

No. 41795-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Maddaus,

Appellant.

Thurston County Superior Court

Cause No. 09-1-01772-1

The Honorable Judge Christine Pomeroy

Appellant's Supplemental Brief

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SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct requiring reversal.
2. The prosecutor improperly expressed a personal opinion in closing arguments.
3. The prosecutor improperly appealed to passion, prejudice, and emotion during closing argument.
4. The prosecutor improperly showed jurors PowerPoint slides of photographic exhibits that had been altered.
5. Mr. Maddaus was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

SUPPLEMENTAL ISSUES

1. A prosecutor may not express a personal opinion or appeal to jurors' passion and prejudice during closing arguments. Here, the prosecutor altered a booking photograph by superimposing the word "Guilty" in large print over Mr. Maddaus's face, showed jurors numerous other exhibits altered by the addition of text, and repeatedly expressed his personal opinion that Mr. Maddaus was guilty. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Maddaus's right to due process under the Fourteenth Amendment and Wash. Const. Article I Section 3?
2. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to repeated instances of prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Maddaus denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

Prosecutor David Bruneau made extensive use of a lengthy PowerPoint presentation during his closing argument in the murder trial of Robert Maddaus. CP 576-978.¹ In his presentation, Bruneau showed jurors numerous exhibits that he'd altered by adding text summarizing the prosecution's perspective on the evidence. CP 867, 868, 881, 885, 886, 889, 890, 891, 892, 902, 903, 904, 905, 907, 940, 944, 978. He also showed jurors photographic exhibits altered by adding red circles or arrows, highlighting parts of each image. CP 911, 912, 913.² Many of these slides also included a caption indicating their exhibit numbers. See, e.g., slide 39 (CP 904), captioned "Exhibit 84."

Some slides used animation (such as flashing text or words appearing in stages) and/or audio (such as excerpts from recordings

¹ The transcript contains no clear reference to the PowerPoint slides, which were projected on a large screen for the jurors to see. RP 1978-2089. Nor did Bruneau file a copy of his presentation with the trial court. Instead, counsel for Respondent was ordered to file a copy of the presentation. The materials she filed are now part of the record on appeal; however, the paper copy does not include the audio and animation jurors saw in the original presentation. CP 576-598.

² Bruneau also showed jurors slides outlining language from the jury instructions, with words highlighted to emphasize the prosecution's interpretation of each instruction. CP 871, 873, 879, 883, 884, 895, 899, 916. Other slides contained only text summarizing the state's interpretation of the evidence. CP 907, 913, 914, 915, 918, 919, 920, 921.

admitted as exhibits). See CP 869, 870, 871, 873, 874, 875, 876, 877, 879, 880, 882, 884, 885, 886, 888, 893, 894, 895, 897, 899, 901, 902, 903, 905-938, 947, 949, 951, 953, 955, 957, 959, 961, 964, 967, 969, 971, 973, 975, 978.³

One slide—which was shown to the jury twice during Bruneau’s presentation—showed a bloody close-up of Peterson wearing handcuffs. To this Bruneau had added (in red type) a quotation attributed to Mr. Maddaus; the caption read “Defendant: ‘I’m not taking those cuffs off’.” CP 881, 885. It was shown twice, and the record does not reflect how long each slide was left on screen. RP 1978-2016; CP 881, 885.⁴

Another slide showed a photograph of Jessica Abear (who was the alleged victim of the assault and attempted kidnapping charges). CP 902. Bruneau had captioned this slide with text outlining the prosecution’s version of the alleged assault:

- Interrogated
- maced
- shot with paintball gun

³ These animations and audio excerpts are available on the CD of the PowerPoint provided to appellate counsel by Respondent; they are not contained in the printed version of the PowerPoint that Respondent provided to the court.

⁴ Police compared the handcuffs found on Peterson with handcuffs Mr. Maddaus had allegedly purchased; Bruneau added multiple arrows to one slide to indicate his opinion on the similarities between the two. CP 886. Another slide superimposed text outlining the prosecution’s theory as to the sequence of events over an image of the handcuffs (which was still marked with red arrows). CP 907.

-threatened with pistol
-hit with pistol
-pulled trigger
CP 902.

Another slide relating to the alleged assault on Abear showed a photo of a trailer with text superimposed in red:

Defendant returned
Interrogation
Calling Hugo
“Torture the truth out of her”
CP 904.

