw a hole on the right side of her head. (*Id.* at 954, 971). It looked like the body had been rolled over post-mortem. (*Id.* at 970-72). Blood was on her left hand, but not the right. (*Id.* at 973). The deceased female was Sabrina Flores. (*Id.* at 974).

Officer Ceja did not move her body and did not see anyone else move it. (2/5/13 RP 1010). The way Ms. Flores's body was positioned and blood on the gun did not make sense to him. (*Id.* at 1014). Mr. Powell told him Ms. Flores shot herself. (*Id.* at 1028). Officer Ceja said it appeared her body was moved before he arrived and had been rolled over. (*Id.* at 1043).

Officer Jared Hinze also responded to 905 Tieton on October 23, 2010. (2/5/13 RP 1055). After talking with Officer Ceja inside, he went to the patrol car where Mr. Powell was seated. (*Id.* at 1057). He was not in cuffs and the car door was open. (*Id.*). Officer Hinze transported him from the scene; Mr. Powell said nothing. (*Id.* at 1062).

Sergeant Jeff Gillespie responded to 905 Tieton on October 23, 2010, and contacted Mr. Powell in the patrol car. (2/5/13 RP 1080). The sergeant read him his *Miranda* rights. (*Id.* at 1082-83). When asked what happened that evening, Mr. Powell said he had left his loaded handgun on their living room couch when he went upstairs to get his car keys. (*Id.* at 1085). He walked back into the living room and Ms. Flores had the gun to the side of her head. (*Id.*). As he walked toward her, she fired the gun and fell to the floor. (*Id.*). Sergeant Gillespie went back into the house and saw no blood spatter, but there was a large pool of blood to the right side of her head. (*Id.* at 1090-91).

He had a second conversation with Mr. Powell after he had viewed the crime scene. (2/5/13 RP 1092). In this talk, Mr. Powell said the gun was in Ms. Flores's left hand in direct contact with the left side of her head. (*Id.* at 1093, 1096). The medical examiner's report indicated the entry wound was on the left side of the head. (*Id.* at 1097). Blood was on Ms. Flores's left hand, wrist, jacket bottom, and lower right side of the chin. (*Id.* at 1099).

Casey Weigley was a paramedic and responded to the scene on October 23, 2010. (2/5/13 RP 1103-04). Ms. Flores had no pulse. (*Id.* at 1110). Her left arm was over her face and the gun

was on the right side of her body. (*Id.* at 1111-12). Ms. Flores was clinically dead. (*Id.* at 1113). The paramedic talked to Mr. Powell, who was distraught and tearful. He had blood spatter on his left arm and a little blood on his right arm. (*Id.* at 1115, 1118).

Anthony Jennings was serving 14 years for robbery. (2/5/13 RP 1142). He met Mr. Powell in October 2010. (*Id.* at 1142-43). He heard Mr. Powell talk about his girlfriend, Sabrina Flores, and domestic violence situations. (*Id.* at 1144-45). Mr. Powell told him he killed Ms. Flores, describing in detail what happened. (*Id.* at 1145-46). They were fighting the night of the murder when he pushed her head down, put the gun to her head, and blew her head off. (*Id.* at 1147-49). Mr. Jennings heard the story over thirty times. (*Id.* at 1151). Mr. Powell told him he used a 40 caliber chrome Smith and Wesson. (*Id.* at 1153). He also said he put the gun in the wrong hand – the opposite hand from where the bullet entered her head. (*Id.* at 1154). Mr. Powell was angry about Ms. Flores's wanting to leave. (*Id.* at 1156). Evidence of some of Mr. Jennings' prior crimes was admitted to impeach his credibility. (*Id.* at 1164). He acknowledged he would be labeled a snitch; got no deal from the State for his testimony; and was testifying because he did not

like what Mr. Powell did to Ms. Flores and her family. (*Id.* at 1165-67).

Detective Sam Perrault responded to the Tieton address on October 23, 2010. (2/6/13 RP 1193). He did not talk to Mr. Powell. (*Id.* at 1195). Ms. Flores was face up and left hand over her face. (*Id.* at 1196). It looked like a single gunshot wound to the head and a pool of blood was beside her head. (*Id.*).

