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JUL 21 2009

King County Prosecutor
Appellate Unit

NO.62909-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID MUIR,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 21 PM 5:07

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

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to ensure the jury was properly instructed on the law denied appellant his constitutional right to effective representation and a fair trial.

2. The trial court commented on the evidence, thereby violating appellant's constitutional rights under article 4, § 16 of the Washington Constitution.

Issues Pertaining to Assignments of Error

1. Appellant was charged with Burglary in the First Degree, requiring that the State prove he "remained unlawfully" in a building, a legal term with a specific technical definition. Defense counsel failed to ensure jurors were provided a definition of the term, thereby easing the State's proof requirements. Did this failure deny appellant his right to effective representation and a fair trial?

2. The Washington Constitution forbids judicial comments on the evidence. A trial judge violates this prohibition when he suggests in the jury instructions that the jury need not consider an element of the State's proof. In this case, where the State sought to prove as an aggravating sentencing factor that the

charged burglary involved domestic violence, the court repeatedly described the burglary as a “domestic violence” offense. Do these comments on the evidence require vacation of the aggravating sentencing factor?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor’s Office charged David Muir with one count of Burglary in the First Degree – Domestic Violence and two counts of Assault in the Fourth Degree – Domestic Violence. CP 17-18. On the burglary charge, the State alleged an aggravating sentencing factor – that the offense involved domestic violence. CP 17.

A jury acquitted Muir on one count of assault, but convicted him on the other two charges. CP 38-40. Jurors answered “yes” on a special verdict form asking them if the “Burglary in the First Degree Domestic Violence” was a domestic violence offense. CP 41.

Muir’s standard range was 15 to 20 months. CP 72. On the burglary, the court imposed an exceptional sentence of 22 months (17 months plus an additional 5 months for the aggravating factor).

CP 74. The court imposed a concurrent 365-day sentence for the assault. CP 69. Muir timely filed his Notice of Appeal. CP 80-91.

2. Substantive Facts

a. The alleged crimes

Kimberly Wolfstone and David Muir began dating in January 2007. RP 43. By June 2007, Muir had moved in with Wolfstone at the Highland Village Apartments in Bellevue. RP 43-44. They split the bills equally – including rent and utilities – and both had keys to the apartment. RP 44-45, 128, 138. When Muir moved in, he brought his personal belongings, which included dishes, furniture, clothing, a PlayStation console, and a DSL box for Internet access. RP 45, 48, 128-129. Muir later purchased a television set for the apartment. RP 130.

Wolfstone's son, Dustin, who was five years old at the time of trial, shared the apartment with the couple. Muir's seven-year old daughter stayed with them every other weekend. Wolfstone and Muir put a bed in Dustin's room for her to use. RP 42, 48, 130, 137. Muir would invite friends and family to the apartment to visit. RP 129-130.

After Muir moved in, the couple had several breakups. During these incidents, Wolfstone would ask Muir to leave the

apartment, but he apparently did not move out. RP 131. After a fight in February 2008, however, both agreed it would be best if Muir left. RP 49, 131. Muir took his clothes, electronics, and furniture with him and returned his key to Wolfstone, who nonetheless had the locks changed. RP 50-51, 132.

The two did not see each other for some time, but then Muir initiated contact. RP 50-51. In the months that followed, the couple had an on again/off again relationship, alternating between periods of dating and fighting. RP 52. By April 2008, the two were in couples counseling. RP 132. By May 2008, Muir was once again spending almost every night at the apartment. RP 139. When the door handle fell off the front door that month, it was Muir who replaced it with a new one. RP 135. Moreover, he moved some of his personal items back inside the apartment. RP 133-34.

By June, things were going well and the two were a couple again. Muir paid to have DSL reinstalled for their use and used the apartment for his billing address on the account. RP 53, 138, 173. Muir was once again inviting people over, and Muir's daughter had resumed spending the night on occasion. RP 137-138. Muir's clothes were in Wolfstone's closet and he had a drawer for his belongings in her dresser. RP 76. Wolfstone had not yet given

Muir a key to the apartment; instead, she simply left the door unlocked for him when she knew he was coming over. RP 52-54, 68.