Bruneau also showed several slides depicting excerpts of phone records that had been admitted into evidence; red text overlay each excerpt, emphasizing its importance (from the prosecution’s point of view). CP 922-58. These slides all indicate that they were displayed in conjunction with some audio or visual feature; however, the record does not reflect the details. RP 1978-2015.⁵

Bruneau’s final slide displayed a photo of Mr. Maddaus in the center of the screen, wearing a wig. CP 978. A yellow circle circumscribed the photograph, and Bruneau had superimposed the word “GUILTY” in red text over Mr. Maddaus’s face. Eight white arrows pointed toward the yellow circle around Mr. Maddaus and the word

⁵ In addition, Bruneau showed jurors excerpts of recorded telephone calls while playing the audio recording of each excerpt. CP 944-975; RP 2003-2014.

“GUILTY”. Each arrow originated at a word or phrase (written in yellow) indicating a reason Bruneau believed the evidence established Mr. Maddaus’s guilt. CP 978. The record does not reflect how long this slide was shown, but it was the last slide used in the state’s closing argument. CP 978.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. In re Glasmann, ___ Wash.2d ___, ___, 286 P.3d 673 (2012).⁶ Even absent an objection, error may be reviewed if it is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” Id, at ___.

⁶ Citations are to the lead opinion in Glassman. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers “agree[d] with the lead opinion that the prosecutor’s misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct.” Glasmann, at ___ (Chambers, J., concurring). Justice Chambers wrote separately because he was “stunned” by the position taken by the prosecution. Id. Furthermore, even the dissent recognized that the prosecutor committed flagrant misconduct; the dissent’s disagreement centered on the degree of prejudice suffered by the defendant. Id, at ___ (Wiggins, J., dissenting).

B. The convictions must be reversed because Mr. Bruneau engaged in the same misconduct condemned by the Supreme Court in *Glasmann*.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann*, at ____; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann*, at ____.

The state must seek convictions based only on probative evidence and sound reason, rather than arguments calculated to inflame the passions or prejudices of the jury. *Id.*

A prosecutor who, during closing argument, alters a photograph of the accused person by adding the word “Guilty” commits prejudicial misconduct that is flagrant and ill intentioned. *Id.* Washington courts have “repeatedly and unequivocally denounced [this] type of conduct.” *Id.* at _____. Showing jurors a photograph of the accused with the added word “Guilty” is equivalent to submitting evidence that has not been admitted at trial.⁷ *Id.* Showing altered photographs may influence jurors to stray from mandatory legal principles or to use less care in determining guilt. *Id.*

⁷ Conduct of this sort is improper even when the unadmitted evidence is not sent to the jury room during deliberations. *Glasmann*, at _____.

Such evidence encourages jurors to rely on their feelings rather than reason in reaching a verdict. *Id.*

In addition, the addition of the word “Guilty” to a booking photo communicates the prosecutor’s personal belief in the accused person’s guilt. *Id.* at _____. This, too, is prejudicial misconduct. *Id.* It is difficult to understand why an accused person’s booking photo should ever be shown to jurors (except possibly in some cases where identity is at issue); the addition of the word “Guilty” magnifies the inherent prejudice and can only be seen as an appeal to passion, prejudice, and emotion, in an attempt to sway jurors by improper means. *Id.*

In this case, the prosecutor showed jurors a PowerPoint slide similar to the slides at issue in *Glasmann*. The word “GUILTY” was superimposed in red over a photo of Mr. Maddaus in a wig, conveying the prosecutor’s personal opinion of Mr. Maddaus’s guilt and appealing to the passions, prejudices, and emotional reactions of jurors. See slide 113. As in *Glasmann*, the word was written in red, using capital letters. *Glasmann*, at _____.

Furthermore, the slide featured eight white arrows, pointing inward toward Mr. Maddaus’s photo, and originating from words and phrases such as “Motive,” “Fugitive,” “False alibi attempt,” etc. See Appendix; CP 978. Like the word “Guilty,” these words and phrases, the layout of

the slide, and the use of the 8 arrows were intended to produce an emotional response rather than a rational consideration of the evidence. Glasmann, at ____.