Katerina Lemus, Ms. Flores's mother, said her daughter was right-handed and 28 years old when she died. (2/6/13 RP 1220, 1222).

Dr. Gina Fino, a forensic pathologist, conducted the autopsy on Ms. Flores. (2/6/13 RP 1233, 1236-37). She had an injury to her head and injury to her right arm from a gunshot wound. (*Id.* at 1239). The entrance wound was to the left side of her head and the other entrance wound was on her right anterior upper arm with a partial exit wound on the posterior outside of the arm. (*Id.* at 1239-40). The entrance wound on the head was behind her left ear and the exit wound was on the right side of the face near her right eyebrow. (*Id.* at 1240). Those injuries were the result of a gunshot wound as well as the fractures to her skull. (*Id.*). Some soot was present on the soft tissues, meaning not much distance from the

gun muzzle to the entrance wound. (*Id.* at 1241). But there was no skin splitting or stippling so Dr. Fino opined there may have been fabric between the muzzle and scalp. (*Id.* at 1242).

The bullet went left to right, back to front. (2/6/13 RP 1244). It entered 5" from the top of the head and exited at 3". (*Id.*). Ms. Flores's right arm was in contact with her head so there were two injuries from one wound path. (*Id.* at 1249). The gunshot caused her injuries and the gunshot wound to the head caused her death. (*Id.* at 1250, 1267). Dr. Fino characterized the bullet as a large caliber. (*Id.* at 1262). She did not see a blood pattern suggesting Ms. Flores was standing and fell on her back. (*Id.* at 1263). Her wound was not consistent with being self-inflicted. (*Id.* at 1269). Dr. Fino testified it was possible Ms. Flores fell and hit the floor at or shortly before the time the bullet was fired. (*Id.* at 1281-84). The doctor could not exclude the scenario where the gun could have fired if it was between Ms. Flores and someone was on top of her. (*Id.* at 1302).

Deputy Edward Levesque was at the scene on October 23, 2010. (2/7/13 RP 1318). He saw Ms. Flores lying on her back and kind of rolled on her right side. (*Id.* at 1321). There was a pool of blood by her head on the right side, the gun to the right side of the

head with blood on the grips, and a gunshot wound to the right of her head. (*Id.* at 1322-23). The left ankle was crossed over the right, suggesting the body was probably rolled up on the right side. (*Id.* at 1323). The left hand was covered in blood and the hair on the left side of her head was matted and bloody. (*Id.* at 1324). He saw massive trauma to the left side of Ms. Flores's head. (*Id.*) The only gunshot wound he could see was to the right side of the head. (*Id.* at 1328).

Deputy Levesque did follow-up investigation and talked to Mr. Monzo and his wife. (2/7/13 RP 1330-31). He was present for the autopsy done by Dr. Fino, who took out a 40 caliber bullet from Ms. Flores's right arm. (*Id.* at 1333-345). The State rested. (*Id.* at 1367).

Jeffrey Kelso knew Anthony Jennings. (2/7/13 RP 1367). He testified Mr. Jennings knew either the father or brother of Sabrina Flores. (*Id.* at 1385).

Mr. Powell testified in his own behalf. (2/7/13 RP 1391). He met Ms. Flores in March 2010 and they moved in together at 905 Tieton around July 2010. (*Id.* at 1395-96). The car incident where he was supposed to have hit Ms. Flores occurred in September 2010 when going to see a friend in Naches. (*Id.* at 1397). Ms.

Flores wanted to go to Yakima, but he did not and wanted to go home. (*Id.*). She got mad, whereupon he told her to get out of the car. (*Id.* at 1398). She got out while Mr. Powell paced her with the car. (*Id.* at 1399). He tossed her purse to her; she threw it back. Mr. Powell stopped the car and told her to get back in. (*Id.*). Ms. Flores crossed in front of the car; his foot slipped off the clutch; the car bumped her. She fell down and he helped her back up. (*Id.*).