June 4, 2008 was Wolfstone's birthday. Her friends arranged for Muir to watch Dustin while they took her out for the evening. RP 55-56. Wolfstone did not get home until 4:00 a.m. the morning of June 5. RP 56. She and Muir did not have a chance to speak that morning (although Muir was staying at the apartment), but they argued about the matter by text messages that day while Wolfstone was at work. RP 56-57. Wolfstone sent a message to Muir asking if he was getting paid that day because she needed to pay rent. RP 141. Later, however, she told Wolfstone that she "wanted him to move out" and Muir responded that he was in the process of doing so. RP 57.

When Wolfstone arrived home from work, Muir was at the apartment. RP 58. Wolfstone asked if Muir was going to remove his belongings or whether she should do it for him and an argument ensued. RP 59. She repeatedly asked Muir to leave, and he responded that he did not have to leave because he lived there. RP 67-68.

According to Wolfstone, Muir called her names, spit on her face, threw her down on a bed and held her there while covering her mouth to muffle her screams. RP 59-64. He let her up after a couple of minutes. RP 60, 64. Because Justin was in his bedroom at the time, and Wolfstone did not want to upset him, she calmed herself down. RP 65-67.

The next day, June 6, after Muir left for work, Wolfstone talked to the apartment manager about getting the locks changed and told the manager what happened. The manager encouraged her to call police. Wolfstone did and provided a statement. RP 69-71. She sent a text message to Muir informing him that she was talking to police and arranged to have the locks changed. RP 72.

Later that day, Muir twice showed up at Wolfstone's work, the second time seeking access to the apartment so that he could retrieve his personal property. RP 73-74. Wolfstone told Muir the apartment manager would call police if he simply showed up at the complex. RP 74. She offered to let him in after she got off work, but Muir stormed off. RP 77.

When Wolfstone arrived home that evening, she discovered that someone had forced the front door open, breaking the door frame. RP 78-79, 200-204, 236. Most of Muir's personal items

were missing, as were some of Wolfstone's. RP 80-82. Police responded to the scene. RP 79. The lock was changed, and a piece of wood was affixed to the doorframe as a temporary measure allowing the deadbolt to lock. RP 87-88, 238-39.

The police officer that responded to the call explained to Wolfstone that Muir had established legal residency in the apartment. Although Wolfstone initially challenged this assertion, she eventually agreed with the officer. RP 214-215.

Wolfstone slept on the living room couch that night. Dustin slept in his bedroom down the hall. RP 46, 85. Around 3:00 a.m., Wolfstone heard someone ring the doorbell. She assumed it was Muir and ignored it. RP 84, 86-87. Shortly thereafter, Muir came crashing through the front door and said, "I forgot my blankey," apparently a reference to the fact a blanket he owned was still in the apartment. RP 84, 89-91. Wolfstone grabbed her phone, but Muir took it from her. RP 90-91.

Muir was extremely intoxicated, falling over, slurring his words, and not making sense. RP 99. Wolfstone repeatedly told him to leave, and he said he would after they talked. RP 93. After about an hour, Wolfstone became frustrated and began yelling at Muir, hoping that a neighbor might hear her. RP 96, 98. According

to Wolfstone, Muir then grabbed her, threw her over the back of the living room couch, and covered her mouth with his hand. RP 96-97. For another hour, Wolfstone struggled to get away. RP 98.

Wolfstone eventually calmed down and Muir got off of her. Both were crying, and Muir indicated he had messed up. RP 101. He told Wolfstone she needed to fall asleep with him on the couch and that once he was asleep, she could take Dustin and go. RP 102, 104. When Muir fell asleep, she grabbed Dustin and took him to her parents' home in Redmond. RP 105-107.

Later that morning, Bellevue Police arrested Wolfstone at the Bellevue apartment. He was still asleep on the couch and still appeared intoxicated. RP 206-210.

The burglary charge in count one and the assault charge in count two were based on events the morning of June 8. CP 17-18. The assault charge in count three was based on the events of June 5. CP 18.

b. The Defense Strategy

During trial, defense counsel challenged several aspects of the State's case. At the close of the State's evidence, counsel moved to dismiss the burglary charge for failure to prove that Muir lacked the lawful authority to enter or remain in the apartment on

June 8. RP 289. The court denied the motion, concluding that a jury could find Muir lacked such authority. RP 292.