Additional slides showed other photographic exhibits, altered by superimposing red captions. Among them were (1) a photo of Shawn Peterson's body, covered in blood and still wearing handcuffs, with the caption "Defendant: 'I'm not taking those cuffs off...[']", (2) another copy of the same slide, (3) a photo of a trailer and several cars, captioned with, among other things, the phrase " 'Torture the truth out of her,'" (4) a photograph of handcuffs, with text, numerous red arrows, and the date superimposed over the image, (5) Mr. Maddaus's booking photo with the name "Chad Walker Vogt" superimposed across the top, with quotation marks, and (6) a photo of a car with the phrase "put Acura on hold, Jetta a priority..." superimposed. CP 881, 885, 904, 907, 943, 978.⁸

Similarly captioned photographs were used throughout the prosecutor's closing argument in Glasmann. The Supreme Court found the prosecutor's use of such images violated the defendant's right to a fair trial in that case. Glasmann, at ____.

⁸ Other improper slides are noted in the supplemental statement of facts, above.

Such misconduct is flagrant and ill-intentioned, and could not have been cured by an instruction had defense counsel objected. Glasmann, at _____. First, the improper images pervaded the entire closing argument. Second, the prosecutor accompanied his presentation with improper comments (such as “poppycock”) conveying his personal beliefs. See Appellant’s Opening Brief, pp. 51-52; RP 1984. Third, as noted in Glasmann, “[h]ighly prejudicial images may sway a jury in ways that words cannot.. [and thus] may be very difficult to overcome with an instruction.” Id, at _____. Jurors are particularly susceptible to this sort of misconduct when it occurs during closing arguments. Id, at _____.

The misconduct was especially egregious in this case. Many of the altered slides were captioned with an exhibit number; all of the exhibits had previously been shown to jurors as they were admitted into evidence and published during trial. See, e.g., RP 696 (publishing Exhibits 16-44 to the jury). The jury thus became accustomed to seeing evidence on screen after it had been admitted and publication approved by the judge. Jurors may well have assumed that the judge approved the slides of altered exhibits Bruneau used during his closing arguments.

As in Glasmann, “[t]he prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts.” Id, at _____. There is a substantial likelihood that the misconduct

affected the verdict. The trial boiled down to a credibility contest between Mr. Maddaus on the one hand and Tremblay, Rivera, Grimes, and Leville on the other. By conveying his personal opinion and appealing to passion, prejudice, and emotion, the prosecutor improperly put his thumb on the scale.

The prosecutor's efforts to manipulate jurors to convict without critically examining the evidence denied Mr. Maddaus a fair trial. *Id.*, at _____. Accordingly, Mr. Maddaus's convictions must be reversed, and the case remanded for a new trial. *Id.*

II. MR. MADDAUS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV;

Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22. of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996). (the state’s argument that counsel “made a tactical decision by

not objecting to the introduction of evidence of ... prior convictions has no support in the record.”)

- C. Mr. Maddaus was denied the effective assistance of counsel by his attorney’s failure to object to repeated instances of prosecutorial misconduct that were flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Circuit, 2005).

Here, defense counsel should have objected to the flagrant and ill intentioned misconduct of Prosecutor Bruneau. Just as a prosecutor “must be held to know” that the misconduct engaged in here is improper, so, too, must defense counsel be charged with knowledge that the attempt to influence deliberations through “deliberately altered” evidence constitutes objectionable misconduct. See Glasmann, at _____. As in Glasmann, Bruneau’s misconduct here during closing was pervasive, flagrant, and ill intentioned: he expressed his personal opinion, used the power and prestige of his office to sway jurors, relied on appeals to emotion, passion,

and prejudice rather than reason, and displayed exhibits that had been deliberately altered to manipulate jurors into voting guilty.

As the Supreme Court noted, “[t]he case law and professional standards... were available... and clearly warned against the conduct here.” *Glasmann*, at _____. Counsel’s performance thus fell below an objective standard of reasonableness: at a minimum, Mr. Maddaus’s lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

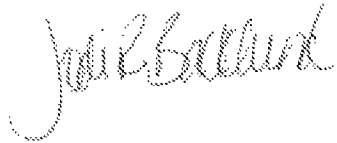
Furthermore, Mr. Maddaus was prejudiced by the error. The prosecutor’s improper multimedia show substantially increased the likelihood that jurors would vote guilty based on improper factors. See *Glasmann*, at _____. The failure to object deprived Mr. Maddaus of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on November 5, 2012.