Mr. Powell said they yelled at each other often, but there was no hitting. (2/7/13 RP 1400). He never told Mr. Jennings he intended to kill Ms. Flores. All he said was what he was charged with and what the cops said he did. (*Id.* at 1402). Mr. Powell told him he was charged with something he did not do. (*Id.* at 1404). He did not tell Mr. Jennings he had a habit of beating up or choking Ms. Flores. (*Id.* at 1405). Mr. Powell did not say he was going to blow her fucking head off. (*Id.* at 1406). He did have a 40 caliber handgun, but it was not chrome. He did not tell Mr. Jennings it was. (*Id.*). Mr. Powell denied what Mr. Jennings testified he told him happened the night she died.

Mr. Powell said he and Ms. Flores fought a lot. (2/7/13 RP 1405). He was a meth addict, but had not used since April 2006. (*Id.* at 1409). He told Ms. Flores drugs were inappropriate and he

did not want drugs in his life. (*Id.* at 1410). Ms. Flores used meth and Mr. Powell found a pipe in her jacket in a pile of clothes in the kitchen. (*Id.*). On October 23, 2010, Mr. Powell went shooting with his 40 caliber hipoint. (*Id.* at 1413). He went home and Ms. Flores was in the living room getting ready to take a laptop back to her father. (*Id.* at 1414). She went to shower. (*Id.* at 1415). He sat in the living room and yelled he was going to the post office two blocks away. Mr. Powell walked there and sat at the park to go through his mail. (*Id.* at 1415-16). He stopped at the front door where he heard Ms. Flores talking to her father. (*Id.*). Mr. Powell could not see her, but assumed she was in the living room because he could hear her. (*Id.* at 1417). The talking stopped and Ms. Flores came to the door, asking him if he was spying on him. (*Id.*).

He went inside and sat on the futon while Ms. Flores sat on the other couch. (2/7/13 RP 1417). He took out his gun as the holster was digging into his side. (*Id.* at 1418-19). Mr. Powell was typically right-handed, but he shot left-handed. (*Id.* at 1419). He put the gun on the coffee table and went through the mail again. (*Id.* at 1410). Mr. Powell told Ms. Flores to get ready to go to Wapato to return the laptop and went upstairs to the bedroom. (*Id.* at 1411). He took his pants from a big pile and found the pipe,

whereupon an argument broke out. She was angry at him for throwing the pipe out. (*Id.* at 1422-23). Mr. Powell was going to pick the gun up before heading upstairs, but he got sidetracked when Ms. Flores started talking to him and put the gun back down. (*Id.* at 1424). When he returned from upstairs, he saw Ms. Flores with a gun to her forehead. (*Id.*). Mr. Powell told her to stop and lunged at her to get the gun away from her. (*Id.* at 1426). He grabbed her and she fought. (*Id.*). Mr. Powell struggled to get the gun away from her; they fell; she shot herself. (*Id.*).

He rolled her over after the gun went off to see if she was breathing. (2/7/13 RP 1427). She was not breathing and had no pulse. (*Id.*). Mr. Powell did not try to put the gun in her hands, but moved it away from her. (*Id.*). He did not intend for Ms. Flores to die that evening. (*Id.* at 1428). When he talked to the police officers, he did not tell the truth. (*Id.* at 1431). He said it was a suicide because he thought she shot herself. (*Id.* at 1431-32). Mr. Powell was afraid of being accused of something he did not do. (*Id.* at 1432). What happened was an accident. (*Id.* at 1433). He did not get the firearm away from Ms. Flores. (2/8/13 RP 1479). The defense rested. (*Id.* at 1496).

The court gave a jury instruction for the lesser-included offense of second degree murder. (CP 242-46). The jury found Mr. Powell guilty of second degree murder with a firearm enhancement and domestic violence aggravator. (2/11/13 RP 1649-50). The court sentenced Mr. Powell to an exceptional sentence upward of 340 months, 60 months beyond the standard range that included the firearm enhancement. (2/22/13 RP 1707; CP 255). The court further found Mr. Powell had the financial ability to pay legal financial obligations, but capped incarceration costs at \$5000. (*Id.* at 1709). It also made the exceptional sentence finding based on the domestic violence aggravator. (*Id.* at 1714; CP 267). This appeal follows.