During closing argument, the defense made this same argument to the jury. Counsel argued that during the month of May 2008, Muir had moved back into the Bellevue apartment – he was there every night, he kept personal belongings there, he was paying the DSL bill, and his daughter was staying there again. RP 339-340. Moreover, both a police officer and Wolfstone herself had expressed their opinions that Muir had established residency. RP 340, 345-346. Therefore, because Muir also lived in the apartment, he could not have entered or remained unlawfully and there could be no burglary. RP 348-349.

As discussed below, although there is a standard jury instruction defining the legal term “enters or remains unlawfully,” defense counsel failed to request it. RP 296-302; CP 28-37.

Counsel also focused on the “domestic violence” aggravating factor associated with the burglary charge, arguing that the factor had not been proved because the evidence was insufficient to demonstrate beyond a reasonable doubt that the crime occurred within sight or sound of Dustin. RP 355-356.

As discussed below, however, the court had already labeled Muir's offenses "domestic violence" throughout the jury instructions and verdict forms. CP 38-40, 54, 62-63, 67.

C. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO ENSURE JURORS WERE ADEQUATELY INSTRUCTED DENIED MUIR HIS RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make

reasonable investigations"). The failure to bring relevant authority to the trial court's attention is deficient performance. State v. McKinnon, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001). So is the failure to offer an instruction that would have aided the defense. See State v. Thomas, 109 Wn.2d 222, 226-29, 743 P.2d 816 (1987) (counsel ineffective for failing to offer instruction regarding defendant's mental state where intent a critical trial issue).

Under Washington law:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1) (emphasis added).

"A person 'enters or remains unlawfully' in or upon the premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(3). The test is not who holds legal title to the premises. Rather, the test is one of occupancy, possession, or habitation. State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007); State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (citing State v. Klein, 195 Wash. 338, 342, 80 P.2d 825 (1938)).

Consistent with Washington law on this subject, WPIC 65.02 provides, "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." Washington Pattern Jury Instructions, WPIC 65.02, at 36 (Thomson/West 2008). The "Note on Use" accompanying WPIC 60.02, which provides the elements for Burglary in the First Degree, expressly indicates that WPIC 60.02 should be accompanied by WPIC 65.02 and its definition of "enters or remains unlawfully." Washington Pattern Jury Instructions, WPIC 60.02, at 4.

At Muir's trial, the State did not attempt to prove that he unlawfully entered the apartment on June 8. Rather, the "to convict" instruction only focused on whether Muir unlawfully remained in the apartment. CP 54. And since the lawfulness of Muir's remaining in the apartment was a critical issue at trial, counsel's failure to request an instruction employing the Legislature's statutory definition is inexcusable.

It is well settled that in a criminal trial, while commonly understood words require no definition, technical rules or expressions must be defined for the jury. See State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) ("A term is 'technical'

when it has a meaning that differs from common usage.”), cert. denied, 523 U.S. 1007 (1998); State v. Hill, 10 Wn. App. 851, 854, 520 P.2d 946, review denied, 84 Wn.2d 1006 (1974); State v. Jones, 9 Wn. App. 1, 8, 511 P.2d 74 (1973).

This “technical term rule” is designed “to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law.” State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Jurors should not have to speculate about the law; nor should counsel have to engage in legalistic analysis as to what the instructions mean. State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff’d, 125 Wn.2d 707 (1995).

For example, in State v. Allen, 101 Wn.2d 355, 678 P.2d 799 (1984), the defendant was charged with second-degree burglary. Counsel proposed an instruction defining “intent,” the requisite mental state. Allen argued that his basic defense theory was lack of intent. Thus, it was imperative the jury understand the meaning of that word. Allen, 101 Wn.2d at 359. The Supreme Court agreed, holding that the failure to supply the statutory definition was a critical error because intent, as used in the criminal code, is a term of art with a specific legal definition. Allen, 101 Wn.2d at 361-62. The court reasoned that “[t]here is no way to

ascertain whether [the jury] used the proper, statutory definitions. Although the jurors may be able to hammer out a definition . . . it cannot be assumed that these definitions would match those established by the Legislature for use at trial." Allen, 101 Wn.2d at 362.

As with "intent" in Allen, "unlawfully entering or remaining" is a term of art with a precise legal meaning. In the absence of the intended definition, the jury had no guidance. It was left to hammer out its own definition. Thus, counsel performed deficiently when he failed to research and propose the proper legal definition of this term.