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Robert Maddaus, DOC #975429
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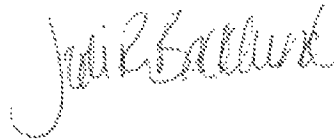
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 5, 2012.

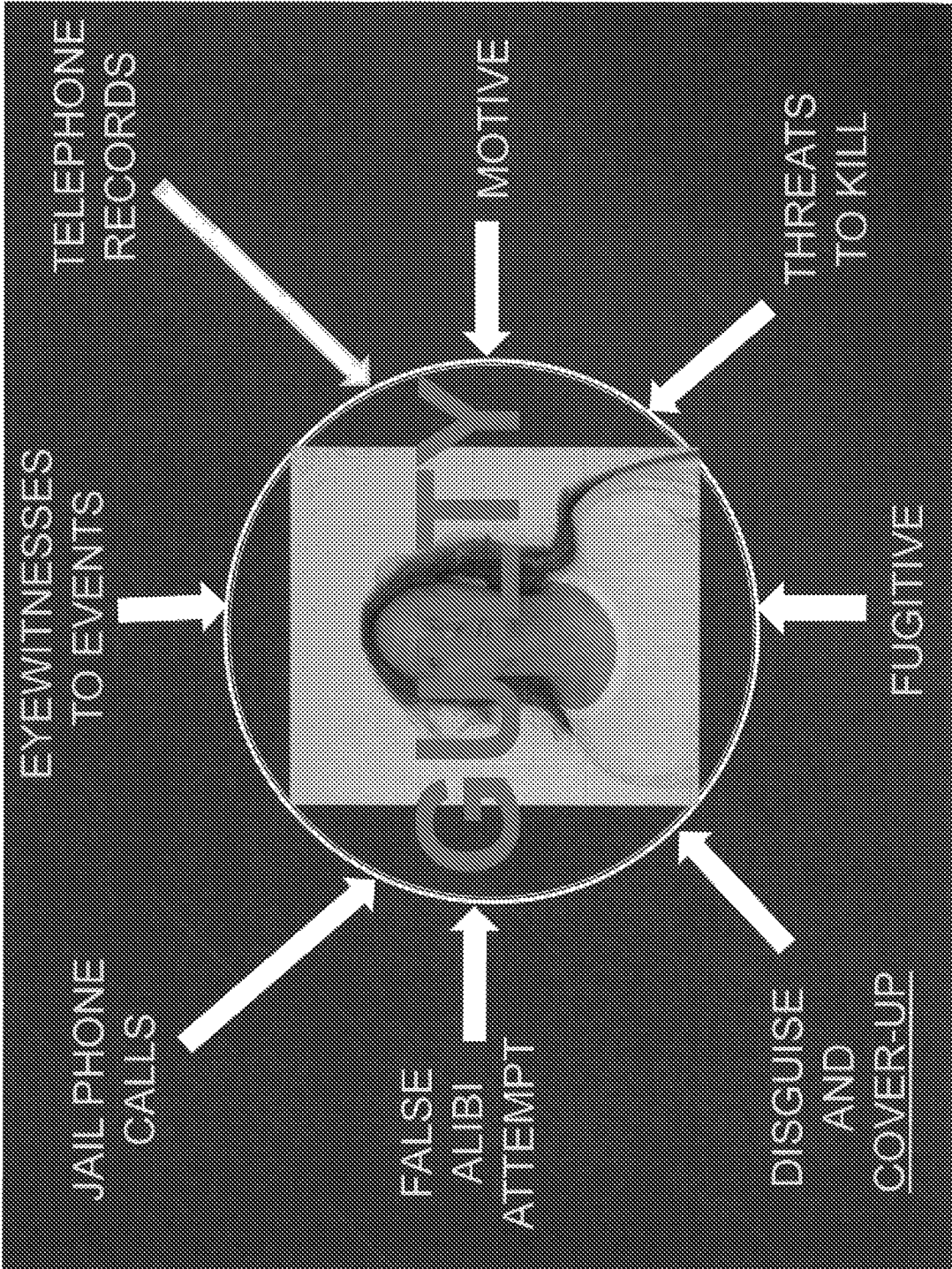


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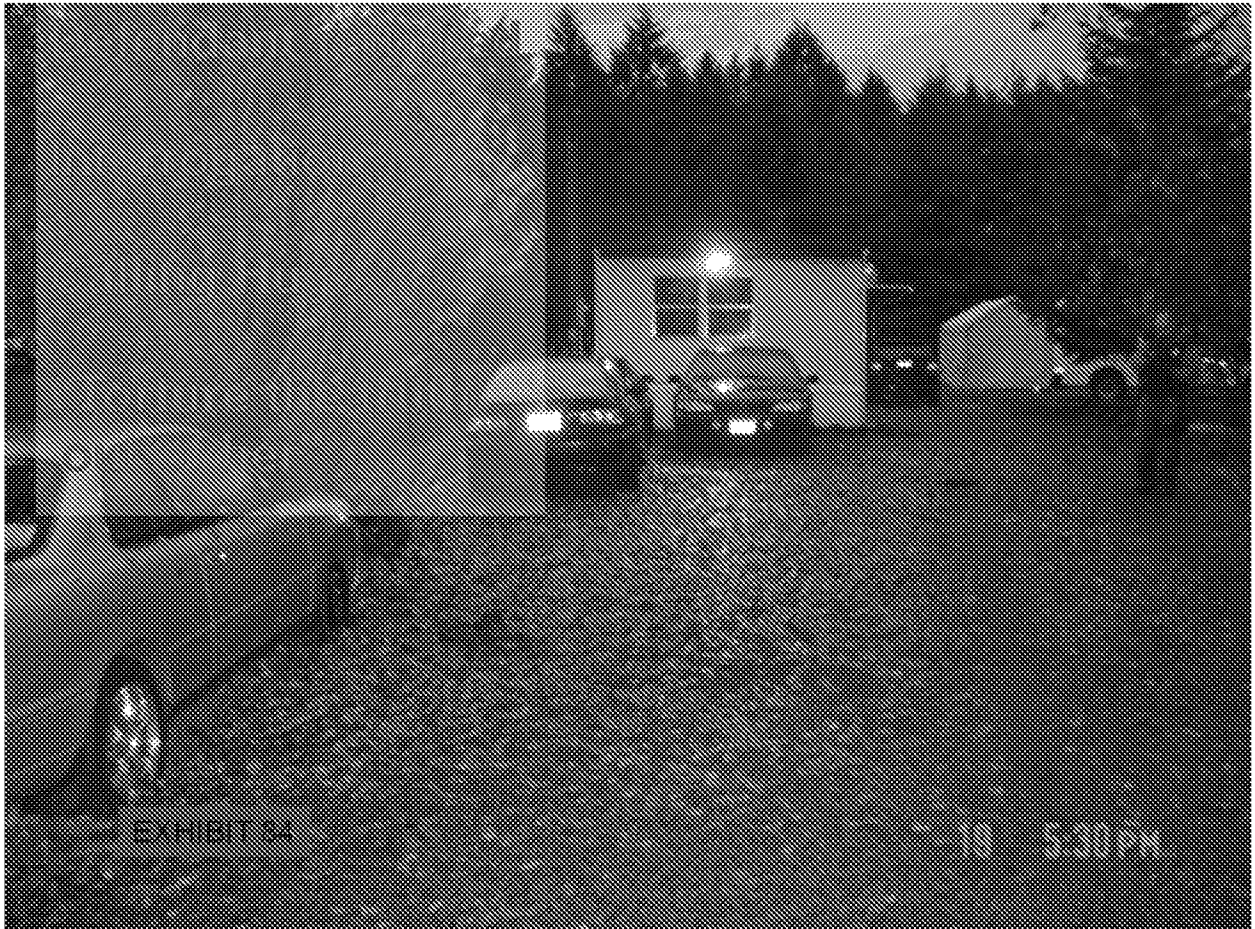
APPENDIX

EXCERPTS FROM PROSECUTOR'S POWER POINT

PRESENTATION – CLOSING ARGUMENT







NOVEMBER 15, 2009

- Maddaus purchases handcuffs
- last call, Peterson to Maddaus: 10:01 p.m.
- telephone calls between defendant and Leville
- Peterson meets Maddaus at Fred Meyer
- Rivera contacts Maddaus at Fred Meyer
- Shaun Peterson handcuffed
- Shaun Peterson driven away by Maddaus
- Tremblay contacted by Maddaus

"CHAD WALKER VOGT"



EXHIBIT 149

“put Acura on hold...
Jetta a priority”



EXHIBIT 153

BACKLUND & MISTRY

November 05, 2012 - 3:06 PM

Transmittal Letter

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