III. ARGUMENT

A. Mr. Powell's right to public trial was violated.

A criminal defendant has a right to a public trial under the Constitutions of the United States and Washington State. *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); U.S. Const. amend. VI; Wash. Const. art.1 § 22. Article 1, section 10 of the Washington State Constitution also guarantees that justice in all cases shall be administered openly. *State v. Frawley*, 181 Wn.2d 452, 458-59, 334 P.3d 1022 (2014).

Whether a defendant's public trial right has been violated is a question of law reviewed de novo. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). The question involves a three-part inquiry: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" *State v. Smith*, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014).

The proceeding at issue, jury selection, implicates the public trial right. *Wise*, 176 Wn.2d at 16-19. The next inquiry is whether the proceeding was closed. Although characterized as sidebars, the unrecorded conferences between counsel and the trial judge were not "proper sidebars" or their equivalent in any event. *Smith*, 181 Wn.2d at 515-17. They were improper because mundane issues implicating little public interest were not their focus as they did not only involve scheduling, housekeeping, and decorum. *State v. Whitlock*, 188 Wn.2d 511, 513-14, 396 P.3d 310 (2017).

Furthermore, these conferences were not recorded or promptly memorialized. (See 4/21/17 RP 5, 9, 10, 14, 17, 21, 24, 26, 27; CP 1053, 1064, 1066; 9/28/17 RP 9; CP 1070).

On January 30, 2013, two sidebars were held at 12:21 and 12:22 p.m. (1/30/13 RP 524-25). The prosecutor could not recall

what was discussed at any of the sidebar conferences at issue. (CP 1064, 1066). Defense counsel generally had no specific recollection either, but attempted to infer what happened from the context. (CP 1053-63). At the hearing on the motion to settle the record, the judge found the sidebars at 12:21 and 12:22 likely concerned scheduling, but one of the jurors was excused. (CP 1083-86). Indeed, defense counsel thought the first unrecorded sidebar involved a prospective juror who was a relative of one of the testifying deputies, but he would not have asked to excuse that juror without Mr. Powell's approval. (CP 1055-56). Excusing a juror for cause is not a mundane issue and implicates the jury selection process, which must be open and public. *Wise, supra*.

The next unrecorded sidebar was on January 31, 2013, at 2:44 p.m. (CP 1057). Defense counsel had no specific independent recollection of what took place, but inferred from context it had to do with excusing a juror for cause because of his personal trauma and experience with issues critical to Mr. Powell's case. (CP 1057). Counsel believed he then asked that the juror be excused. (CP 1058). The court noted this sidebar was not later put on the record. (CP 1089-93). Excusing a juror is not a mundane

issue and was not a subject for a “proper sidebar.” *Whitlock*, 188 Wn.2d at 513-14.

On February 1, 2013, there were three unrecorded sidebars at 11:06 a.m., 11:22 a.m., and 11:44 a.m. (CP 1058). Defense counsel could not specifically recall what was discussed at sidebar, but surmised it had to do with the court’s denial of his challenge of a juror for cause. (CP 1059). Counsel thought the court wanted to put his comments on the record. (*Id.*). With respect to the second sidebar, defense counsel again had no specific independent recollection of what was discussed, but inferred from the context that it had to do with timing. On the other hand, the court indicated it was reversing its ruling as to excusing a juror, whereupon the sidebar took place. (2/1/13 RP 751; CP 1060, 1093-94). Defense counsel further inferred the State intended to bring a *Batson* challenge, which the court said would be decided with the jury out. (CP 1060, 1096). As to the third unrecorded sidebar, counsel thought it had to do with confirming the list of selected jurors. (CP 1061). The court thought so too. (CP 1098-1101). This last sidebar appears to be “proper” in that only a mundane issue was involved. *Whitlock*, 188 Wn.2d at 514.

As to the other two sidebars on February 1, 2013, it is clear they involved a challenge for cause and a *Batson* challenge by the State. These are not matters pertaining to scheduling, housekeeping, and decorum. Rather, they deal with the substantive process of excusing a juror for cause and a *Batson* challenge implicating Mr. Powell's right to public trial. *Wise, supra*.

There appears to be an attempt to put on the record the substance of some of the unrecorded sidebars, but all of the sidebars were not memorialized until the trial court held a hearing on Mr. Powell's motion to settle the record and subsequently entered findings and conclusions on the sidebars. (CP 1070-1110).