To satisfy the second requirement – prejudice – Muir needs to show a "reasonable probability" that but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94).

Whether Muir was privileged to remain in the apartment was a close question for jurors. In State v. Wilson, Division Two held that the defendant *lawfully* entered and remained in the apartment he had shared with his girlfriend where, despite the presence of a

no-contact order: (1) Wilson had lived there both as a signatory to the lease and as a non-signatory, (2) he had keys to the residence, (3) his clothing and his car were at the residence, (4) there was no evidence he had a separate primary residence, and (5) the victim had referred to the residence as “our house.” Wilson, 136 Wn. App. at 600, 607.

In Muir’s case, there was certainly sufficient evidence from which jurors could have found that he lawfully remained, meaning he was privileged to be in the apartment. This included the fact he was staying there almost every night, had personal items in the apartment, was doing home repairs, invited friends and family over, was receiving the DSL bill at that address, had been asked to pay rent as recently as June 5, and – just the day before – both a police officer and Wolfstone herself had concluded that he had legal residency in the apartment. Although Wolfstone testified that in early June 2008 she had only *considered* allowing Muir to move back in, her request to him at the time was that he “move out,” indicating this had gone past the point of mere consideration. Compare RP 53-54 with RP 57.

Had counsel requested the statutory definition, the trial court would have been obligated to give it. See State v. Olmedo, 112

Wn. App. 525, 534, 49 P.3d 960 (2002) (“when requested, a trial court in a criminal case must define technical words and expressions used in jury instructions”; conviction reversed), review denied sub nom., State v. Johnson, 148 Wn.2d 1019, 64 P.3d 650 (2003). By failing to provide the statutory definition, counsel permitted jurors to find that Muir unlawfully remained based on evidence well short of the statutory mandate.

Indeed, the absence of a proper definition permitted the prosecutor to argue that jurors could use their own definitions and she argued that Muir’s presence in the apartment was unlawful because he no longer had Wolfstone’s permission or consent to be there. RP 330. The statutory definition of “remains unlawfully,” however, includes the absence of any privilege to be on the premises. A privilege is defined as a right. Webster’s Third New Int’l Dictionary 1805 (1993). And if Muir was privileged to be in the apartment because it was also his residence, Wolfstone could not unilaterally revoke his permission to be there by telling him to leave. See Wilson, 136 Wn. App. at 612.

Failure to use the statutory definition of “remains unlawfully” undermines confidence in the trial’s outcome. It permitted the prosecutor to argue a definition far narrower than that provided by

the Legislature. Because defense counsel failed to ensure Muir's jury used the relevant legal standard, and Muir suffered prejudice, he should receive a new trial on the burglary charge.

2. THE TRIAL COURT'S COMMENT ON THE EVIDENCE VIOLATED MUIR'S CONSTITUTIONAL RIGHTS UNDER ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968)

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." Id. at 721.

This constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

As previously discussed, with the desire to seek an exceptional sentence against Muir, the State alleged that the burglary was aggravated because it was a “domestic violence offense.” CP 17. Instruction 13 told jurors that to find this allegation met, they had to conclude, beyond a reasonable doubt, that (1) the victim and defendant were in a dating relationship and (2) the offense was committed in sight or sound of the victim’s child. CP 60.

Unfortunately for Muir, the trial court relieved the State of its burden to prove this factor by repeatedly referring to the charged offenses as “domestic violence.” The amended information uses this label for all three charges. CP 17-18. The “to convict” instructions use this label for all three charges. CP 54 (“burglary in the first degree domestic violence”), 62-63 (“assault in the fourth degree domestic violence”). The special verdict form for burglary uses the label. CP 41 (“Having found the defendant guilty of the

crime of Burglary in the First Degree Domestic Violence”). As does the instruction telling jurors how to use the special verdict form. CP 67 (“If you find the defendant guilty of Burglary in the First Degree Domestic Violence . . . you must also consider the special verdict form.”).

Recently, in State v. Hagler, 150 Wn. App. 196, 198, 208 P.3d 32 (2009), this Court warned against informing jurors that a crime has been designated a domestic violence offense. In Hagler, where jurors were not asked to decide whether the offenses involved domestic violence, revealing this information was deemed harmless. But this Court noted that prejudice might result in other cases. Id. at 201-203.

This is such a case. By repeatedly referring to the burglary as a domestic violence offense, the trial court commented on the evidence and relieved the State of its obligation to prove the domestic violence aggravator. In particular, the Supreme Court’s opinions in Levy and Becker make it clear that these repeated references require reversal.

In Becker, a special verdict form asking whether defendants were within 1,000 feet of school grounds included the phrase “to-wit: Youth Employment Education Program [YEP] School.” Becker,

132 Wn.2d at 64. The Supreme Court held that by describing the program as a “school,” this comment impermissibly relieved the State of its burden to prove the program was, in fact, a school and reversed. Id. at 64-65.

Similarly, in Levy, a burglary instruction required jurors find the defendant had unlawfully entered “a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA.” Levy, 156 Wn.2d at 716. Citing Becker, the Supreme Court found that “use of the word ‘building’ in the instruction improperly suggested to the jury that the apartment was a building as a matter of law.” Levy, 156 Wn.2d at 721.

There is no practical distinction between the special verdict form in Becker, the burglary instruction in Levy, and the instructions used at Muir’s trial, which told jurors that the burglary was a domestic violence offense as a matter of law.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

In Becker, the Supreme Court reversed because whether the program at issue was a school was an important and disputed issue at trial. Becker, 132 Wn.2d at 65. In Levy, however, the comment was deemed harmless because whether the apartment was a building “was never challenged in any way by the defendant” and “the jury could not conclude that [the apartment at issue] was anything *other than* a building.” Levy, 156 Wn.2d at 726.

At Muir’s trial, the defense challenged the domestic violence aggravating factor. The apartment was just shy of 1,000 square feet. RP 61-62. Wolfstone testified that on the morning of June 8, when Muir came through the door around 3:00 a.m., Dustin was asleep in his bedroom down the hall. RP 84-85. According to Wolfstone, when she went to check on Dustin, he had been awakened and was sitting up in his bed. She told him to go back to sleep and he lay down quietly in his bed. RP 93-94. Another time, according to Wolfstone, she tried to grab Dustin, who was reaching out for her from his bed, but Muir pulled her out of the room from behind. RP 102-104, 169-170.

Wolfstone also testified that when she expressed concern for Dustin, Muir said it was her fault if Dustin was scared because she was being too loud and it would be her fault if he had to harm

her in front of Dustin because she kept resisting. RP 100-101, 168-169. After Muir fell asleep, Wolfstone retrieved Dustin, who was still awake in his room, and left the apartment with him. She testified he was quiet and, based on her maternal instincts, she could tell he was concerned for her. RP 105-106, 170-171.

Other evidence, however, showed that Dustin was calm following the incident, casting doubt on whether he saw or heard anything. Dustin's television had been on in his bedroom throughout the incident. RP 160. At some point, Wolfstone closed the bedroom door. At no time did he get out of his bed. RP 102. Nor did he cry. RP 106. At one point, Muir went into Dustin's room, asked how he was doing, and told him to go to sleep. Dustin did not seem upset when Muir was talking to him. RP 163. Wolfstone's father testified that once his daughter brought Justin to their Redmond apartment, Justin "was playing pretty quietly." RP 250. Similarly, Wolfstone's mother testified that Dustin was quiet, not crying, and "[n]ot real visibly upset." RP 263. They had him watch television until he fell back to sleep. RP 266, 268-269.

During closing argument, the defense noted that Wolfstone was the only witness to testify that Dustin saw or heard anything on June 8, and argued that jurors should not find the aggravating

factor in light of Dustin's calm demeanor shortly after the events at issue. RP 355-356. This argument would have fallen on deaf ears, however, given that the trial court repeatedly told jurors this was a domestic violence offense. The State cannot show this was harmless.

Based on the repeated judicial comments on the evidence, this Court should vacate the jury's finding on the aggravating factor and Muir's exceptional sentence.

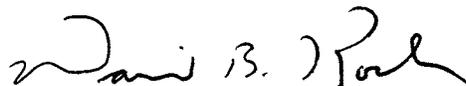
D. CONCLUSION

This Court should reverse Muir's burglary conviction. Alternatively, this Court should vacate his exceptional sentence on that conviction.

DATED this 21st day of July, 2009.

Respectfully submitted,

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