The constitutional right to an open courtroom does not require trial courts to invite the public to attend sidebars as they have not historically been open to the public and allowing such access would play no positive role in the proceedings. *Smith*, 181 Wn.2d at 511. But "proper sidebars" involve just mundane issues implicating little public interest, such as scheduling, housekeeping, and decorum. *Whitlock*, 188 Wn.2d at 513-14. With the exception of the sidebar confirming the juror list, the unrecorded sidebars were not mundane, but involved discussion of excusing jurors for cause and a *Batson* challenge by the State. These sidebars

involved discussion of substantive issues that resulted in a closure where the public was excluded, but it had interest in an open jury selection process. Thus, the sidebars were not “proper” and resulted in a closure. *Whitlock*, 188 Wn.2d at 521-22.

The improper sidebars were also not recorded or promptly memorialized. (CP 1070-1110). This is required by *Whitlock*. 188 Wn.2d at 523-24. The resulting courtroom closure occurred without a *Bone-Club* analysis. *Id.* at 520. Without such an analysis, a closure will almost never be considered justified. *Id.* at 521. And there was no justification for the courtroom closure through the improper sidebars. This was structural error requiring reversal. *Id.* at 524.

B. The State’s evidence was insufficient to support the conviction of second degree murder.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State’s evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

The court instructed the jury on excusable homicide:

It is a defense to a charge of Murder in the First Degree and Murder in the Second Degree that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, or without any unlawful intent.

The State has the burden of proving the absence of this defense beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty. (CP 225).

The jury decides credibility, but it cannot find facts through guess, speculation, and conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). No one was there when the gun went off except Ms. Flores and Mr. Powell, who admitted lying to the police that it was a suicide. But he did testify he was trying to get the gun away from her when it accidentally went off as they struggled. Rather than intending to kill Ms. Flores, he was trying to prevent her death and he attempted to do so by acting lawfully by lawful means. Under the circumstances here, the State's evidence fell short of proving beyond a reasonable doubt that the homicide was not excusable. *State v. Brightman*, 155 Wn.2d 506, 524-25, 122 P.3d 150 (2005).

Although the jury decides credibility, it still cannot resort to guess, speculation, or conjecture to determine facts proving guilt or the absence of excusable homicide beyond a reasonable doubt. *Hutton, supra*. Considering the unreliable testimony of Anthony Jennings and Dr. Fino's acknowledgement the gunshot wound could have been accidental but not self-inflicted, the State failed to establish by the requisite quantum of proof that the homicide was not excusable. *See Brightman, supra*. Accordingly, the conviction must be reversed and the charge dismissed.

C. The court erred by imposing an exceptional sentence.

The court instructed the jury that it had to find two elements the State had to prove for an aggravated domestic violence:

(1) That the victim and the defendant were in a dating relationship; and

(2) That the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents of abuse over a prolonged period of time. An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks. (CP 234).

The State did not prove Mr. Powell psychologically or physically abused Ms. Flores over a prolonged period of time.

Neither the testimony of the Manzos, Ms. McCoy, or Mr. Powell

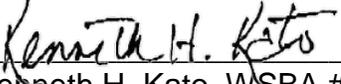
himself showed beyond a reasonable doubt such abuse over a prolonged period of time. Mr. Manzo's wife heard them arguing, but there was no time frame provided in her testimony. The couple fought a lot, but that is all the evidence showed even when viewed in a light most favorable to the State. See RCW 9.94A.585(4) (reason for exceptional sentence not supported by the record). Because the State's evidence did not prove aggravated domestic violence beyond a reasonable doubt, the trial court's imposition of a sentence beyond the standard range by adding 60 months for the domestic violence aggravator must be reversed. See *State v. Lindahl*, 114 Wn. App. 1, 17-18, 56 P.3d 589 (2002), *review denied*, 149 Wn.2d 1013 (2003).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Powell urges this court to reverse his conviction and remand for new trial.

DATED this 29th day of January, 2018.

Respectfully submitted,



Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on January 29, 2018, I served a copy of the Brief of Appellant by USPS on Adam Powell # 364246, 191 Constantine Way, Aberdeen, WA 98520; and through the eFiling portal on David B. Trefry at his email address

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